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Xeno-Racism and International Migration

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Contents

Book Review

Introduction

Xeno-Racism and International Migration

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Introduction

This special issue of *Refuge* marks the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance convened by the United Nations General Assembly from August 3 to September 7, 2001. The conference is taking place in the context of rising xenophobia and anti-refugee sentiment in the public discourse as well as increasingly restrictive laws in the North, accompanied by a powerful juggernaut called globalization. Migration is a key area where racism and discrimination continue to pervade all levels of policy and institutional practice. While refugee issues are expected to be part of the official conference agenda, we have proposed this special issue to further animate the debates and discussions surrounding racism and migration in the international context.

"Race," Refugees, and Labour

Traditionally, refugee issues were understood and studied from humanitarian perspectives. These studies focused on the plight of refugees all over the world and called for relief and humanitarian assistance. However, the current perspective on these issues goes beyond the conventional understanding. The term *Complex Humanitarian Emergencies* (CHE) indicates this shift in thinking. CHE describe the interconnected scenarios of refugee movements, forced migrations, civil wars, humanitarian assistance, and intervention.

In many important ways the issues and experiences of refugees and asylum seekers are qualitatively different from the issues of other migrants. In a liberal democratic context the problems of refugees and asylum seekers need to be addressed through internationally accepted and agreed mechanisms. Yet, these issues are generally subsumed under immigration laws. Historically, domestic immigration laws that govern the selection, importation, regulation, exploitation, and control of labour have been racist. This exemplifies the contradiction/dilemma that has been central to the nation-building process of white settler colonies. On the one hand states espouse the values of liberal democracy. However, on the other, the core of these states is colonial and racist because of their historical formation that was deeply rooted in racism and colonialism.

Immigration policy cannot be separated from labour and by logical extension also from the movement of global capital. Capitalism and globalization require cheap labour. Global capital moves without borders to where cheap labour is readily available. International instruments like the General Agreement on Trade in Services (GATS), the North American Free Trade Agreement (NAFTA), and the Free Trade Agreement of the Americas (FTAA) facilitate and enhance the free movement of capital, while labour from the so-called Third World is locked within their national spaces and blocked from entering the West, stigmatized by a discourse concerning the "undesirables": illegal immigrants, aliens, economic migrants, and bogus refugees. In the process, economic inequalities are generated, which force people to migrate to places where they can sell their labour. Simultaneously,

civil wars in various parts of the world are producing large numbers of refugees and displaced people that are in search of safe havens.

Realizing that migrations of this kind cannot be stopped, Western countries have instituted control mechanisms. Global migration control is the means by which the West regulates and manipulates the movement of people from the Third World and, depending on the need, can "select" highly skilled people as designer immigrants and refugees "suitable" for resettlement. While immigration policies have been explicitly linked to labour markets and demographics, refugee policies have not been linked explicitly to the needs and desires of the labour market of countries that traditionally depend on immigration for their labour supply. In the past decade even the EU has moved towards accepting immigration as a major source for labour. This is an important shift in policy for the EU, not because the traditional contours of their "nation states" are being challenged by minorities, immigrants, and other "aliens," but because of the effect of this policy shift on EU refugee and asylum policy.

In the EU an extended lifespan, coupled with a significant decline in fertility, over the last four decades has resulted in a rapid transition to a much older population and a declining labour force.[1] Consequently, in November 2000, the European Commission indicated that the EU should promote greater immigration. National governments within the EU are now beginning to adopt skills-based immigrant recruitment programs. At the time of writing, the German Interior Minister has proposed new legislation that would enable Germany to receive a large number of skilled immigrants while tightening the rules for refugees and asylum seekers.[2] There is a growing realization within the EU that refugees might provide an important source of cheap labour.

Racism and Criminalizing Refugees and Migrants

The US, Canada, Australia, and the EU have been cooperating in sharing information, pooling resources, and establishing intergovernmental organizations in the global control of migration of all sorts. For example, the International Center for Migration Policy and Development (ICMPD) was founded in 1993. The ICMPD came into being after intergovernmental consultations on asylum, refugee, and migration policies in Europe, Canada, the US, and Australia. There are at least thirty other networks set up by European states, with participation or contributions from the US, Canada, and Australia, to control global migration.[3] The major task of these international mechanisms is to combat human smuggling and trafficking. In fact the year 2000 was declared as the year of the anti-trafficking plan by the EU, Group of 8, and the Organization for Security and Co-operation in Europe, which includes the US and Canada. Universal access to the rights of asylum and *non-refoulement* are fast disappearing from the agenda of powerful countries and multilateral organizations.

Xeno-Racism

Contributors to this volume analyze racism in migration policy in various international contexts and point to the emergence of xenophobia and a new form of racism. Links between xenophobia and racism are rarely made. The new form of racism is the combination of racism and xenophobia described by Sivanandan, director of the Institute of Race Relations in the UK, as xeno-racism. Xeno-racism is racism in substance, but "xeno" in form. "It is a racism that is not just directed at those with darker skin, from the former colonial territories, but at the newer categories of the displaced, the dispossessed and the uprooted, who are beating at western Europe's door."[4] It is racism that is meted out to strangers, refugees, and poor immigrants. The papers in this volume also clearly point to the fact that economic viability and labour needs dominate the thinking of the emerging control regime.

In her paper "Nation Building and the Construction of Identity," Janet Reilly explains how the rise of xenophobia in post-apartheid South Africa can be understood in the context of state building and identity formation. Her paper is important for two reasons. First, her illustration of the inherent contradiction that exists between the aspirations of liberal democracy and the exclusivist nature of the identity formation—a process that always creates the others, aliens, foreigners, and visible minorities—is not only a mirror image of the Canadian, US, Australian, and other settler contexts, but it also signifies a major dilemma of liberal democracy. Second, the xenophobia in South Africa is mainly directed against fellow Africans. In this regard, the situation serves as a good example of xeno-racism. Reilly also highlights the importance of immigrant labour in the formation of South Africa.

In "Migration, Refugees, and Racism in South Africa," which will be published in the next issue of *Refuge*, Jeff Handmaker and Jennifer Parsley make the important connection between xenophobia and racism. As they point out, victims of xeno-racism are, "almost invariably,

black people from African countries" whose "skins are darker, clothes more colourful, vaccination marks in different places, Africans unable to speak a local African language, and a host of other physical attributes not deemed 'South African' and therefore 'illegal.'" Their article will include a report on the Durban Conference itself.

Anthony Richmond's paper focuses on refugees and racism in Canada.[5] He provides us with an overview of Canadian racism and its impact on domestic refugee law and policy. Richmond situates his analysis of Canada's immigration policies and treatment of refugees in the global context and actions of other states and agencies. His argument that the "economically advanced countries of the world have welcomed temporary and permanent migrants including refugees when their own economies were in need of labour and skills, and imposed restrictions when economic and political conditions changed" is echoed in other papers of this volume as well. Richmond rightly concludes that a "non-exodus" approach to global migration from developing countries and the use of deterrents by Canada and other Western countries are forms of institutional racism, despite the numbers of racialized refugees actually admitted from the Third World.

The intersection of race and gender is the focus of Pittaway and Bartolomei's paper. They explore the notion of racism as a root cause of refugee generation and the gendered nature of the refugee experience. Using a case study of refugee policy in Australia, they illustrate the impact of discrimination on refugee women. Their paper clearly highlights the gap that exists between refugee policies and practices, and gender blindness in all aspects of policy.

Louise Humpage's article points out how the application of ostensibly "neutral" rules and universal standards produce systemic racism in the refugee resettlement context in New Zealand. Her critique that the liberal commitment to superficial pluralism does not take differences seriously evokes similar arguments in the discourse of official Canadian multiculturalism.[6] This form of institutional discrimination, as she argues, "is, by definition, unconscious and unintended because of its embeddedness within structures, functions, and processes that are taken for granted." This is exactly what one would call the prevalence of "common sense" racism or "micro racism" as Anthony Richmond suggests—racism that has become part and parcel of our lives through centuries of internalization. Humpage asserts that a philosophy of economic rationalism dominates refugee policy, as it does immigration policy.

As the papers in this volume amply illustrate, the future of refugees and asylum seekers is indeed bleak. As fortress Europe tightly closes its door to refugees and asylum seekers, new policies and regulations are being formulated in Canada and the US to match the efficiency of Europe. In future, the reach of domestic refugee law and policy would not commence at the point of arrival in the West; rather, prevention of refugees from leaving their national spaces would be achieved by keeping them in open relief centres and camps for the displaced in the South. Refugees who still manage to flee would be stopped at the beginning point of their flight.

There is no doubt that delegates attending the World Conference against Racism will have a great deal of work to translate broad policy recommendations into concrete action in the fight against racism.

Notes

1. Federal Ministry of Labour, Health, and Social Affairs, *A Society for All Ages: Employment, Health, Pensions and International Solidarity,* background report of the European Union International Symposium (Vienna, 1998), 6.
2. *International Herald Tribune,* 4–5 August 2001, 4.
3. Liz Fekete, "The Emergence of Xeno-Racism," *European Race Bulletin* 37 (2001): 5.
4. A. Sivanandan, quoted in Fekete,"The Emergence of Xeno-Racism."
5. There is a growing literature on this topic. For example, see A. Simmons, "Racism and Immigration Policy," *Racism and Social Inequality in Canada,* ed. V. Satzewitch (Toronto: Thompson Educational Publishing, 1998); and S. Aiken, "Racism and Canadian Refugee Policy," *Refuge* 18, no. 4 (1999): 2.
6. For an illuminating analysis and critique of Canadian multiculturalism and nationalism, see Himani Bannerji, *Dark Side of the Nation: Essays on Multiculturalism, Nationalism, and Gender* (Toronto: Canadian Scholars Press, 2000).

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Nation Building and the Construction of Identity: Xenophobia in South Africa

Janet E. Reilly

Abstract

This article examines the process of nation building in South Africa and its effect on the rise of xenophobia. It explores the ways in which South Africa's efforts, since the elections of 1994, to construct a non-racial national identity have led to the exclusion of and the denial of rights to non-citizens. Looking at the history of immigration policy in South Africa, it argues that increased levels of xenophobia among South Africans represent an ever-widening gap between the country's attempts to restructure itself constitutionally (by altering its laws) and culturally (by changing the people's perception of what it means to be South African).

Résumé

Cet article examine le processus mis en oeuvre en Afrique du Sud pour bâtir une nation et ses conséquences sur la montée de la xénophobie. Il explore la question de savoir comment, depuis les élections de 1994, les efforts de l'Afrique du Sud pour façonner une identité nationale non-raciale ont abouti à l'exclusion des non-citoyens et au déni de leurs droits. Considérant l'histoire de l'immigration en Afrique du Sud, l'article soutient que des niveaux accrus de xénophobie parmi les Sud-africains représentent un fossé de plus en plus grandissant entre, d'une part, les efforts de ce pays pour restructurer sa constitution (en changeant ses lois) et de l'autre, son désir d'une restructuration culturelle (en altérant la perception du peuple sur ce que cela signifie d'être Sud-africain).

Introduction

In 1966, the United Nations proclaimed March 21 the International Day for the Elimination of Racial Discrimination, to commemorate the events of March 21, 1960, when South African police opened fire and killed sixty-nine people at a peaceful demonstration against the apartheid "pass laws" in Sharpeville, South Africa. This year, the United Nations used observance of the International Day to focus attention on the upcoming World Conference on Racism, Xenophobia, and Related Intolerance, to be hosted by South Africa in 2001. High on the agenda was the growing concern over the level of xenophobia and increased violence toward those perceived as "foreigners" in South Africa within the past several years. The end of apartheid, though a stunning victory for human rights and democracy, has not translated into the expected end to racial discrimination in South Africa. Why has the transition from apartheid to the "Rainbow Nation" envisioned by Archbishop Desmond Tutu proven fertile ground for xenophobia? The answer can be found in an understanding of the process of nation building and national identity construction. At the same time that South Africa actively seeks to promote itself as a liberal democratic state and to foster ties to the African continent, its efforts to construct its own sense of national identity have led to the exclusion of and the denial of rights to those perceived as "foreigners."

The preamble of South Africa's constitution envisions a "society based on democratic values, social justice, and fundamental human rights."[1] In the years since the historic all-race democratic elections of 1994, South Africa has embarked on a fervent—and in many ways visionary—restructuring of its policies toward immigration

and asylum. In an attempt to rid itself of its apartheid legacy, the new government, in 1995, acceded to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and, in 1996, to the 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol. Although the universal human rights enshrined in these international documents were reinforced by the Government of National Unity's amendments to South African domestic law, the reality of immigration and asylum in South Africa has proven to be far less enlightened than the rhetoric. Despite the new legal rights afforded to non-citizens within South Africa, the "exclusion policies" established under apartheid continue to be enforced. As the government and the people of South Africa strive to define who is a citizen, the convenient solution has been to focus on who is not. Examining South Africa's immigration policies in their historical context and incorporating an understanding of the process of nation-building, it is evident that the increased levels of xenophobia among South Africans represent an ever-widening gap between the country's attempts to restructure itself constitutionally (by altering its laws) and culturally (by changing the people's perception of what it means to be South African).

The Importance of Migrants to South Africa

From the time of its creation as a state, South Africa has relied heavily upon, and been defined by, the migration of populations across its borders. Based on census figures, South Africa's foreign-born population has always been significant, and it increased steadily during the twentieth century.[2] For a multiplicity of reasons, African migrants have traditionally flocked to South Africa, attracted by the employment opportunities within South Africa, and driven from neighbouring countries by political and economic instability.

Over the past 150 years, large-scale migration into South Africa has been fuelled by the mining industry's need for unskilled and semi-skilled "contract labour." Tracing the carving up of Africa between the colonial powers to the 1884 Berlin Conference, Kotzé and Hill assert that, in southern Africa, political boundaries failed to coincide with economic boundaries. As a result, large numbers of migrants from neighbouring states recruited to work in South Africa's mines "played an indispensable role in building South Africa's economic infrastructure, while simultaneously (if unwittingly) contributing to the economic decline of their countries of origin."[3]

Historically, foreigners have accounted for at least 40 per cent, and at times up to 80 per cent, of those employed as mine workers in South Africa.[4] According to Wilson and Ramphele, "Nowhere else in the world has an industrial economy employed for so long such a high proportion of oscillating migrants (coming from both inside and outside the country) in its labour force."[5] One of the reasons that South Africa's mining industry has consistently been able to attract such a large number of foreign workers has been the relative economic inequality that exists between South Africa and its border countries. South Africans are reportedly thirty-six times richer, on average, than Mozambicans—an enormous wealth disparity when compared to the fact that Americans are only seven times richer than Mexicans.[6]

Equally important as the economic "pull" factors within South Africa that have attracted foreign workers, have been the "push" factors—economic and political instability—within neighbouring countries that have driven people out of those countries and into South Africa. The causes of economic stagnation in South Africa's border countries are complex, but an important contributing factor has been the destabilization campaign waged by the apartheid state in South Africa during the 1980s.[7] According to a highly critical report published recently by Human Rights Watch, the South African government led by President Pieter Willem Botha launched a campaign aimed at destroying the educational, transport, and economic infrastructure in neighbouring African countries, in order to punish neighbouring states for supporting the African National Congress (ANC) and its anti-apartheid movement.[8] South Africa backed the rebel groups UNITA in Angola and RENAMO in Mozambique, and intervened directly in Lesotho, Botswana, Angola, and Namibia. The apartheid state also instituted an economic embargo that was particularly destructive to the landlocked states of Swaziland, Lesotho, and Botswana.

As a result of the destabilization campaign during the apartheid era, South Africa's Bantustan regions received large numbers of not only economic migrants, but also refugees from the countries of the Southern African Development Community (SADC). The separate and quasi-independent status of the various "homelands" enabled them to grant refugee status to hundreds of thousands of linguistically and culturally affiliated Africans, especially Mozambicans. Since the dissolution of South Africa's internal borders and the incorporation of the homelands into the South African state, however, the legal status of

these former refugees has been blurred. As a result, foreign-born people in South Africa, who were once accepted in the homelands, increasingly find themselves the targets of anti-immigrant sentiment, often resulting in violence. While the new government has attempted to rectify this through a series of amnesties granting permanent residence to miners and members of SADC countries resident in South Africa for a specified period of time, countless Africans remain in South Africa without formal status.

The History of Migration Policy in South Africa prior to 1994

In order to understand the challenges that South Africa currently faces in determining citizenship rights for those within its borders and for those wishing to immigrate, it is necessary to view the present situation in the context of the policies that were developed to control migration prior to, and as part of, the apartheid regime of the twentieth century. As early as 1913, three years after the establishment of the Union, immigration legislation sought to restrict black mobility within South Africa. The Immigration Regulations Act of 1913, South Africa's first nationwide immigration legislation, established an Immigration Board with the power to prohibit the entry of "any person or class of persons deemed by the Minister on economic grounds or on account of standards or habits of life to be unsuited to the requirements of the Union."[9] Subsequent immigration legislation, such as the 1937 Aliens Act, designed to restrict Jewish immigration by requiring work permits for non-citizens, paved the way for the apartheid policies enacted after 1948.

During the apartheid era, the government attempted to control the movement of non-whites within South Africa through the establishment of the influx control system. All Africans who travelled outside of the Bantustans were required to have a pass, and inability to produce the pass on request was cause for immediate arrest and deportation. The pass laws, which were finally removed in 1986, resulted in over 381,000 Africans being arrested in the year 1975–6, at the height of their use, and in over 12 million arrests over the period from 1948 to 1985.[10] Referring to the creation of the Bantustan policy, Kotzé and Hill argue that "the domestic result of this economic restructuring was the creation of massive rural settlements of South Africans in refugee-like conditions but robbed of official refugee status under the emerging international refugee regime by the fiction of separate development."[11]

While the system of "separate but equal" never gained any real international legitimacy, it allowed South Africa to maintain an image of itself as an immigration state. At the same time that South Africa sought to restrict black migration and other classes of "prohibited persons" from entering, it openly encouraged white immigration from Germany, Holland, and Britain. During the 1960s, white Nigerians and Angolans fleeing the collapse of colonialism were offered asylum in South Africa. While the simultaneous policies of immigration (primarily white) and exclusion (primarily black) were at odds with one another, they were, in fact, not all that different from the practices of other colonial-settler states. Both the United States, through its National Origins Act, and Australia, through the White Australia policy, sought to control the racial composition of the populations within their territories.

The legacy of the apartheid period and the immigration policies that shaped it are still very evident in the issues facing South Africa today. The 1991 Aliens Control Act, still in effect today, is merely a consolidation of previous acts entrenched in the racism and anti-Semitism of the 1930s. Adopted by the previous administration but amended during the course of the transition to democracy, the Aliens Control Act continues to distinguish between white migrants and black migrants, and extends the power of immigration officers to decide immigration claims, while removing the applicants' rights to appeal their decisions. While the government has worked to enact new immigration legislation and has even invited opinions and comments on its green and white papers, the sections of the Aliens Control Act relating to refugees were replaced only this year by the new Refugees Act of 1998, and the draft white paper on International Migration has yet to be adopted as law.

The Rise of Xenophobia

While many predicted that the end of apartheid would set in motion the machinery necessary to eliminate racial discrimination in South Africa, the years since 1994 have witnessed a dramatic increase in xenophobia and acts of hostility toward those perceived as "foreigners." Despite the adoption of numerous international conventions, and despite the human rights claims made in the South African Constitution and the new Refugees Act, newspaper headlines attest to the increased violence and negative attitudes toward immigrants, on the part of both government officials and South African citizens. In 1999, a National Plan of Action, called *Roll Back Xenophobia,* was drafted, encouraging various sectors of society, including government, to get involved in activities to combat xenophobia. The plan, published jointly by the South African

Human Rights Commission, the National Consortium on Refugee Affairs, the United Nations Human Rights Commission, and the United Nations High Commissioner for Refugees, defined *xenophobia* as a "deep dislike of non-nationals by nationals."[12]

An extensive national survey conducted in mid-1997 by the Southern African Migration Project examining South Africans' attitudes toward immigrants and immigration policy found that 25 per cent of South Africans favoured a complete ban on immigration and 45 per cent supported strict limits on the numbers of immigrants permitted to enter the country. Only 17 per cent indicated openness toward a more flexible policy that would be tied to the availability of jobs, and only 6 per cent supported a totally open policy of immigration. According to the survey, the figures represented the highest level of opposition to immigration recorded by any country in the world where comparable questions have been asked. Respondents cited job loss, crime, and disease as the negative consequences they feared from immigrants living in the country, though only 4 per cent recorded interacting on a regular basis with non-citizens in the region.[13]

Although many South Africans are reluctant to admit that the scores of anti-immigrant abuses reported by human rights groups in recent years are motivated by xenophobia, it is clear that those perceived as foreigners are being singled out for abuse. Immigrants are blamed for crime, drugs, and the high level of unemployment. Anyone considered "too black" or who is unable to speak a local language, such as Xhosa or Zulu, is a potential target. Police use extremely unreliable indicators such as inoculation scars to identify someone as a foreigner; as a result, an estimated 20 per cent of those placed in detention on suspicion of being undocumented migrants are eventually released after proving South African citizenship.[14]

Inaccurate representation and "criminalization" of migrants by the media have had a tremendously negative impact on public opinion toward migrants, especially when one considers the small minority of South Africans who report having regular personal contact with non-citizens. A survey drawing on over 1200 English-language clippings about migration from South African newspapers between 1994 and 1998 indicated that "coverage of international migration by the South African press has been largely anti-immigrant and unanalytical . . . A large proportion of the articles reproduce racial and national stereotypes about migrants from other African countries . . . [which are] made worse by the more subtle use of terms like 'illegal' and 'alien.'"[15]

The media, however, are not the only source of misinformation and inflammatory statements about migrants. Incendiary comments made by state officials are also contributing to the problem of xenophobia. Minister of Home Affairs Mangosutho Buthelezi, in his first introductory speech to Parliament, stated, "If we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Program."[16] In this same speech, Buthelezi called on local South African communities to assist his department in curbing the influx of foreigners by reporting suspected undocumented migrants. Police have also been accused of offering monetary rewards to local citizens in exchange for information about suspected "illegals."[17]

The role of state officials in promoting anti-immigrant sentiment among South Africans may, on initial consideration, seem contrary to the state's professed goal of racial equality. While it is unlikely that the inflammatory statements made by Buthelezi and other officials represent a concerted, state-sponsored attempt to demonize foreigners, the rise in xenophobia is in fact symptomatic of the objective to build a "Rainbow Nation" based on the principle of non-racial citizenship in South Africa. The explanation of this can be found in an understanding of what Croucher refers to as the difference between "constitutional engineering" and "cultural engineering."[18]

Constitutional Engineering since 1994: Restructuring South African Law

"Constitutionally," South Africa has made impressive advances in granting universal human rights to both citizens and non-citizens. In addition to its ratification of the 1951 Refugee Convention, the 1967 Protocol, and the 1969 OAU Conventions mentioned above, South Africa has signed on to the UN Convention against Torture, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the African Charter on Human and Peoples' Rights.[19] Together, these represent one of the most far-reaching commitments to the values of universal human rights that a state has ever undertaken.

The 1996 Constitution draws no distinction between non-citizens and citizens for most rights, and specifies thirty rights accorded to all persons in its Bill of Rights. The rights restricted to citizens are the right to enter the country, to obtain a passport, to vote, to stand for office, to form a political party, and to exercise other political rights.[20] The Constitution guarantees the right of human

dignity to all individuals and outlines a number of rights granted to those in detention.

Although many of the rights contained in the Constitution have not yet been interpreted by a court of law, a unanimous judgment dealing with the rights of non-citizens found that they "were protected by the Bill of Rights' non-discrimination clause, and that all employment opportunities, with the limited exception of politically sensitive positions, should be available to permanent residents and South African citizens on an equal basis."[21] The conclusion was that "the treatment of undocumented migrants, asylum-seekers, refugees, and other migrants in South Africa should be viewed in light of the protections provided by the Constitution's Bill of Rights as well as against international standards."[22]

Outside the courts, however, the reality of life in South Africa for migrants is far less egalitarian. As mentioned above, those perceived as "foreigners" suffer frequent attack and are often scapegoated by the media and by politicians for the country's economic difficulties. The end of apartheid has not led to the expected redistribution of wealth. Consequently, South Africans who have yet to "taste the fruits of liberation" have blamed and been incited to blame those whom they perceive as foreigners.[23] As South Africa struggles to realize its goal of building a "Rainbow Nation," the establishment of a non-racial citizenship has translated into an environment of resentment and fear of migrants. Redefining South African identity in the fledgling democracy has concentrated increasingly on the need to determine who is South African in opposition to who is not.

Cultural Engineering: Reconstructing Identity and Nation Building

Though academics debate the precise origins of the modern nation-state system, most agree that it developed in Europe and that the concept of national citizenship emerged as the "natural" joining of identity and rights at the time of the French Revolution. The state developed as the protector of citizens—a particular "nation" of people united by a sense of common purpose, race, language, etc., and located within a bounded territory. The concepts of nation and territory were integral to the definition of the nation-state and yet, in practice, combined in different ways to form various types of states.

In attempting to clarify the complex links that exist between nation and state, Buzan identifies four models: the nation-state, the state-nation, the part-nation-state, and the multination-state, which comprises both the federative and the imperialist state models.[24] In the first model, represented by states such as Japan, the nation precedes the state and is the driving force behind its creation. The second model, typical of the United States and Australia, is a top-down model in which the state plays an instrumental role in forming the nation. Buzan notes that while the state-nation model is most easily achieved when the state occupies a previously uninhabited or sparsely populated region, it also applies to states that attempt to unify multiple nations within their boundaries into one cohesive nation. The third model, the part-nation-state, occurs when a nation is divided between and dominant within two separate states, as was the case with North and South Vietnam. The multination-state comprises two or more relatively complete nations within its borders and is either federative, meaning that the nations exist separately and are allowed or even encouraged to pursue their own identities (exemplified by Canada), or imperialist, meaning that one nation dominates and controls the others (exemplified by the Russians' control of the former Soviet states). Not every state falls into one of these categories, but the models highlight the key links that exist in the relationship between nation and state.

During the apartheid era, South Africa functioned as what Buzan refers to in his classification of nation-states as an imperialist state—one in which one of the nations within the state (in this case, white South Africa) dominated the state structures to its own advantage.[25] The South African state drew its sense of national purpose from ideas of racial preservation, and, as is clear from the history of South African migration policy outlined above, immigration and asylum policies were shaped according to the state's desire to define citizenship racially.

In 1994, South Africa confronted the immense challenge of restructuring its concept of nation. Although the political transition to democracy, marked by the drafting of the new constitution and the adoption of numerous international instruments based on human rights, was already under way, the path toward cultural and social reform was not as clearly delineated. In order to rid itself of the legacy of apartheid, the Government of National Unity (GNU) sought to redefine national identity. The former imperialist state was faced with the decision either to adopt a more federative multination-state system in which racial and ethnic diversity would be respected, or to pursue a state-nation model by constructing a non-racial identity that rejected the racial divisiveness of the past. The problem with the federative model, according to Croucher, was the potential threat it posed to the sta-

bility and unity of the state, while the state-nation model ran the risk of "homogenizing, or not respecting cultural difference."[26] Nelson Mandela, by embracing the idea of the "Rainbow Nation at peace with itself and the world," chose to lead South Africa on a path toward the formation of a state-nation, based on the ideal of non-racial reconciliation.

Constructing a Non-Racial Nation

The ability to create a sense of nation among a group of people hinges on the "constructivist" nature of identity and ethnicity. While a set of common values or characteristics must exist as a precondition to the formation of a nation, the concept of ethnic identity upon which it rests is open to interpretation and manipulation on many levels. "The definition of nation imposes no condition of permanence, and since both culture and race are malleable qualities, there is no reason why states cannot create nations as well as be created by them."[27]

In applying the "constructivist" approach to the South African case study, it is evident that, since 1994, the process of nation building within South Africa has relied heavily on both the "primordial" and "instrumental" aspects of ethnicity. Under the apartheid state, government officials invoked race as the defining characteristic in determining ethnicity. While the "primordial" nature of race is quite evident, it alone was not sufficient to guarantee the success of a policy that used race as the determinant of ethnicity. Even skin colour can blur across the black/white divide. The success of the apartheid state was due to its ability to manipulate state structures in support of its racist campaign.

Since the transition to democracy, the South African state has actively relied on the "instrumentalist" nature of ethnicity to redefine South African identity and construct a new concept of nation. The state has chosen to define ethnicity non-racially, and instead has focused on promoting national citizenship as the cultural determinant of South African identity. While many might argue that such a concept is inclusive of all South Africans, its acceptance has, in fact, denied basic rights to a large number of people within South Africa's borders and has promoted an atmosphere of fear and resentment toward a group of people who, during the apartheid regime, were accepted within South Africa.

The new concept of national identity has not materialized out of nowhere, of course. Certain cultural differences have always existed between those now considered South Africans and the foreign-born individuals who have, increasingly, become the targets of xenophobia. The "primordial" differences in language and appearance between South African citizens and non-citizens have always been present, but have not, until recently, been used to define membership in the South African nation. For example, South Africa's long period of isolation under apartheid fostered a sense of alienation, shared by both whites and blacks, from the rest of the continent that is only now being made relevant. Referring to a recent episode of xenophobic violence in which 300 immigrants from Angola, Namibia, and Nigeria—many of them longtime residents in South Africa—were chased from the township of Dunoon by a group of local men, Lloyd Thomas, a Baptist minister and social activist in Cape Town, remarked, "We've always thought ourselves special and apart, and now Africa has invaded our lives. I suppose a backlash like the one in Dunoon was inevitable, wasn't it? We will probably be seeing more of them."[28]

The rise in xenophobic feelings among those, both black and white, that are now defined as South Africans can also be understood as analogous to the way in which the process of globalization has harbingered the proliferation of ethnic conflicts throughout the world. While many predicted that the process of globalization would result in the demise of ethnic differences, as local communities increasingly came into contact with one another, the reality has proven quite different. Globalization, instead of causing cultural difference to become obsolete, has, in fact, increased its significance. For it is only in opposition to an "other" that cultural difference becomes relevant and can be used by political leaders to construct concepts of ethnicity. As Turton explains, "Globalization is a precondition of localization . . . One cannot 'think' locally unless one already has an idea of a global context in which localities can co-exist."[29]

In a similar sense, the merging of racial identities into a single unified concept of nation in South Africa has necessarily resulted in increased attention being focused at the local level on who qualifies as South African and who does not. Whereas foreign-born Africans were once accepted and granted legal status within the Bantustans during apartheid, they are now targeted as "illegals" in the new South Africa. Just as globalization highlights the dissimilarities between local communities, the process of South African nation building has drawn attention at the local level to the cultural differences that exist between native and foreign-born people within South Africa.

Conclusion

As the gap between the new government's efforts, in recent years, to restructure the South African state "constitutionally" and "culturally" continues to widen, the prevalence of xenophobia amongst South Africans has risen dramatically. On the one hand, the South African state, through its adoption of numerous international instruments, has exhibited its commitment to the principle of universal human rights enshrined in the documents. The values espoused, including the thirty rights granted to all persons as opposed to only citizens, in the 1996 Constitution's Bill of Rights represent a visionary attempt to separate South Africa from the legacy of apartheid and establish it as a liberal democratic state.

On the other hand, in order to claim legitimacy, the new South African state must be seen as representing the South African nation. The "natural" coupling of identity and rights, embodied in the concept of national citizenship, which has defined states since the time of the French Revolution, describes the relationship between the nation and the state as follows: "The principle of sovereignty resides essentially in the Nation: no body of men, no individual, can exercise authority that does not emanate expressly from it."[30] In attempting to separate itself from the apartheid state that preceded it, the post-apartheid government has sought to redefine the South African nation non-racially. What once could be referred to as an "imperialist state" has now begun the transition to a "state-nation" model, predicated on the reconstruction of South African identity. The dissolution of the Bantustan system and its concomitant emphasis on internal borders has led to an increased awareness of and attention paid to the control of South Africa's external borders.

The process of nation building within South Africa, however, has not proven inclusive for all those residing in its borders. The state's new sense of nation has developed not only in opposition to those whom it tries to prevent from entering South Africa, but also in opposition to the large numbers of foreign-born people within South Africa whom it, by definition, has sought to exclude from national citizenship. While foreign-born people in South Africa are granted numerous rights on paper, in reality they are often denied their most basic rights due to the xenophobic attitudes of state officials and ordinary citizens alike.

The disparity in South Africa between the "constitutional" and "cultural" reform strategies is not unusual. As the process of globalization occurs and the culture and language of human rights becomes more prevalent, the traditional concept of national citizenship, understood as the union of identity and rights within a bounded territory, is being challenged. Soysal contends that, in the post-war era, "Rights that were once associated with belonging in a national community have become increasingly abstract, and defined and legitimated at the transnational level. Identities, in contrast, are still perceived as particularized and territorially bounded."[31] In other words, as the culture of universal human rights is increasingly adopted throughout the world, the role of the state as the guarantor of rights is being limited. "While nation states and their boundaries are reified through the assertions of border controls and appeals to nationhood, a new mode of membership, anchored in the universalistic rights of personhood, transgresses the national order of things."[32] In South Africa, "constitutional" reform has progressed in accord with the global culture of human rights, but "cultural" reform, expressed as nation building and the reconstruction of identity, has resulted in the limitation of rights to certain persons both inside and outside South Africa's borders.

Viewed in its historical context, it is possible to understand the intrinsic, yet tumultuous, role that migrants of all types have played in constructing South African identity since the country's creation. As the fledgling democracy struggles to claim legitimacy as the expression of the South African nation, the history of immigration and identity formation in South Africa continues to affect the country.

While President Mbeki refers to South Africa's participation in an "African Renaissance," the increasing levels of xenophobia within South Africa, due to the rift between the processes of "constitutional" and "cultural" engineering, thwart his efforts to foster solidarity with the rest of the African continent. This does not mean, however, that South Africa is necessarily doomed to regress into a state defined by its xenophobia and at peace with neither itself nor the world. South Africa has a long history as the economic force in Southern Africa and could potentially, acting in what Dolan refers to as its "enlightened self interest," help to lessen its attractiveness to foreigners by investing constructively in neighbouring countries.[33] As host to the UN World Conference on Racism, Xenophobia, and Related Intolerance this summer, South Africa will gain legitimacy as a liberal democratic state and a contracting party to the universality of human rights. In order to actually achieve its objective of eliminating xenophobia and racial discrimination, however, the South African government must recognize that there

exists an inherent contradiction between its desire to combat xenophobia and the fact that its success in building a South African nation hinges on its ability to construct its own identity in opposition to people from other African countries.

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Refugees and Racism in Canada

Anthony H. Richmond

Abstract

The terms race *and* racism *are defined, and the history of their use in Canada since Confederation is examined. A distinction is made between "macro" and "micro" racism. Examples of interpersonal and systemic racism in Canada are considered in the context of multicultural policies and the Charter of Rights and Freedoms. Changes in Canadian immigration law and regulations are examined and their implications for refugee movements reviewed. It is concluded that there are unintended consequences of stricter control over borders and the "faster, fairer, firmer" treatment of asylum-seekers, that constitute institutional racism.*

Résumé

L'article commence par définir les termes « race » et « racisme » et retrace l'historique de leur utilisation au Canada depuis la Confédération. Les exemples de « macro-racisme » et « micro-racisme » sont différenciés. Des cas de racisme interpersonnel et systémique au Canada sont examinés dans le contexte des politiques multiculturelles et la Charte des droits et libertés. Sont aussi passés en revue, les changements intervenus dans la Loi canadienne sur l'immigration, ainsi que dans les règlements s'y rapportant, et leurs implications sur le mouvement de réfugiés. La conclusion est que des conséquences non intentionnelles ont découlé des mesures de contrôle plus strictes exercées aux frontières, ainsi que du traitement « plus vite, plus équitable et plus ferme » des demandeurs d'asile, et que ces conséquences constituent en soi un racisme institutionnel.

Definitions of Terms

The UN Convention definition of a *refugee* is "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." For purposes of this paper the term *refugee* goes beyond the UN Convention definition to include all those reactive migrants—whether their apparent motives are political or economic—who have come to Canada since the end of World War II, escaping crises in their former countries. The term *reactive migrant* is used in contrast to *proactive.* The latter are the "voluntary" migrants whose decisions to move are made within a "rational-choice" framework. The former are all those whose decisions have been severely constrained by economic or political pressures and situations largely beyond their own control. They include those admitted to Canada under Special Measures Programs and Designated Classes, as well as Convention refugees. In its broadest sense, the term *refugee* may include anyone escaping a life-threatening situation, such as an environmental disaster.[1]

Originally, in both English and French, the term *race* simply meant any aggregation (of people or animals) with common characteristics, whether biological or cultural in origin. The identification of race with hereditary traits began in the nineteenth century, and was accelerated by the influence of Social Darwinism. In a strictly biological sense, *race* is synonymous with *species;* thus there is only one human race in this sense, with gene pools determining the statistical distribution of particular characteristics. However, the cultural connotation persisted, particularly in French, as illustrated by the publication, in 1906, of André Siegfried's *Le Canada: les deux races: problèmes politique contemporaines*, a study of French Canadians and their relations with the English. It was published the following year, in English, under the title *The Race Question in Canada.*[2]

Racism is a controversial concept whose precise meaning varies according to the writer concerned. In popular and journalistic language it has assumed a pejorative significance, applying to almost any example of prejudice, discrimination, or disadvantage experienced by individuals, or groups, who can be distinguished by physical or cultural characteristics. The term *ethnocentrism* would be more accurate, but the word has not gained currency in

English. In French, the term *racisme* refers to anti-Semitism, and to hostility toward immigrants and ethnic minorities. Neo-Marxist writers either treat racism as an ideology designed to divide workers against each other, or as a "relation of production" in cases of unfree labour. Some scholars argue that the terms *race* and *racism* should be confined to situations where genetically determined phenotypical characteristics are used as social markers to define group boundaries. However, to limit discussion of race relations to those situations where hereditary differences are involved, would exclude many conflict situations when race is *perceived* to be an issue. When people are victims of differential treatment and subordination, in which the characteristic basis of differentiation is not biologically determined, in fact or belief, it may still warrant description as racist in its consequences.[3]

Racism may take institutional forms and occur independently of the attitudes or intentions of those involved, if the consequences of certain actions are seriously disadvantageous for certain groups. For example, in the case of refugees and asylum applicants, requiring valid passports, visas, work permits, literacy tests, medical examinations, DNA tests, "continuous journey" regulations, "points" systems of selection, fees for documents, landing fees, security checks, the strict application of the Convention definition of a refugee, and the selective use of interdiction to prevent undocumented persons reaching Canada's borders, all may be racist in their consequences if they create differential opportunities for some nationalities, or ethnic groups, to escape from intolerable crises in their former place of residence.

Terms such as *institutional racism* and *systemic racism* recognize that discrimination may occur as an unintentional consequence of particular social policies. When hiring for employment or when admission to educational establishments requires minimal or maximal age, gender, physical, educational, or language criteria, these may be difficult for certain groups of people to meet. At the same time, preferential hiring or admission, designed to compensate for past discrimination against minorities, may in time have a detrimental effect on members of other communities, including a majority or dominant group. In some cases, affirmative action, quota systems, and "positive discrimination" may generate a backlash and increase prejudice against certain groups.

It is useful to differentiate between *macro-racism* and *micro-racism.* The latter may occur in the everyday relations of people in the workforce or the neighbourhood, including outbreaks of violence against immigrant and other ethnic minorities. Stereotypes that stigmatize certain groups, and the "profiling" of particular crimes and behaviour patterns, may lead police and immigration officers to stop, search, or otherwise harass innocent individuals who appear to fit a certain description. It is the task of complaints authorities, Human Rights Commissions, Employment Equity Programs, and Multicultural Directorates to combat such forms of hatred, prejudice, and discrimination. Macro-racism is institutionalized in the barriers that states erect when rigidly controlling borders, refusing entry to particular ethnic or racial groups, exterminating or expelling minorities, and endeavouring to reunite diasporic populations. Macro-racism is practised by political and military leaders who seek to establish territorial domination by force, in the name of national pride or purity. In its most extreme form it is manifest in genocidal policies such as those that occurred in Nazi Germany, and more recently in Cambodia, Rwanda, and the former Yugoslavia. It is a major source of refugee movements. Before 1962, Canada's exclusionary immigration policies could be described as macro-racist, but since then have exhibited varying degrees of micro-racism.

Race and Racism in Canada

When the first census of Canada was conducted in 1871, attempts were made to distinguish *birthplace, citizenship,* and *origins.* The significance of the last term was not made clear to enumerators, and confusion arose because there was already evidence that many people were of mixed descent, including French-English, French-Aboriginal, and other combinations. The 1881 and 1891 censuses retained the term *origins,* and were mainly concerned with distinguishing the French Canadian population, but even then failed to account for Acadians in New Brunswick and the Métis in the West. It was not until 1901 that the term *racial origin* was introduced into the census. Anyone of mixed European-Aboriginal origins was designated as such. Others of mixed origin were defined by paternal ancestry alone. *Race* in this context referred to language or geographic region of origin, as well as physical differences, such as skin colour.

In the 1921 census, an attempt was made to clarify the concepts being used; the term *race* was defined as "a subgroup of the human species related by ties of physical kinship." Specific mention was made of physical characteristics such as skin colour, stature, and shape of head as criteria. However, the census definition of *origin* continued

to combine biological, cultural, and geographic characteristics into one classification, largely reflecting conventional perceptions of ethnic divisions within the community. However, it was later noted that many people who had reported themselves as of German ethnic origin in 1911, must have preferred to be enumerated as Dutch by 1921, presumably to avoid the prejudice created by hostilities in World War 1.[4] Those conducting and analyzing the census continued to have difficulty classifying people of mixed origins, preferring to use *paternal* ancestry only, as a proxy marker. In 1991, census respondents were permitted to indicate more than one ethnic origin, but the emphasis was still on ancestry. By 1996 there were two census questions, one referring to *ancestors* in the plural and another requesting a self-definition as "white," "Chinese," or one of nine other categories designed to identify "visible minorities."

In 1941 the census showed that half of the population was of British origin (by paternal ancestry), 30 per cent French, and 18 per cent of other European origins. Those of Asian origin made up 0.64 per cent. All other groups, including Aboriginals (labelled "Indian") and Negroes, account for the remaining 1.7 per cent of the total. All "coloured" people combined formed slightly under 2 per cent.[5] By 1996, census data indicated that "visible minorities" made up 11.2 per cent of the population, the proportion rising to almost a third in Toronto and Vancouver. It is expected that the 2001 census will reveal an even larger proportion of Asians and other non-Europeans resident in Canada.

Ironically, as the proportion of immigrants and their descendants in Canada who were not of British, French, or other European ancestry increased, the term *race* crept back into the vocabulary of political discourse, as part of the campaign for affirmative action, employment equity, and non-discrimination. Familiar euphemisms such as *black*, *visible minority*, and *persons of colour* have been used almost synonymously with the way that *race* was used earlier. Such terms rely on physical markers that aggregate people who may have little in common culturally, except perhaps their exposure to prejudice and discrimination. Unfortunately, attempts to rectify the effects of past discrimination, and eliminate its current practice, gave misplaced legitimacy to the social constructs that feed racism. Thus, requiring employers to enumerate "visible minorities" in the workplace, and using census questions to enumerate and quantify groups "at risk," may have had the unintended consequence of reinforcing the artificial boundaries that created the victimized categories in the first place. In Canada, the term *racism* has widened its connotation to include hostility between other ethnic groups, including the English and French, as well as antagonism between ethnic minorities that were engaged in civil war, or other conflicts, in their former country. In this respect, the term has reverted to an earlier, very imprecise, cultural usage.

Domestic Racism and Multiculturalism

Superficially Canada appears to have undergone a transformation from a racist and Anglo-conformist society to one that embraces ethnic diversity and "multicultural" policies, but the change is by no means complete. Human rights legislation, at the federal and provincial levels, includes the federal Bill of Rights, 1960. Federal and provincial Human Rights Commissions were established, and programs were instituted at that time to combat discrimination in employment, housing, public accommodations, and government services. The "equality rights" clause (15:1) of the Charter of Rights and Freedoms became an entrenched part of the Constitution, when the amended British North America Act was repatriated in 1981, although it did not come into force until three years later, giving federal and provincial governments time to implement the measures necessary to make the clause effective. It specifically allowed for the possibility of affirmative action based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Subsequently, federal and provincial jurisdictions implemented legislation to promote employment equity and to strengthen the powers of existing Human Rights Commissions. The effectiveness of these measures in combating discrimination depends upon the interpretation placed on the Charter provisions by the courts. The record to date is not consistent, and the federal Human Rights Commission itself has been criticized for failing to deal expeditiously with cases brought before it.[6]

Various Liberal and Conservative administrations have indicated their determination to eradicate manifestations of racism in Canada. In 1984, the House of Commons *Report of the Special Committee on Visible Minorities in Canadian Society* made eighty recommendations ranging from increasing the representation of visible minorities in the public service to strengthening the law concerning the "promotion of racial hatred." The Conservative Minister responsible for multiculturalism indicated in May 1988 that his department would have a budget of $192 million for "new directions in the multicultural policy of Canada," and later outlined his

plan to spend a substantial part of that budget (about 60 per cent) on public education and other efforts, such as support for community advocacy, to improve race relations in schools, workplaces, the health-care system, the social services, and the media. A federal statute (Bill C-93), passed in July 1988, reiterated Canada's commitment to the International Convention on the Elimination of All Forms of Racial Discrimination and to the International Covenant on Civil and Political Rights. Differences remain between theory and practice in the implementation of these statutes and their interpretation by the courts.

Racist Attitudes and Behaviour

There are a number of different levels at which racism and other forms of ethnic prejudice and discrimination, however defined, may express themselves toward refugees and other immigrants. There is a hierarchy of "social distance," which places British, French, and other Western European peoples high, and Jews, blacks, Asians, and other "visible minorities" low on a preference scale. Canadians appear to reject explicit racism, although physical differences are important in the perception of groups. Although not synonymous with *racism,* it is reasonable to suppose that there is a high correlation between anti-Semitic sentiments and antipathy towards racial minorities. The term *democratic racism* has been used to describe the ambivalence of many people in contemporary societies that simultaneously subscribe to liberal democratic values, and to implicitly racist attitudes and practices. There is a "discourse of denial and political correctness" that contrasts with the everyday experiences of ethnic minorities who are aware of latent hostility and subtle discrimination.[7] Studies have shown that in renting accommodation, applying for jobs, and in the treatment by law enforcement agencies, including immigration officers, visible minorities are likely to experience subtle forms of differential treatment, explicit discrimination, and sometimes outright violence. As in other countries, the police in Canada are often accused of racism. Visible minorities are under-represented in the police forces, but it is not clear whether this is due to discriminatory recruitment or disinclination on the part of blacks and Asians to join the police. Several dramatic incidents where police have used firearms, wounding or killing a black person, have led to special investigations, which generally exonerate the officer involved.[8]

Ethnic minorities and recent immigrants experience "structured inequality" due to a combination of factors that include language difficulties, non-recognition of qualifications, limited social networks, as well as explicit discrimination. After experiencing some initial disadvantage during their first few years in the country, immigrants from European countries generally recover a good deal, while still not reaching the Canadian average. Caribbean and Asian immigrants have more serious difficulties. A study of metropolitan Toronto, based on 1996 census data, suggested that recently arrived immigrants from some European countries suffered economic difficulties, as did the recent arrivals from Africa and Asia. However, overall, visible minorities experienced much more severe economic deprivation than others. There was considerable variation *within* the non-European immigrant groups. For example, the Vietnamese were five times more likely to be in poverty than the Japanese. The most severely disadvantaged were the Ethiopians, Ghanaians, Somalis, and "other African nations." Others who were severely disadvantaged included Tamils, Pakistanis, Bangladeshis, Sri Lankans, Vietnamese, and a combined "other Asian group" that included those from Cambodia. What is notable about those ethnic groups, experiencing the most severe poverty and disadvantage, was the high proportion of refugees and asylum applicants among them. In contrast, "selected" immigrants from Asia and elsewhere were relatively well off, having brought with them money to invest, or human capital in the form of education and English language skills. However, education and professional qualifications earned abroad do not bring the same economic return as similar qualifications obtained in Canada. A comparison of 1991 and 1996 census data showed that "visible minority status" correlated with the incidence of poverty, and that returns to education were significantly lower among recent immigrants, many of whom were of non-European origin, including refugees.[9] Various studies have drawn attention to the barriers that provincial licensing bodies and professional organizations place in the way of newly arrived immigrants.[10] The non-recognition of qualifications obtained outside Canada, and the need to undertake further studies and examinations in this country, seriously disadvantages immigrants. Refugees who have lost money and property as a result of their persecution and displacement are particularly disadvantaged in these circumstances.

Refugee Policies and Legislation

Historical evidence is conclusive in its demonstration of racism in the administration of Canada's immigration laws in the nineteenth century and the first half of the twentieth. Anti-Semitism was rife, and there were systematic

efforts to exclude blacks from the USA and elsewhere. Chinese, Japanese, and East Indians were all victims of systemic discrimination, instigated and supported at all levels of the bureaucracy. Until 1962, Canada pursued a "white Canada" policy at least as racist as its Australian counterpart. At the end of World War II, Canada's immigration policies were still governed by an Act of 1927, which included clauses dating back to the practices of the nineteenth century. Largely due to the economic depression of the inter-war period, immigration to Canada had been severely restricted before and during the war. There was a growing recognition that more people would be needed once the war was over, but there was a strong preference for British immigrants and a reluctance to accept a large number of "displaced persons" from Europe. Notwithstanding Nazi pogroms and the Holocaust, anti-Semitism was still evident among politicians, officials, and the general public, so that the response to the needs of Jewish refugees was limited. Canadian immigration officials were encouraged to issue visas to Protestant and Catholic refugees but to limit the number of Jews admitted, largely by insisting that those accepted should have "agricultural experience," or be prepared to work as domestic servants. International Refugee Organization records confirm the anti-Jewish bias in Canada's "bulk labour" schemes for domestics, woodworkers, mining, and railroad maintenance in 1948. In fact, approximately 8,000 Jewish refugees were admitted in the first three years after the war, representing about 12 per cent of the intake at that time, when an estimated 30 per cent of the refugees in Europe were of Jewish origin. In the following decade (1947–58) less than 18,000 Jews, out of nearly a quarter million refugees, displaced and stateless persons, were admitted as immigrants. Between 1945 and 1960, only 3.3 per cent of all immigrants to Canada were of Jewish ethnic origin.[11]

A new Immigration Act came into force in 1953 (325, R.S.C. 1952). It listed the "prohibited classes" and further provided that the Governor in Council might make regulations "prohibiting or limiting of admission of persons by reasons of:

(i) nationality, citizenship, ethnic group, occupation, class or geographic area of origin,
(ii) peculiar customs, habits, modes of life or methods of holding property,
(iii) unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health or other conditions or requirements existing temporarily or otherwise, in Canada or in another country from or through which such persons come to Canada, or
(iv) probable inability to become readily assimilable or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their admission.

There was no explicit provision for the admission of refugees, and Canada did not subscribe to the UN Convention of 1951. Refugees were subject to the same selection criteria applied to all immigrants. The regulations introduced at this time remained in force until 1962. These gave explicit preference to immigrants from the British Isles, France, and the USA, followed by those from northern and Western European countries, Eastern and southern Europe, and the rest of the world, in that order. In the case of non-European countries, sponsorship by a Canadian citizen was generally required, effectively excluding almost anyone from Africa, Asia, the Caribbean, or Latin America. There were token "quotas" for immigrants from Commonwealth countries such as India, Pakistan, and Sri Lanka, but the requirements were so stringent that the numbers (less than 300 from each country) were rarely achieved. A scheme for admitting Caribbean women as domestic workers was instituted in the mid-1950s and began a chain migration that continues to this day.

Without introducing a new Immigration Act, an Order in Council (tabled in 1962) abolished the explicit racial discrimination in the regulations, although it left potential immigrants to Canada from Third World countries at a disadvantage, at least in part because there were numerous offices in Britain, the USA, and Western Europe capable of handling visa applications, but very few in Africa, Asia, or Latin America. This is still true today. Refugee movements originating from traditional sources in Europe included Hungary (1956–7) and Czechoslovakia (1968). By 1967 a "points system" of selection had been adopted, emphasizing education and occupational qualifications and eliminating ethnic preferences. This opened the way for Canada to respond to the crisis in Uganda in 1972, when Idi Amin expelled large numbers of Asians, many of whom had a good education and business experience. The evidence suggests that Canada tended to select the "cream," leaving less well-qualified Uganda Asians to find asylum in Britain or elsewhere.[12] A small number of Tibetans were admitted in 1970.

In 1974, the government published a green paper on immigration policy, instituted research, and instigated a public debate on immigration issues as a first step toward

formulating new legislation. The green paper was followed by a Joint Parliamentary Committee which made further recommendations. The debate over the green paper in 1974 is typical of the veiled forms that racism can take. There were references to the demographic consequences of increased immigration, urban overcrowding, environmental pollution, and threats to the conservation of resources, as well as the need to be cautious about making fundamental changes in "national identity." The subtext of these themes was clear enough and warranted their description as racist in the wider sense of that term. After the new Immigration Act came into force, the use of temporary employment permits increased, and the "enforcement branch" of the department grew substantially in personnel and resources, ensuring that the majority of visitors and short-term workers coming to Canada from Third World countries left again when their visas expired. There was also a growing concern, among bureaucrats and politicians, about the alleged scale of "illegal" (i.e., undocumented) immigration and persons travelling on forged documents. That problem appears to have become even more serious in the last decade. From time to time there are allegations of differential treatment of black and Asian persons by immigration officials at airports and border crossings, where they may be more likely to undergo searches for drugs or to have their documents questioned.[13]

A new Immigration Act was passed in 1976 and came into force in 1978. Like its predecessors, it gave considerable discretionary power to the Minister through Orders in Council and Minister's Permits, but the new Act carefully avoided any suggestion of ethnic preference. For the first time, Canada's commitment to the UN Convention and Protocol on Refugees (as amended in 1967) was confirmed in the legislation and special procedures instituted for refugee status determination, including an appeal mechanism for those who applied for asylum in Canada. Special refugee movements admitted abroad, and arriving in Canada as "landed immigrants," included Vietnamese, Cambodians (1975–8). and Indochinese, the last numbering over 60,000 in 1979–80. The decade since Canada's new refugee policy was introduced, in 1978, was a critical one globally. The number of refugees rose to an estimated 12–14 million. Access to air and sea transportation, together with the movement from Central and South America, through the United States, to Canada, brought more and more refugees across Canadian borders, whereas traditionally there had always been the luxury of careful selection abroad to protect Canada from becoming a country of "first asylum."

The administrative machinery established under the 1978 legislation to deal with refugee status determination proved inadequate. A backlog of applications and appeals built up. The sympathetic reception at first accorded to the Vietnamese "boat people" faded in the face of economic difficulties, including inflation and unemployment.[14] Annual immigration "targets" declined steadily, while the use of temporary employment visas replaced reliance on the economically motivated "independent" migrant scheme to a large degree.[15] The government became increasingly concerned with the security aspects of immigration control as global terrorism, organized crime, and drug dealing became more widespread. The unexpected arrival on the Atlantic coast of "boat people" from Sri Lanka via Germany in 1986, followed by a similar ship carrying Sikhs in 1987, was exploited by the media in ways much less sympathetic than in the case of the Vietnamese. Government reaction was at first ambivalent and later, when public opinion was clearly negative, led to the introduction of two new Immigration Bills in Parliament, each designed to give more power to officials to turn away potential immigrants and refugee claimants.

Bill C-55, which redefined the concept of *refugee* and established new machinery for determining refugee status, received its first reading in May 1987 and, after much criticism at the Committee stage and in the Senate, received royal assent July 21, 1988. A further piece of legislation, even more controversial because of its potential criminalization of church workers and others involved in "sanctuary" type movements, was Bill C-84, tabled in August 1987. It was also amended before receiving royal assent at the same time as Bill C-55. Both statutes were proclaimed and fully implemented in January 1989. A list of "safe countries" to which those found ineligible for refugee status may be deported has yet to be drawn up. Neither piece of legislation is explicitly "racist" in the way that the 1952 law governing immigration clearly was. In fact, Bill C-55 refers specifically to the Canadian Charter of Rights and Freedoms, which is a constitutional document. However, the relevant clause [3(f)] is amended to read "to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate *in a manner inconsistent* with the Canadian Charter of Rights and Freedoms." At first sight this formulation appears broader than in the previous (1976) Act, which prohibited discrimination on grounds of "race, national or ethnic origin, colour, religion or sex." However, it could also be interpreted as permitting discrimination if, under

the Charter, such action could be "demonstrably justified in a free and democratic society," or is subject to clause 33 of the Charter subsection (1) which permits a provincial legislature to override certain provisions of the Charter.

Bill C-84 amended the Immigration Act, 1976, and the Criminal Code. One of its objectives was to "control the widespread abuse of the procedures for determining refugee claims, particularly in the light of organized incidents involving large-scale introduction of persons into Canada to take advantage of these procedures." It was also designed to "deter the smuggling of persons into Canada" and "to respond to security concerns." Clause 8 originally empowered the Minister to direct a ship believed to have "illegal immigrants" on board to leave, or not to enter, Canadian waters. Although an amendment now requires ships suspected of carrying illegal immigrants to be escorted into port, rather than being forced to leave Canadian waters, there is no guarantee that asylum will be granted to any of the passengers on such a ship. Clause 9 made it an offence to "organize, aid, or abet" the coming to Canada of a group of ten or more persons not in possession of valid or subsisting visas, passports, etc. Clause 11 gave increased powers of search, seizure, and forfeiture of vehicles or premises where undocumented immigrants may be found. It is not necessary to attribute explicit racist motives to policy makers and administrators in order to recognize the potentially negative consequences of the restrictive measures that have been adopted to deal with organized crime and "people smuggling." The list of countries whose nationals now require a visitor's or transit visa includes virtually all Third World countries known to have generated reactive migration flows in recent years. It excludes all Western European countries, except Portugal from where a number of Jehovah's Witnesses have sought refugee status in Canada. When Roma from central and Eastern Europe began to seek asylum in Canada, visas were also required from their countries of origin.

These two pieces of legislation (Bills C-55 and 84) were widely regarded as having threatened the civil liberties of Canadians and potential refugees alike. The rise of politically influential Islamic fundamentalism, Sikh militancy, and other nationalist or ethno-religious political movements not only introduced a new element into the Canadian "multicultural mosaic" but also generated a perceived security threat, as well as complicating Canada's external relations with other countries. At the time of writing, yet another piece of legislation, Bill C-11, is pending. This is a revised version of Bill C-31, which died on the Order Table when Parliament was dissolved before the election in 2000. The Bill has been criticized by human rights advocates, and by the Canadian Refugee Council, because it will make it harder for asylum applicants to reach this country and receive a fair hearing. Following the precedents set in Britain and the European Union, new laws and regulations are intended to be "fairer, faster, and firmer" in dealing with asylum applicants and undocumented migrants. In practice they are part of a concerted effort by developed countries to harmonize immigration policies and to discourage migration from the Third World. In fact, the legislation may breach Canada's obligations under the UN Convention on Refugees, as well as the Rights of the Child.[16] Against those who criticize government plans for failing to live up to humanitarian obligations are those who believe that Canada is not controlling its borders strictly enough and that Canada's border "is a sieve." There are those who believe that the Charter of Rights should apply only to citizens and permanent residents and that "the refugee program is facing widespread abuse."[17]

Trends in Refugee Movements to Canada

In the first two decades after World War II the principal flow of refugees was of persons displaced in Europe. and the UN Convention was intended to apply only to European refugees. The Convention was not amended to cover non-European until 1967. In the decade 1971–80 Canada admitted approximately 100,000 refugees, including over 7,000 Uganda Asians, and over 70,000 Vietnamese, Indo-Chinese, and Cambodians. In the following decade, 1981–90, a total of 219,720 refugees were admitted, the principal source countries being "Iron Curtain" countries such as Poland, together with Latin America. From 1991 to 1999 a total of 243,264 refugees were admitted. In this period the leading source of refugees and asylum applicants was the former Yugoslavia, including Bosnia-Herzegovina, and Croatia. The following table shows the leading source countries for refugees admitted, 1996–9. In this period Bosnia and Croatia ranked high, while Sri Lanka, Iran, and Afghanistan followed close in the numbers admitted. The numbers from central and southern African countries were much smaller, despite the crises on that continent, reflecting the difficulties faced by refugees in that region in obtaining visas and other necessary documentation and qualifications for selection abroad or asylum in Canada.

Conclusion

There are obvious contradictions between the humanitarian and egalitarian ideologies Canada espouses and the institutional practice of micro-racism in immigration

Refugees by Source Area
Leading Source Countries 1996–99

Country	1996	1997	1998	1999
Bosnia Herz.	4,960	3,677	3,590	2,692
Sri Lanka	3,603	2,564	2,130	2,606
Iran	1,724	1,665	1,472	1,440
Afghanistan	1,787	1,674	1,278	1,814
Croatia	—	996	1,285	1,187
Somalia	800	729	1,195	1,376
Iraq	1,337	1,346	947	915
India	1,223	770	829	694
Pakistan	652	752	723	1,088
Sudan	—	678	614	399
Algeria	675	558	564	743
Bangladesh	825	795	566	387
Total (top 12 only)	17, 586	16,204	15,193	15,341
Total (others)	10,762	7,926	7,507	9,026
Total refugees	**28,348**	**24,130**	**22,700**	**24,367**

Source: CIC, *Facts and Figures 1999: Immigration Overview* (adapted)
(Numbers include principal applicants and dependants)

policy, including the treatment of immigrant minorities. Refugees and asylum-seekers in some parts of the world are victims of these contradictions because of the obstacles in the way of their selection abroad, or their inability to reach Canadian shores with appropriate documentation, including evidence of their actual or potential persecution in their home countries. At the same time, those who are deemed admissible to Canada are exposed to the prospect of further systemic discrimination, personal prejudice, and structured inequality when they attempt to settle in their new country. The contradiction between the provisions of the 1981 Constitutional Charter of Human Rights and Freedoms and these micro-racist practices constitutes a genuine Canadian dilemma. The closing of borders, by the more advanced industrial countries of the world, has been described as a form of global apartheid, designed to preserve the wealth and power of Western societies and to segregate their people from the crises in the Third World. Although Canada's response to the growing numbers of asylum-seekers in the last decade has been more generous than some other countries', attempts to eliminate racism from this country's immigration and refugee policies remains a "work in progress."[18] There is a danger that concerns about security, and the attempts to deter undocumented migration, prevent human smuggling, and combat terrorism may seriously disadvantage those who genuinely need protection from persecution.

Canada's immigration policies and its treatment of refugees cannot be considered in isolation from the global context and actions of other countries and agencies. The economically advanced countries of the world have welcomed temporary and permanent migrants (including refugees) when their own economies were in need of labour and skills, and imposed restrictions when economic and political conditions changed. Furthermore, the involvement of the super-powers in Third World conflicts, the global arms trade, together with the actions of multinational companies, banks, and international agencies (such as the World Bank and the International Monetary Fund) through "structural adjustment programs" have contributed to the economic hardship, social problems, and civil unrest, that precipitate refugee crises.[19] The fact that a large majority of the estimated 12 million refugees in the world today are of non-European ethnic origin and are still located in Africa, Asia, and the Middle East, raises the question of racism, when compared with the more sympathetic response to refugee crises in Yugoslavia. A "non-exodus" approach to global migration from developing countries, and the use of deterrents by Canada and other wealthy countries, to protect their borders, are forms of institutional racism, despite the numbers of refugees actually admitted from the Third World.

Notes

1. The terms *special measures* and *designated classes* refer to Canada's programs for bringing refugees to Canada under humanitarian criteria, who would not necessarily have met the strict UN Convention definition. An example was the program for Eastern Europeans in the 1980s. For a discussion of the relation between environmental crises and refugee movements see Thomas Homer-Dixon, *Environment, Scarcity and Violence* (New Jersey: Princeton University Press, 1999).
2. André Siegfried, *The Race Question in Canada* (London: E. Nash, 1907).
3. As defined in the International Convention on the Elimination of All Forms of Racial Discrimination (article 1), *racial discrimination* "refers to any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in

the political, economic, social, cultural or any other field of public life." For a discussion of the various uses of the term *racism,* see Michael Banton, *The Idea of Race* (London: Tavistock, 1977), and John Rex, *Race and Ethnicity* (Milton Keynes: Open University Press, 1986.)

4. See N. B. Ryder "The Interpretation of Origin Statistics," *Canadian Journal of Economics and Political Science* 20, no. 4 (1955): 466–79.
5. See *Ethnic Origin and Nativity of the Canadian People*, 1941 Census Monograph (Ottawa, Queen's Printer, 1965).
6. Ian Hunter, "Equality's Bloated Bureaucracy," *Globe and Mail*, 25 May 25 2001, 15(A). For a discussion of the Charter of Rights and its implications for Canadian federalism see a special issue of the *International Journal of Canadian Studies*, 7–8, (1993); also vol.14, 1996.
7. For an examination of these questions, see Frances Henry and Carol Tator, "The Theory and Practice of Democratic Racism in Canada," in *Perspectives on Ethnicity in Canada*, eds. M. A. Kalbach & W. E. Kalbach (Toronto: Harcourt Canada, 2000).
8. *Race and Ethnic Relations in Canada*, ed. Peter Li, rev. ed. (Don Mills, ON: Oxford University Press, 1999).
9. See Michael Ornstein, *Ethno-Racial Inequality in the City of Toronto: An Analysis of the 1996 Census* (Toronto: Access and Equity Unit, 2000), and A. Kazemipur and S. S. Halli, "The Changing Colour of Poverty in Canada," *Canadian Review of Sociology and Anthropology* 38, no. 2 (2001): 217–38.
10. For example, P. A. Cummings, et. al., *Access! Task Force on Access to Trades and Professions* (Toronto: Ministry of Citizenship, 1989).
11. I. Abella and H. Troper, *None Is Too Many* (Toronto: Lester and Orpen Dennys, 1983).
12. Freda Hawkins, "Uganda Asians in Canada," *New Community* 11, no. 3 (1973): 268–75.
13. A recent example was reported in the media. A British-born woman of African descent, carrying a British passport, was handcuffed, detained, and interrogated at Pearson International Airport by an immigration officer who doubted the authenticity of her documents. Similar cases have been reported. See Maureen Murray, "Pain Still Persists Seven Years after Pearson Ordeal," *Toronto Star*, 6 June 2001: 17(A).
14. G. E. Dirks, "A Policy within a Policy: The Identification and Admission of Refugees in Canada," *Canadian Journal of Political Science* 17, no. 2 (1984): 279–307.
15. L. Wong, "Canada's Guestworkers: Some Comparisons of Temporary Workers in Europe and North America," *International Migration Review* 18, no. 1 (1984): 85–98; M. Boyd et al., "Temporary Workers in Canada: A Multi-faceted Program," *International Migration Review* 24, no. 4 (1986): 929–50.
16. See Canadian Council for Refugees, "Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies," online: <http://www.net/~ccr/antiracrep.htm> (date accessed: 26 June 2001).
17. See J. C. Best, et. al., "Canada Must Stand on Guard: Open Letter to Jean Chrétien," *Globe and Mail,* 6 June 2001, 17(A).
18. For a discussion of the changes in policy and their implications, see Sharryn Aiken, "Racism and Canadian Immigration Policy," *Refuge* 18, no. 4 (1999): 1–7, and A. H. Richmond, "Global Apartheid: A Postscript," *Refuge* 19, no. 4 (2001): 8–13.
19. Although the negative effects were not confined to that continent, it has been shown that structural adjustments imposed by the IMF and the World Bank, in the name of fiscal responsibility, aggravated social conditions in Africa and "ended in a considerable fiasco." See Manuel Castells, *End of Millennium* (Oxford: Blackwell, 1998), 113–5. See also A. Adepojo, ed., *The Impact of Structural Adjustment on the Population of Africa* (Portsmouth, NH: Heinemann, 1993).

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Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women

Eileen Pittaway & Linda Bartolomei

Abstract

This paper examines the intersectionality of race and gender in refugee situations, and the multiple forms of discrimination experienced by refugee women. It explores the notion of racism as a root cause of refugee generation, and the gendered nature of the refugee experience. The manner in which racism and sexism intersect to compound the human rights violations that refugee women experience is explored in the treatment of sexual violence in international and domestic law and policy; during armed conflict; in refugee camps; in countries of first asylum; and in countries of resettlement. Using a case study of one strand of refugee policy in Australia, it illustrates the impact of this discrimination on refugee women. The forthcoming World Conference against Racism offers a unique opportunity for this phenomenon to be addressed by the international community.

Résumé

Cet article examine la façon dont des considérations de race et de genre se croisent dans les situations concernant les réfugiés, ainsi que les multiples formes de discrimination qui frappent les femmes réfugiées. Il explore la notion du racisme comme cause primaire pour la génération de flots de réfugiés, ainsi l'aspect relié au genre de l'expérience des réfugiées. La manière dont le racisme et le sexisme s'entrecoupent pour aggraver encore plus les violations des droits de la personne dont sont victimes les femmes réfugiées est explorée dans un nombre de contextes, dont : le traitement de la violence sexuelle dans les régimes de loi et de politiques au niveaux international et domestique ; dans les situations de conflits armés ; dans les camps de réfugiés ; dans les pays de premier asile et dans les pays de réinstallation. Se basant sur une étude de cas portant sur une section de la politique sur les réfugiés en Australie, il illustre l'impacte qu'a cette discrimination sur les femmes réfugiées. La Conférence contre le racisme, qui doit se tenir bientôt, offrira une occasion unique à la communauté internationale de se pencher sur ce phénomène.

Introduction

More than 80 per cent of the world's refugees are women and their dependent children. Violence against women is rampant during armed conflict. It is manifested through involuntary relocation, as forced labour, torture, summary executions of women, forced deportation, and racist state policies denying or limiting public representation, health care, education, employment, and access to legal redress. Rape and other forms of sexual torture are now used routinely as strategies of war in order to shame and demoralize individuals, families, and communities. Resettlement policies actively discriminate against women on grounds of both race and gender. The gender blindness of the 1951 Refugee Convention and international law and domestic policy relating to refugee women has been recognized only relatively recently within the international system. The 1951 Refugee Convention does not recognize persecution based on grounds of gender as a claim for refugee status, nor is it clear that violence on grounds of gender can be considered as persecution. Rape has been recognized as a crime against humanity, a war crime, and an act of genocide in the Statutes of the International Criminal Court, but to date only thirty-two of the sixty nation states needed to ratify these statutes before they can become operational have done so.

Racism as a Root Cause of Refugee Generation

In an address to the Human Rights Commission in Geneva on March 21, 2001, the United Nations High Commissioner for Refugees, Ruud Lubbers, stated that "violations of human rights, racism, and xenophobia were to blame for the world's growing number of uprooted people."[1] Preparations for the World Conference against Racism (WCAR), to be held in Durban in September 2001, have provided a unique opportunity to address the issue of racism as one of the root causes of increased refugee flows in the international public arena. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that there are some 21 million refugees and an additional 20 million internally displaced peoples across the world in more than forty countries.[2] Most wars are now intra-state rather than inter-state conflicts. Many of these civil wars are characterized by violence resulting from heightened ethnic tensions driven by economic goals.[3] These include disputes over access to natural resources and land, which intersect with goals of economic and ethnic supremacy, as evidenced through recent and ongoing conflicts in Sierra Leone, Angola, Fiji, and Indonesia.

There are multiple manifestations of racism in the experience of refugees and other displaced peoples. Refugees are forced to leave their country or community of origin because of a well-founded fear of persecution for reasons of race, ethnicity, or nationality, religion, political opinion, or membership of a particular social group. Once the conflicts that caused them to flee are declared over, often following the intervention of superpowers, racism can preclude safe return and integration of refugees back into the communities from which they fled. Despite this knowledge, repatriation is often forced on refugee communities by host countries and UN agencies unable or unwilling to sustain the financial cost of the refugee population. Internal armed conflict, generating large numbers of internally displaced peoples, is most often institutionalized racism and must be recognized as such.

As the flow of uprooted peoples increases, many states are increasingly reluctant to host refugees. Narrow definition and interpretations of refugees, as reflected in the 1951 Convention and the 1967 Protocol, often leave those discriminated against on the grounds of minority or ethnic status unprotected. Refugees are routinely demonized by Western countries and the media as "illegal immigrants" and "economic migrants."[4] This is despite evidence that the majority of people seeking asylum have a genuine fear of persecution if returned to their home country, and despite the acknowledged contribution made by refugees to their host countries over the years.[5]

The Gendered Nature of the Refugee Experience

At the preparatory committee for the World Conference against Racism held in Geneva in May 2000, a paper titled "Racism, Refugees, and Multi-Ethnic States" was presented. Prepared by five invited experts on refugee issues, at least four of whom were men, the paper details the many links between refugee issues and racism. Despite the fact that 80 per cent of the world's refugees are women and their dependent children, not once in the twenty-seven-page document is gender mentioned. Not once is the well-documented difference in refugee experience between men and women acknowledged or addressed. The experience and impact of racism during armed conflict is clearly a gendered experience: the majority of those who are killed or "disappeared" are men and male youths. This accounts for the refugee populations, who in the majority are women and their dependent children, who generally have been exposed to extreme physical violence.[6] Research has shown that the legal protections for women around the world, including refugee women who have experienced violence, are largely gender blind and do not address the reality of women's lives. Charlesworth and Chinkin[7] have argued that "the very nature of international law has made dealing with the structural disadvantages of sex and gender difficult."[8] Refugee women continue to be discriminated against in situations of armed conflict, in refugee determinations, and in resettlement because of their gender.

The special needs of refugee women have not been acknowledged within the UN system except in relatively recent years. Only since the thirty-fourth session of the General Assembly held in 1979 has there been a special emphasis on the urgent and particular needs of refugee women. Kourula[9] indicates that it was not until 1985 that the specific needs of refugee women were included as a separate agenda item at UNHCR's annual Executive Committee (EXCOM) meeting. In 1993 EXCOM Conclusion No. 73 (XLIV) considered the link between the widespread nature of sexual violence perpetrated against refugee women and their coerced displacement. This trend to single out the special needs of refugee women has continued ever since. However, "efforts to address the particular situation of refugee women have so far fallen short of the adoption of any legally binding international instruments singling them out as a specific group."[10] Despite a small number of judgments by refugee review tribunals

in resettlement countries including Canada, America, and Australia—which have accepted that in certain situations, for the purposes of the Convention, women can be considered as a social group—there has been strong resistance within the international community to accepting gender-based asylum as grounds for refugee status.[11] There have been some advances by UNHCR and in some domestic government policy towards recognizing the specific situation of women, demonstrated by the establishment of gender guidelines. There is, however, a general lack of political will to implement them, as evidenced by their ad hoc application. There has been little recognition of the manner in which racism and sexism intersect to doubly discriminate against refugee women in either international or domestic legal instruments and policies.

The Interesectionality of Race and Gender

International awareness of the way in which multiple forms of discrimination intersect to inhibit the empowerment and advancement of women has its origins in 1975 at the UN First World Conference on Women, and subsequent women's conferences, the last of which, the Fourth World Conference on Women, was held in Beijing in 1995. The conference outcomes document, the Beijing Platform for Action (BPFA), was adopted by all member states. It recognizes that factors such as age, disability, socio-economic position, or membership in a particular ethnic or racial group could compound discrimination on the basis of sex, to create multiple barriers for women's empowerment and advancement. In documentation for the World Conference against Racism, the Committee to Eliminate Racial Discrimination noted that racial discrimination does not always affect women and men equally or in the same way: "There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men."[12] The United Nations Division for the Advancement of Women (DAW), in collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Fund for Women (UNIFEM), organized an Expert Group Meeting on "gender and racial discrimination" to contribute to further understanding of this issue. This meeting provided an opportunity to explore the ways in which multiple forms of discrimination affect the lives of women. The report[13] of this expert meeting identified that the failure to address the "'differences' that characterise the problems of different groups of women can obscure or deny human rights protection due to all women." Although all women are subject in some manner to discrimination based on gender, this distinction is compounded for some women when gender discrimination "intersects" with discrimination on other grounds, which may include, among other things, race, class, and colour. This notion of "intersectionality" has been defined in the following manner:

> The idea of 'intersectionality' seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structure the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment.[14]

Non-government organizations (NGOs) around the world have documented the fact that the oppression women suffer because of their race, religion, caste, ethnicity, nationality, and other socio-political categories is aggravated by the discrimination they face because of their gender. As a result, women, more than men, are subjected to double or multiple manifestations of human rights violations.

The Intersectionality of Race and Gender in Refugee Situations

During armed conflict, women can become the targets of "ethically motivated gender-specific"[15] forms of violence. Ideological frameworks developed by extreme forms of nationalism and fundamentalism that reify women's image as "bearers of the culture and values" have led to widespread sexual assaults against women as political acts of aggression. Such acts of sexual aggression are often fuelled by race- and gender-based propaganda.[16] An additional intersect of race and gender is the forcible impregnation of females from one ethnic group by males from another group as a form of genocide. Women bear the direct impact of these actions. Racism, racial discrimination, xenophobia, and related intolerance have increasingly been used to incite armed conflicts over resources and rights within and between countries around the world.

The "othering"[17] of refugees—that is, regarding one or several sections of the community as "the other," or of intrinsically lesser value than the dominant culture or power holders—has increased, particularly in some countries in Europe where the concept of "fortress Europe"

has fostered a climate of xenophobia and racism. Theodor van Boven has identified "a climate and a perception that a priori regards a foreigner as an adversary, a rival, a competitor, or an adventurer who is a threat to prosperity, culture and identity."[18]

Refugee women are actively discriminated against on the grounds of their ethnicity and their gender. They are often devalued or "othered" on grounds of their race, and this racial discrimination effectively removes any need by the aggressors to respect them by gender. This effectively "others" them twice and makes them prime targets for rape, systematic rape, and sexual torture for the purpose of shaming the men of their communities.[19] Members themselves of patriarchal societies, women are also "othered" by their own communities, making this form of torture extremely effective, to the point where women are sometimes murdered in "honour killings" and are often rejected by their own communities because they have been "violated" by the aggressors.[20]

Women are raped to humiliate their husbands and fathers, and for reasons of cultural genocide. They are forced to trade sex for food for their children. They are raped by the military, by border guards, and by the UN peacekeeping forces sent to protect them. Rape and sexual abuse is the most common form of systematized torture used against women, and it ranges from gang rape by groups of soldiers to the brutal mutilation of women's genitalia.There is evidence of military training to commit these atrocities. In recent ethnic-based conflicts in Bosnia, Rwanda, Sierra Leone, and East Timor, rape and sexual violence have been used to target women of particular ethnic groups and as an instrument of genocide. Similar patterns are found in all armed conflict. In an exploration of racism, misogyny, and politico-military violence in the construction of Western modernity, Uli Linke cites a range of studies that have begun to explore the link between military patterns of rape and racial stratification.[21]

Refugee women who have suffered rape and sexual abuse report keeping their trauma secret from determining (immigration) officers for fear of being labelled prostitutes and being denied refugee status or visas on moral grounds. Such fears are well documented by UNHCR, Amnesty International, and many aid agencies working with refugee women.[22] A study conducted in Winnipeg, Canada, found that more than 50 per cent of refugee women who had been raped, and 94 per cent of other refugee sexual-assault victims, did not tell their refugee workers of their experience.[23] Far more sought help for psychosomatic symptoms related to the experience. Because the post-traumatic symptoms such as depression, loss of sleep, anger, fear of strangers, and feeling dirty are similar to those of other trauma, the root of the problem often goes unrecognized and untreated. There is still a conspiracy of silence surrounding the true extent of the problem, and until it is fully acknowledged women will not receive the services they deserve.

Refugee Women at Risk: A Case Study

An examination of the Australian Women at Risk Program, illustrates the racism inherent in much refugee policy.[24] This research, first undertaken by Pittaway and Winton in 1991 on behalf of the Australian National Consultative Committee on Refugee Women (ANCCORW), and revisited by Hercus, Ray, and Pittaway in 2000,[25] highlights the gulf between policy and practice, and the gender blindness that has led to the ongoing discrimination against refugee women in international law and policy.

The Women at Risk Program (WaRP) is designed to identify refugee women at risk of violence in refugee camps or during armed conflicts and to fast-track their removal to safety in Australia. Since its inception, the program has failed to meet its modest quota. In the first two years of implementation, less than a third of the annual allocation of sixty visas were issued each year, despite an estimated 16 million refugee women and children worldwide. In 2001 the program still remains significantly below quota. The research project aimed to discover why the identification of women at risk was proving so difficult. Interviews were conducted with UNHCR officials, workers in refugee camps, and officials at Australian posts in Southeast Asia. Several implementation problems were identified, such as a lack of information and poor communication between levels of management, but these hurdles did not explain an apparent apathy towards the program.

A potential key to the problem became clear after it was noted that a total of seven out of twenty-two senior male officials in Australia, Thailand, and Hong Kong interviewed for the project had all used the same revealing phrase to describe the difficulties of identifying refugee women at risk.[26] They described the trauma that some women experienced as "only rape," implying that rape or the likelihood of being raped was insufficient grounds for considering a woman for the WaRP. These officials used the phrase when asked whether they considered rape and sexual abuse to be grounds for referring women to the WaRP.

Their argument was that if a woman was complaining of only rape and sexual abuse, she could not possibly be considered a woman at risk. As one man commented, "If

only rape was the criterion, I could send you most of the women in this camp. It happens all the time, especially to the young single women, and we can't do much about it." A UNHCR official stated that rape was not grounds for refugee status, therefore it could not be grounds for the WaRP, and that to qualify for this program a woman had to be experiencing extreme forms of violence and not only rape. A third said rape was so common that it could not be seen as grounds for consideration and, anyway, that was how women got extra food (from the guards who raped them), and was therefore hardly likely to be classified as "extreme danger." The worst comment was that often what happened wasn't really rape anyway, because some women "exploited" their sexuality within the camp system in order to get favours from the guards. Another official commented that because it had often happened to women before they reached the camps, it was no longer an issue. And the final remark was that "it happens so often to these women that they get used to it, sort of expect it, and they don't see it as violence like being beaten up or tortured."[27]

The interviewees were asked if anyone talked to the women about the rape and sexual abuse. Most acknowledged that such conversation did not occur because the women were too ashamed or shy to discuss such issues with male officers. It was apparent from the research that in the camps there was no treatment or support for women who had been raped or sexually abused prior to arrival, and that there was little protection within the camps. Interviews with women and service providers in Hong Kong indicated that often camp security staff perpetrated abuses within the camps.[28] These comments highlighted not only insensitivity to gender but also racism, as they implied that refugee women were of lesser social standing and therefore of lesser value than those making the comments, who were mainly Anglo-Saxon. While it can never be proved, it can be hypothesized that they would not have made these comments about women from their own ethnic groups and class.

It is worth noting that the interviews conducted with refugee women in Australia and with the women in camps indicated that the rape of refugee women was not just the result of an opportunity that men seized when they found themselves in a position of power over vulnerable women. Much of the rape and sexual torture was planned and systematic. In camps it was institutionalized and a way of keeping control. These acts were undertaken with relative impunity. During conflicts, women were raped in an attempt to extract information, to shame communities, and to destroy the social fabric. The women were forcibly impregnated to destroy ethnic purity. They were often systematically tortured in a way that suggested that soldiers had been trained to do it; for example, the cutting of nipples with wire cutters after rape has been reported across Indochina and Indonesia. From Latin America come stories of genital mutilation with electric prods, with broken glass, and through the use of trained dogs.[29]

Apparently, despite much rhetoric about protecting refugee women, many people in positions of influence were unwilling or unable to accept rape and sexual torture during an armed conflict as a major problem. This has been well documented internationally.[30] While the rape and sexual torture of women had been noted as a component of the problem at the time of the original research conducted by the ANCCORW in 1991, it was not recognized at the time that it might be the key. It was only on reflection that the significance of the phrase "only rape" became clear. An incident at a meeting in Sydney further reinforced the importance of the realization. When informed of a case involving the pack rape of a refugee woman, a prominent cleric sitting on the board of a major overseas aid agency remarked, "I hope she enjoyed it!"[31] Horrifying though his statement was, this man voiced a very commonly held view of rape and sexual abuse, though perhaps he expressed it more blatantly than usual. This attitude, while not overtly expressed, was reflected in the comments of determining officers and their superiors in discussions about the WaRP.[32]

Because refugee policy is strongly linked to international human rights instruments, it was hoped that a solution might be found in using them. The researcher undertook a major literature survey in order to identify a solution to the problem of interpretation. It was found that the relevant human rights instruments did not adequately address the torture and trauma of refugee women. Not only did these instruments not provide a solution, they were part of the problem. The issue was not only invisible in Australian policy, it was also silent in the rest of the world. Until 1998, rape during conflict, which includes rape, systematic rape, and premeditated sexual torture, was not considered a crime against humanity, a war crime, or grounds for refugee status.

The literature survey identified the gender blindness inherent in human rights instruments, which is based upon the notion of "public" and "private" spheres in human rights. The "public" addresses the political sphere, the sphere most often occupied by men, especially in the developing countries, which are the biggest generators of refugee populations. The "private" reflects the domestic

sphere, including the sexual, the domain of most women, and as such is not addressed by human rights instruments. Because of anomalies in the human rights instruments, the rape and sexual abuse of women is seldom recognized as torture. The preamble of the Torture Convention acknowledges rape as torture, but the operating paragraphs in the directions to the UN Special Rapporteur on Torture refers to torture *and* rape. These semantics, these very minor changes in language, provide the basis for the dismissal of rape as torture. Judges have declined to accept it as the grounds for refugee status because "[it] is the common experience of women everywhere."[33] Many cases of judges and officials discounting the rape of refugee women and refusing the protection of refugee status on these grounds have been identified in Haiti, Kashmir, Tibet, Peru, countries in the Horn of Africa, and the former Yugoslavia. These cases are well documented; it is a universal problem.[34]

A classic case, cited by international human rights lawyers in their fight to change the legal recognition of the experience of refugee women, illustrates the issue. A man was tied to a chair and forced at gunpoint to watch his common-law wife being raped by soldiers. In determining the case for refugee status, he was deemed to have been tortured. His partner was not.[35]

From the understanding gained from the re-evaluation of the research findings and the literature survey, it became apparent that, if the needs of refugee women were to be recognized and addressed, there had to be change at an international level. The rape and sexual abuse of refugee women, during a conflict, in flight, or in refugee camps, had to be recognized as a war crime and be considered as persecution, and such a finding had to be reflected in international law and conventions. Without such recognition, domestic law and social policy designed to address the needs of these women, although grounded in international law, would constantly fail to fulfill their goals. This not only explained the failure of the WaRP. It also explained why the experience of refugee women had not been accepted and reflected in domestic policy. Gender blindness, patriarchal values, and racism combined to ensure that the experiences of refugee women were not acknowledged or addressed.

Manifestations of Racism in Refugee Policy

Throughout 1993, the escalating conflict in Yugoslavia and the resulting increase in refugee flows also highlighted the racism inherent in refugee policy. In the 1980s and early 1990s the majority of refugee women came from developing regions such as Indochina, Africa, Iran, Iraq, the Horn of Africa, and Central and Southern America. They were the "other," people of lesser international status than the major decision makers and power-brokers in the world, subjects of pity and charity, rather than people with equal rights. In 1990 war broke out in Yugoslavia. Yugoslavia was part of Europe and accessible to Western media, and for that reason, from 1991 onwards, the international community learned more about that war than about any other in the world. The sexual abuse of the women, the rape camps, and the "ethnic cleansing" through the killing of males and impregnation of females in the three countries involved was nightly television news, inciting international outrage.

It is suggested that this outrage intensified because the women were Caucasian, and the villages and towns were obviously those of a developed country. The average person in the Western world could identify with the women and their experience in a way that had not happened before. Similar treatment of refugee women from developing countries was well documented and reported in the past, but never received this level of response. As an example of this reaction, AUSTCARE and UNHCR Australia started a major campaign to send "comfort packages" (containing sanitary napkins and articles of feminine hygiene) to women in the former Yugoslavia. Qantas freighted the goods free of charge, and it was reported as the most successful campaign that AUSTCARE had ever run. An African refugee, living in Australia and working with the researcher, commented wryly, "There have been African women experiencing what those women are experiencing for many years. Do they think that we don't bleed?"[36]

Acceptance of the magnitude of the abuse taking place and the numbers of women being raped and sexually abused was difficult, and the world then had to digest the fact that it was not just a handful of men perpetrating these atrocities. In the same way that it was difficult to accept that it was Caucasian women being raped, it was equally painful to realize that was Caucasian men who were raping them.[37] This realization challenged many men, who in some way identified with the collective blame, and women, who had to accept the fact that many men who find themselves in positions of power will treat women in this way. It was a strong statement about gender relations and was a difficult concept for many to contemplate. The fact that they were from ethnically discrete communities, and that the rape was racially motivated, was not acceptable to the Western world. For the first

time, the rape of women during armed conflict was considered a possible war crime.

The experiences of the women from the former Yugoslavia brought about a major shift in the acknowledgment of the experiences of women in conflicts. It brought the rape and sexual abuse of women in such situations to the public consciousness. Because the women were Caucasian, the Western world could identify with them. Because they had experienced similar forms of torture, other refugee women identified with them. This gave an impetus to the work of the International Refugee Caucus in its fight to have these issues addressed. However, public consciousness of the issues was not sufficient at that stage to move beyond compassion to reparation. The majority of women raped and sexually abused in the conflict in the former Yugoslavia were never accorded refugee status. The majority of those who have entered Australia and other countries as the result of these atrocities came on Special Humanitarian Visas. The lack of recognition that their experience was sufficient to warrant full international protection denied the gravity of the experience they had suffered.

Refugee Women, Racism, and Resettlement

Racism is not only a cause of refugee movement, it also continues in countries of settlement and resettlement. Gender discrimination is also entrenched in social structure. Refugee women, like many migrant workers, are frequently treated as second-class citizens in their countries of destination. Racist state policies of host countries in the West and the Asia-Pacific, particularly on labour and immigration, result in the exploitation of refugee and migrant women. They are discriminated against in terms of wages, job security, working conditions, job-related training, and the right to unionize. They are also subjected to physical and sexual abuse. When illegally employed, they have no access to labour laws. They are not given equal access to the law, nor are they treated equally under the law. Their employment opportunities are limited largely to domestic work or the sex industry, where their right to work, freedom of movement, reproductive rights, right to acquire, change, or retain their nationality, right to health and other basic human rights are violated. The result is that refugee women and their families are more vulnerable to religious, racial, and gender discrimination and exploitation.[38]

Their stateless condition makes refugee women and children easy targets for traffickers.[39] Trafficking has not been deterred by the imposition of restrictive and exclusionary immigration policies by host countries. On the contrary, such policies account for the increasing number of undocumented migrant female workers who have been trafficked or are most vulnerable to trafficking. Trafficking involves the recruitment, transportation, transfer, and harbouring of persons and is conducted by threat, use of force or other forms of coercion, abduction, fraud, and deception. The purposes of trafficking in persons include involuntary servitude—domestic, sexual, or reproductive—in forced or bonded labour in conditions akin to slavery. Refugee women, indigenous women, Dalit women, and women from ethnic minorities are some of the groups of women most vulnerable to trafficking. The extensive documentation of the exploitation of migrant and refugee women, especially from countries in the Asia-Pacific region, underscores the fact that migration and trafficking in women is a critical area of concern in the Asia-Pacific region, which must be included on the agenda of the World Conference against Racism.

Racism directed at refugee populations in resettlement countries often causes refugee women to remain silent about their experiences of gender discrimination and violence within their own communities. Often racism within the broader community exacerbates the pressure on refugee women to maintain their traditional roles in order to keep their communities intact. The problems of many refugee women remain hidden in countries of resettlement. The racial barriers that men may face in access to employment and education are concerns more frequently aired in the public arena. As a result, the prevailing discourse in many resettlement countries among refugee advocates is that refugee men find resettlement far more difficult than do refugee women.

Refugees face systematic discrimination on the bases of race, ethnicity, and gender in the process of selection for resettlement in third countries—most often developed countries with predominantly white populations. Refugees are selected for resettlement from situations of refuge in first countries of asylum. There is a marked trend for resettlement countries to give first preference to refugees most likely to "blend" into the host country. Therefore humanitarian response from countries of the North to refugee populations from the South is markedly different from response to refugees from the North. For example, in January 2000 the Africa News service reported the decision taken by the United States to terminate "family reunion" for refugees from seven African countries. According to American-based human rights groups, this termination did not apply to refugees from

Eastern European countries. Evidence of racism in refugee policy is further supported by figures quoted in the *Boston Globe*'s City Weekly section in December 1999, which indicated that since 1980 only 67,000 refugees from Africa had been admitted to the USA, while more than half a million had been accepted from Eastern Europe.[40]

Goodwin-Gill[41] has pointed out that as the numbers of refugees and asylum seekers has increased, many Western nations have introduced measures to deter entry, including immediate detention on arrival, the imposition of visa and transit requirements, and the fast-tracking of refugee determinations. These measures have been implemented to a large extent because the majority of those seeking entry have come from non-European countries. Countries have also responded by trying to regionalize the solutions, by keeping many of those in need of assistance within their regions of origin.[42] Yet racism remains inherent in this approach, for refugees in the South are most likely to be assisted with basic food and medical supplies, while refugees from the North are often offered resettlement in the North, and/or substantial assistance in the rebuilding of infrastructure. Such unequal response is justified on the grounds of cultural compatibility. The level of assistance is also usually tied to the economic relationships between the countries concerned, so that refugee-producing countries with few resources to offer countries of the North receive less assistance than those countries upon which the North has strong trade dependencies.

An example of this imbalance is the discrimination in some Western countries against the resettlement of African refugees, which is apparent in the differential treatment given to refugees from Kosava (Caucasians) and refugees from non-Caucasian backgrounds. Discrimination against the resettlement of African refugees is argued on the grounds that the difference in cultures could disadvantage refugees from the African continent. This, despite the fact that refugee flows from Africa are often a consequence of colonizers' imposition of their own culture, which seriously damaged the culture of the colonized. (Racist colonial policies often exacerbated the disadvantage experienced by women, for the sexual divisions of labour were used to support racial and class divisions of labour.)[43] It is also noted that single (widowed, separated) women with children are often denied access to resettlement services on the grounds that they will be a drain on the host economy,[44] as are families with members with a disability. In a recent address to the Canadian Council for Refugees, Elinor Caplan, Minister of Citizenship and Immigration, made not a single reference to the special needs of refugee women, despite acknowledging the need to stress the protection of refugees when considering their ability to resettle in Canada.[45]

The formal equality of discourse tends to isolate racism from sexism and other forms of discrimination, with the result that the marginalization of women and girls is often unacknowledged. Racism experienced by many refugees in resettlement countries has multiple effects on women. Refugee men who are denied access to employment or decision making in the host country can attempt to retain their personal autonomy and power through controlling their wives and children, and the result is often an increase in domestic violence. Resettlement countries exhibit a strong preference for families with a male head, and do not often select single women with large families for resettlement, on the grounds that they will become an economic burden on the resettlement country. Resettlement services seldom acknowledge the experiences of refugee women and their need for services to be provided.[46]

Strategies for the World Conference against Racism

The Asia-Pacific Lobby Caucus is working to ensure that refugee women are invited to participate in the World Conference against Racism, and that they are provided with the opportunity to put forward their case. The Outcomes Document for the Durban meeting was first released in March 2001. It contains input from government reports, expert groups meetings, the five UN regions of the world, and meetings of the UN Human Rights Commission (UNHRC). The document is being continuously amended through a process referred to as "Square Brackets" and "Language" sessions. At each meeting of the UNHRC, representatives from member states discuss the document paragraph by paragraph and agree on language. If agreement cannot be reached on parts of the document, they are placed in "square brackets" until the following meeting. The task of the Durban conference is the resolution of the language still in square brackets.

The Tehran Declaration,[47] which was the Outcomes Document of the Asian Regional Conference, included language on refugees and racism, but nothing on refugee women. Some reference was made to the way in which racism is experienced differently by women in general, but no reference was made to the intersectionality of race, gender, and refugees. At the May 2001 meeting of the UNHRC[48] in preparation for the Durban meeting, progress was slow. While reference to refugees and asylum seekers

was included in lists of some vulnerable groups (within some adopted paragraphs), the lists themselves have not been accepted.[49]

The notion of lists of particular groups is the subject of ongoing debate within the UN system, evidenced recently at the special sitting of the General Assembly to review the Beijing Platform for Action of last year. Governments generally do not wish to commit in specific ways to actions for particular groups. The intersectionality of race and gender is a source of ongoing debate; see para 56, bis 2,[50] which deals with women's experience of sexual violence in armed conflict. Currently, three alternative versions have been submitted by governments, each clearly indicating strong resistance to the recognition that sexual violence during armed conflict is a serious violation of international humanitarian law. They include one version that suggests that "sexual violence in the context of armed conflict *can* be a violation of international humanitarian law." Based on the writers' experience of lobbying within the UN system, this is a familiar debate that has been active throughout a range of UN meetings that deal with women's human rights, including Beijing Plus Five and the International Criminal Court (ICC) process. Underpinning the objections of certain countries is a fear that if sexual violence is recognized as a public crime in situations of armed conflict, it will challenge their current situation, in which sexual violence is considered to fall within the domain of the family, of the private sphere, and is therefore neither a crime nor an area of state responsibility. The Vatican and certain fundamentalist Catholic and Islamic states have aligned at each of these meetings to protest the recognition of rape as a war crime and a crime against humanity and to protest against calls for ratification of the ICC. The Vatican contends that such recognition may lead to social acceptance of abortion.[51] It is the writers' view that these objections are motivated by a desire to prevent any state incursion into the "sacred" domain of the family and therefore into the ability of Church or religious law to control this so-called private space.

Recommendations to the WCAR

The Asia-Pacific Refugee Caucus is lobbying to have the following recommendations included in the Outcomes Document of the WCAR, Durban, September 2001:

- A "human rights" approach to the intersectionality of race and gender in refugee situations must be adopted by UN agencies and governments. This will involve the application of all human rights instruments to refugee women, regardless of their official status in a country of asylum.
- Refugee women must be involved in all aspects of conflict resolution and negotiated settlements for repatriation.
- Increased gender disaggregated data collection on the refugee experience, and documentation of human rights abuses of refugee women must be implemented by government and United Nations agencies.
- States should take seriously their humanitarian obligations, without discriminating between the different regions of the world, with regard to the principles of international co-operation, burden-sharing, and the resettlement of refugees in their countries, to ensure that state refugee policies fulfill the human rights principles inherent in the Refugee Convention and Protocol, and that resettlement is offered to all refugees, regardless of race, creed or gender and family composition.
- The World Conference calls on states to make international funding and other services, such as resettlement services, available to refugee populations in an equitable manner based on need, and unrelated to cultural and economic imperatives, with resettlement places offered to the most vulnerable, targeting women and their dependent children.
- The World Conference calls for an updated definition of refugees and a revision of individual status determination procedure to ensure that the claims of people who are evicted by ethnic violence and women at risk are recognized, particularly women subject to racially based gender violence, including rape, systematic rape, and sexual torture, and their dependent children.
- The World Conference urges states to recognize the different barriers that refugees and immigrants, in particular women and children, who comprise 80 per cent of the refugee population, face as they endeavour to participate in the economic, social, political, and cultural life of their new countries, and encourages states to develop strategies to facilitate the long-term integration of these persons into their new countries of residence and the full enjoyment by them of their human rights.
- Special attention should be given to the violations of the human rights of refugees in refugee camps and detention centres. In these places, women and girls who are bereft of effective protection often face

particular problems. Under these circumstances, they are often subjected to sexual or other assaults. It is essential that women are involved in refugee camp management, and policy making and management systems for relief and rehabilitation. The United Nations and States must ensure that women who are refugees and in other emergency humanitarian situations are protected from acts of violence including sexual violence, rape, and abuse, and ensure appropriate methods of recourse for victims, based on human rights principles, through the apprehension of the perpetrators of such acts of violence. The United Nations and governments should ensure that all health workers in refugee camps and emergency situations are given basic training in sexual violence, and sexual and reproductive heath care and information. In addition, the UNHCR should be supported to implement its guidelines on the protection of refugee women.

- The World Conference recommends that the ICERD[52] and CEDAW[53] committees work collaboratively in the context of the intersectionality of race and gender, to strengthen recommendations for legislation, policy, and programs that decisively address the multiple discrimination against women in racially, ethnically and economically marginalized communities.
- Governments should undertake all measures without delay for the elimination of all forms of racially motivated violence against women, including stringent measures in dealing with state and non-state perpetrators of violence, and providing access to remedies for women living in situations of armed conflict.
- Noting that impunity for the violation of human rights and international humanitarian law is a serious obstacle to political stability and sustainable development, the World Conference urges states to ratify the Rome Statute of the International Criminal Court.

If the Refugee Caucus is successful in having these recommendations included in the document, it will have created a series of "hooks" on which to hang future lobbying strategies. Inclusion will not ensure that governments implement the commitments made. It is up to the NGO community to ensure that these promises are kept. If the language is not accepted, there is still value in the fact that, for the first time, these issues have been explored at an international level and that public consciousness has been raised. This in itself is an important part of the long process of achieving positive change for refugee women. The intersectionality of race and gender in refugee situations and the multiple forms of discrimination that it generates have been named and discussed. The issue will not go away.

Notes

1. All Africa News Service, "Racism to Blame for Growing Number of Refugees, Says Top UN Refugee Official (2001) on-line: UNSW Library Expanded Academic ASAP Int'l Ed. <http://web2.infotrac.galegroup../purl=rc1_ecm_0_a71956217&dyn+9!ar_fmt?sw_aep=unsw.html> (date accessed: 6 June 2001).
2. UNHCR, "Refugees by Numbers" (2000) on-line: United Nations High Commissioner for Refugees <http://www.unhcr.org/> (date accessed: 11 June 2001).
3. "When Is a Refugee Not a Refugee?" *Economist (US)*, 3 March 2001.
4. Ronald Kaye, "Defining the Agenda: British Refugee Policy and the Role of Parties," *Journal of Refugee Studies* 7, no. 2–3 (1994): 144–59; Guy S. Goodwin-Gill, "International Law and Human Rights: Trends Concerning International Migrants and Refugees," *International Migration Review* 23, no. 3 (1989): 526–46. Theodor van Boven, "United Nations Strategies to Combat Racism and Racial Discrimination: Past Experiences and Present Perspectives," UN Doc. E/CN.4/1999/WG.1BP.7, para 56 (1999). UNHCR, "Asian Preparatory Meeting for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001: Declaration and Plan of Action" (2001) on-line: WCAR Homepage <http://www.un.org/WCAR/docs.htm> (date accessed: 6 June 2001).
5. Justice Marcus Einfeld, "Jesse Street Memorial Address" (20 April 2001) on-line: ABC Radio <http://www.abc.net.au/rn/tals/bbing/docs/20010603/-einfeld.rtf> (date accessed: 6 June 2001), and Refugee Council of Australia, "Refugees and Unemployment" briefing paper (Sydney: RCOA, 1993). This paper prepared by the Refugee Council of Australia refugees suggests that the worst-case scenario is that refugees have a neutral impact on the economy of the host country, but, more likely, they have some positive economic effect.
6. UNHCR, "Guidelines on Preventing and Responding to Sexual Violence against Refugee Women" (Geneva: UNHCR, 1995).
7. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Juris Publishing, Manchester University Press, 2000).
8. Ibid., 17.
9. Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (The Hague: Martinus Nijhoff Publishers, 1997).
10. Ibid., 132.
11. Cases include the Australian Refugee Review Tribunal decisions on February 5, 1999, and July 30, 1999, in which "young women in Somalia" were considered as members of a particular social group, and rape was deemed to be persecution. The case of Fauziya Kassinga, an asylum-seeker from Togo

fleeing female genital mutilation, documented in Fauziya Kassinga and Layli Miller Bashir, *Do They Hear You When You Cry?* (Bantam Doubleday, Dell Publishing Group, 1998).

12. ICERD, "Gender Related Dimensions of Racial Discrimination" (2000) General Recommendation 25, International Committee on the Elimination of Racial Discrimination, UN Doc. ICERD/C/56/Misc.21/Rev.3.
13. UN, "Gender and Racial Discrimination," (2000) Report of the Expert Group Meeting 2000, on-line: United Nations <http://www.un.org/womenwatch/saw/csw/genrac/report.htm> (date accessed: 6 June 2001).
14. Ibid.
15. Ibid.
16. Ibid.
17. "Othering" can simultaneously be traced to the Western philosophical tradition of dichotomous thought. Such thought had its origins in Descartes' mind/body dualism, and continues to provide the metaphysical foundations of liberal discourse and theory today. Dichotomous thought is characterized by the representation of ideas as a pair of mutually exclusive and exhaustive opposites. In Western thought, dichotomies traditionally privilege one pole, defining it in absolute terms and the other merely relative to it, as in A and not-A. Descartes' substance dualism established a system of thought that gave privilege to mind, reason,†and culture over body, passion, and nature. Feminists took up the critique and asserted that this philosophical tradition also created the dichotomy between man and woman, and this has more recently been extended to explain the Western relationship to other cultures, races, and species. See Marianne H. Marchand and Jane L Parpart, eds., *Feminism/Postmodernism/Development* (London and New York: Routledge, 1995).
18. van Boven, paragraph 5 (b).
19. R. Coomaraswamy and R. Seifert in Charlesworth and Chinkin, *Boundaries of International Law,*13, 254.
20. International Helsinki Federation for Human Rights, "Women's Rights Must Be Addressed in South-East Europe," on-line: International Helsinki Federation for Human Rights <http://www.ihf-hr.org/appeals/000416.htm> (date accessed: 15 May 2000).
21. Uli Linke, "Gendered Difference, Violent Imagination, Blood Race, Nation," *American Anthropologist* 99, no. 3 (1997): 559–73.
22. UN, EXCOM Conclusions: No. 39 (XXXVI) 1985, No. 54 (XXXIX) 1988, No. 64 (XLI) 1990, No. 73 (XLIV) 1993, and Information Note on UNHCR's Guidelines on the Protection of Refugee Women (UN Doc. EC/SCP/67).
23. L. Pope, "Refugee Protection and Determination: Women Claimants" (summary of comments made at the CRDD Working Group on Women Refugee Claimants: Training Workshop for Members, Toronto, Canada, 1990).
24. This case study was undertaken by Eileen Pittaway 1991–8 and builds on her previous published work, *Women Still at Risk in Australia* (Canberra: Bureau of Immigration Research, 1991).
25. Nicole Hercus, Nandini Ray, and Eileen Pittaway, "The Women at Risk Program: An Evaluation Proposal" (Sydney: Centre for Refugee Research, UNSW, 2000).
26. Research data, WaR Project ANCCORW, interviews conducted by Pittaway in Hong Kong refugee camps in March 1991 and in Thai refugee camps in September 1991. Interviews in Australia were conducted by Pittaway and Sylvia Winton in September 1991.
27. Research data, WaR Research Project 1991 (ANCCORW Archives, Sydney, Australia).
28. Research data, WaR Research Project 1991, interviews by Pittaway with refugee women in Whitehead Refugee Camp, March 1991, and with ISS Director, Hong Kong, March 1991 (ANCCORW Archives, Sydney, Australia).
29. At the time this research was conducted, apart from a few Amnesty International reports, very little written material was available on the sexual torture of women. The researcher had to wait until much later, following the Beijing Conference and the Rwanda War Crimes Tribunal, before significant research and literature became available to support the evidence that she had collected. In fact, the researcher was told several times that she was "overreacting."
30. Diane Hayes and Sylvia Winton, "An Evaluation of the Women at Risk Scheme" (Sydney: ANCCORW, 1991); Jacqueline R. Castel, "Rape, Sexual Assault, and the Meaning of Persecution," *International Journal of Refugee Law* 4, no. 1 (1992): 39–56; Jacqueline Bhabha, "Legal Problems of Women Refugees," *Women: A Cultural Review* 4, no. 3 (1993): 240–9; Nasreen Mahmud, "Crimes against Honour: Women in International Refugee Law," *Journal of Refugee Studies* 9, no. 4 (1996): 367–82.
31. Reference available but not included, in order to protect the privacy of those involved.
32. Research data, WaR Research Project 1991. Interviews by Pittaway with determining officers (ANCCORW Archives, Sydney, Australia).
33. Castel, "Rape, Sexual Assault, and the Meaning of Persecution," 39.
34. Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights* (New York: Human Rights Watch, 1995).
35. From a presentation given by Donna Sullivan, International Human Rights Watch, AWHRC HR Training Course, Jakarta, 1994.
36. Research Data, WaR Research Project 1991, ANCCORW. Recorded conversation between Pittaway and Juliana Nkrumah, 1993 (ANCCORW Archives, Sydney, Australia).
37. Lepa Mladjenovic, *Rape in War: The History of the Universal Soldier* (London: Third World Network Features, 1993).
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Systemic Racism: Refugee, Resettlement, and Education Policy in New Zealand

Louise Humpage

Abstract

Public policy in New Zealand increasingly makes reference to "inclusion of diversity," "equality," and "equity." Yet refugees resettling in New Zealand continue to experience systemic racism based on the application of ostensibly neutral rules and universal standards to unequal situations. This paper draws attention to the way in which poorly formulated refugee and resettlement policy has resulted in quota refugees being favoured over others and in assumptions that refugees have needs similar to those of general migrants. The way in which such racism has been translated into general policy arenas, such as education, is also explored.

Résumé

De manière croissante, la politique officielle en Nouvelle Zélande fait référence aux notions d'« inclusion de la diversité », d'« égalité » et d'« équité ». Malgré cela, les réfugiés qui se réinstallent en Nouvelle Zélande continuent à pâtir du racisme systémique émanant de l'application de règles et de normes universels qui, quoique neutres en apparence, s'adressent en fait à des situations tout à fait inégales. Cet article éclaire la façon par laquelle une politique d'immigration et de réinstallation mal formulée a donné lieu à du favoritisme au profit des réfugiés des catégories réservées (« quota refugees ») et a entretenu des croyances que les besoins des réfugiés sont similaires à ceux d'autres immigrants. Est aussi exploré la manière dont ce racisme s'est trouvé reflété dans des domaines de politique générale, tel celui de l'éducation.

Introduction

Refugees resettling in New Zealand come from a diverse range of countries and backgrounds. Yet they share the experience of suffering systemic racism based on the application of ostensibly "neutral" rules and "universal" standards to unequal situations in refugee, resettlement, and education policy. This application has had the real effect of discriminating against refugees, particularly those from non-English-speaking, non-European, and less-educated backgrounds. This paper draws attention to the way in which poorly formulated refugee and resettlement policy has resulted in quota refugees being favoured over others and in assumptions that all categories of refugees have needs similar to those of general migrants, despite considerable research that provides evidence to the contrary.

In addition, the paper highlights how both of these situations have had a domino effect on policy in more general arenas, with education used as an example. Until very recently, education policy also prioritized quota refugees. In failing to account for the pre- and post-settlement characteristics of refugees in policy making, education policy continues to perpetuate the notion that refugees are not different from general migrants. Ironically, poor recognition of refugee student needs in education policy sits alongside aims articulating the "inclusion of diversity," "equality," and "equity."

The paper explores such arguments by outlining refugee and resettlement policy as it relates to all categories of refugees, regardless of age. However, for the sake of brevity, discussion of education policy is limited to refugee students in the compulsory education sector and excludes the (minimal) policy concerning refugee adults.

Refugees are, of course, a diverse group of people, originating from a variety of national and ethnic backgrounds, as well as socio-economic and educational statuses. Yet in reviewing the difficulties that refugee students face in light of poor policy formulation, examples are provided from research[1] conducted with Somali students in Christchurch, one of New Zealand's larger cities. Coming from a non-European, non-Christian, non-English-speaking background, in combination with the extended period many have spent in refugee camps, Somali represent a major challenge for resettlement and education services. It is difficult to ascertain whether the Somali experience in Christchurch is representative of refugee students in New Zealand in general. But the Somali experience certainly highlights the potential pitfalls in education policy for refugees, who are increasingly coming from diverse backgrounds that are very different from those of most New Zealanders.

The Faces of Racism

There are many faces of racism at the individual, institutional, and societal levels. This paper does not focus on individual acts of denial or exclusion against a group based on biological or cultural inferiority.[2] Nor does it explore the hegemonic processes of societal racism. Rather, it considers the institutional racism embedded within the organizational practices and procedures of New Zealand's social institutions, which either deliberately or inadvertently discriminate against "others."[3] In particular, central government institutions, such as the immigration, justice, health, and education systems, contain or distribute a variety of resources, both social and economic. Differential access procedures and monoculturalism within an institution often mean that minority groups cannot gain access to these resources, and therefore experience discrimination and disadvantage. This inequality may occur even when people—collectively or as individuals—within the institution are not racist in terms of their attitudes and when the institution itself has adopted policies of biculturalism or multiculturalism, acknowledging and valuing cultural difference.[4]

Fleras and Elliott[5] note that there are two main forms of institutional racism. The first, systematic racism, involves rules and procedures that directly and deliberately prevent minority groups from full and equal involvement within society. Immigration policy in New Zealand has certainly provided cases of this form of discrimination. For example, in the nineteenth century, only Chinese immigrants to New Zealand were subject to a poll tax and English proficiency tests. While a ban on New Zealand–born Chinese acquiring citizenship was lifted in 1952, it was not until 1987 that explicit favouritism towards immigrants from Great Britain and Europe was abolished.[6] There have also been cases of systematic racism in the education system, most notably where Maori, the indigenous peoples of New Zealand, were banned from speaking their own language under the 1877 Education Act.[7]

However, this paper focuses on systemic racism—the subtle yet powerful form of discrimination entrenched within the rules, organization, norms, goals, and procedures of social institutions. Many New Zealand institutions now articulate philosophies of biculturalism or multiculturalism. Yet the application of ostensibly "neutral" rules and "universal" standards to unequal situations has the real effect of discriminating against some because of their differences. Even when differences *are* taken into account, customized treatment is expected to fit within an ethnocentric "one size fits all" mentality that reflects a liberal pluralist commitment to a superficial pluralism, rather than taking differences seriously. This form of institutional discrimination is, by definition, unconscious and unintended because of its embeddedness within structures, functions, and processes that are taken for granted.[8] As discussion highlights, systemic racism is common in the New Zealand's refugee, resettlement, and education policies.

A Neo-Liberal Context

In making this assertion, particular note has been made of the economic and political context in which recent policy has been made. It is argued that the neo-liberal restructuring of the New Zealand public sector in the 1980s and the continuing prevalence of a market-economy philosophy in the 1990s has provided an important contextual background to the systemic racism found in all three policy arenas.[9] Even the election of a centre-left government[10] in 1999 has not radically altered the neo-liberal agendas that discriminate against refugees.

Systemic racism existed in immigration, resettlement, and education policy well before the neo-liberal reforms that restructured the New Zealand public sector in the 1980s. While it is difficult to establish a "cause and effect" process, neo-liberal agendas have nevertheless enhanced the systemic racism that refugees resettling in New Zealand have long suffered. For instance, immigration policy has now theoretically eliminated discrimination on grounds of race, national or ethnic origin, colour, sex,

marital status, religion, or ethical belief.[11] Yet the new focus on "sustained economic growth" in immigration policy since 1991 implicitly restricts the access of many refugees to resettle in New Zealand. In addition, a neo-liberal emphasis on decentralization has entrenched the expectation that resettlement services be provided by a non-governmental organization (NGO) sector that is incompletely funded by the government.

Neo-liberal agendas in education policy have also resulted in the decentralization of responsibility for refugee and English-for-Speakers-of-Other-Languages (ESOL) programs to individual schools and educators who frequently work with inadequate funding and information. In education policy, market-driven definitions of *equity* commonly refer to greater consumer "choice." There is an assumed neutrality in the "free" market, which ignores the effects of social and cultural values and beliefs, the differing material conditions of people's lives, and differential access to resources including dominant knowledge and language.[12] As a small, politically weak, and fragmented group, refugee "consumers" do not have greater "choice" under new market philosophy, but are in fact finding their educational options increasingly limited.

Refugee Policy in New Zealand

Since World War II, New Zealand has accepted refugees for resettlement in times of crisis. The first to be officially received as refugees were 838 Poles in 1944. Then, between 1949 and 1956, more than 6000 people, mainly from Eastern and Southern Europe, were given refuge.[13] New Zealand became a party to the 1951 United Nations (UN) Convention relating to the Status of Refugees in 1960 and a signatory to the following 1967 Protocol in 1973.[14] War in Southeast Asia precipitated New Zealand's largest refugee influx, with more than 8000 Southeast Asian refugees having arrived in New Zealand since 1975.[15] In the 1990s, the majority of refugees came from Iraq, Ethiopia, and Vietnam, with smaller numbers from Sri Lanka, Rwanda, Burundi, and Bosnia. A total of over 20,000 refugees have already been resettled in this country.[16] This number may appear small in comparison to larger nations, but New Zealand ranks first equal in the world according to the number of refugees accepted per capita.[17]

To understand the systemic racism that exists in refugee policy, it is necessary to be aware of the wider immigration-policy framework in which it is situated. New Zealand's immigration policy has always been strongly linked with economic factors. Until 1991, immigration policy functioned largely as a labour market tool, in which approvals were determined by an "occupation priority list" that protected local interests in the labour market.[18] Following the deregulation of the New Zealand economy in the 1980s, immigration began to be regarded as a means for population growth and thus expansion of the domestic market for locally produced goods and services. Since 1991, the emphasis has therefore been upon increasing the level of human capital in New Zealand with the objective of contributing to sustained economic growth.[19] In line with neo-liberal ideas of a market economy, this resulted in the establishment of a "points" system and a business investor category, both of which favour highly skilled, professional immigrants, preferably with money to invest in this country and international links that will benefit New Zealand. These two new categories initially aimed to contribute to economic restructuring, but evolved into a means for economic and social development through recruitment of human capital.[20]

The refugee, humanitarian, and family reunification categories are technically quite separate from the points system and business investor categories, but this paper argues that the general assumption that immigrants should provide economic benefit to New Zealand has nonetheless influenced decision making about refugee cases. Thus, although immigration and refugee policy does not explicitly discriminate against any particular ethnic or social group, the ideology behind it—as well as the function and procedures involved—results in systemic racism against refugees, particularly those from non-English-speaking and economically poor backgrounds or countries. Policy relating to quota and asylum refugees provides a good example of the influence that the aim of "economic growth" has had on refugee policy.

The "Official" Refugees: Quota and Asylum

There are two types of "refugee" officially recognized as such by New Zealand immigration policy. The first represents individuals accepted under the refugee quota category. In 1987, a traditionally ad hoc approach to refugee selection was replaced with an annual quota of up to 800 United Nations High Commissioner for Refugees (UNHCR)–recommended refugees.[21] This was reduced to 750 in 1997 when the New Zealand government had to pick up the cost of transporting refugees from UNCHR camps to New Zealand.[22] Although small by international standards, the quota has rarely been fully utilized. Between 1991 and 1998, an average of only 193 people arrived under the quota each year.[23] Failure to accept the entire quota is often justified by a statement emphasizing that it

is "subject to availability of continuing community sponsorship for new arrivals."[24] Thus, blame for the unfulfilled quota is implicitly placed upon the non-governmental agencies that find or provide sponsorship, rather than on government policy itself.

While the difficulties of sponsorship are real, government reluctance to fill the quota also reflects the broad aim of New Zealand's immigration policy, which is sustained economic growth.[25] Consequently, governments have been reluctant to accept the full quota of refugees because they are less likely to offer New Zealand economic "returns" than other immigrants; rather, they often represent considerable "investment."[26]

The institutional processes that limit the number of quota refugees may be regarded as examples of systemic racism. While immigration policy is no longer explicitly discriminatory on the basis of ethnic or cultural differences, a "neutral" emphasis on economic growth has had the result of excluding many refugees, particularly those who are poorly educated, unskilled, and lacking in English language skills.

This fact is most obvious when considering the case of 400 Kosovar refugees who *were* readily accepted into New Zealand in 1999. Admitted under the United Nations Special Humanitarian Program, rather than the refugee quota, Kosovars with relatives in New Zealand were offered immediate permanent residence, a speedy evacuation from wartorn Kosovo, and the right of assisted repatriation. They were also the recipients of far more generous resettlement services than other refugees, including an orientation program usually reserved for quota refugees, free additional English classes, and free clothes and furniture donated by the public.[27]

While the urgency of the situation and media coverage encouraged such generosity, it was also precipitated by the fact that Kosovar refugees were considered far more likely to adapt quickly and provide less of an economic burden on New Zealand than their non-Kosovar counterparts. They had not spent long (if any time) in refugee camps, were generally well-educated, came from a European background, and usually spoke some English. These attributes set them apart from the majority of New Zealand refugees who come from Africa, the Middle East, and Southeast Asia. Significantly, despite their favourable socio-economic profile and the extra resettlement support, the Kosovars have still found resettlement in New Zealand a stressful and difficult experience.[28]

The second type of "official refugee," the asylum seeker, arrives at one of the country's borders, requests asylum, and is given "refugee status."[29] A rapid increase in asylum seekers during the 1990s encouraged New Zealand governments to make it more difficult for those whom they consider "economic refugees" to get into New Zealand and to be accepted as legitimate asylum seekers.[30] This move was so rapid that it caused condemnation from the UNHCR and Amnesty International.[31] There have also been continuing problems with the length of time that asylum seekers have had to wait for their applications to be accepted and the conditions they have had to endure while waiting. The current Labour-Alliance coalition government has made limited investments into supporting and housing asylum seekers,[32] but these issues continue to be problematic while the backlog is cleared.[33] Certainly, although asylum seekers are given "refugee status" and therefore may be considered "official refugees," they are not given the same rights as quota refugees in terms of resettlement services, as outlined in the next section.

The cases of quota, asylum, and Kosovar refugees have illustrated that, even though the refugee categories were introduced on humanitarian grounds, a philosophy of economic rationalism dominates refugee policy, as it does for immigration policy and the public sector as a whole. Thus, the "neutral" goal of immigration policy—to bring economic benefit to New Zealand—has discriminatory consequences for refugees and may be considered an example of systemic racism.

The "Unofficial Refugees": Humanitarian and Family Reunification

There is additional cause to assert that there exists a state of systemic racism when taking into account the "unofficial" refugees living in New Zealand. Figures for refugees accepted into New Zealand are misleading, for considerably more refugees—according to the UNHCR definition—have arrived in this country than they suggest. Under immigration policy, only those who apply as part of the refugee quota, or who arrive in New Zealand spontaneously and are subsequently granted asylum, are considered "refugees." Others, accepted on humanitarian grounds (other than the quota) or through the family reunification program, are considered "migrants." It is preferable for the New Zealand government that refugees apply for permanent residency under general criteria, because "migrants" are not covered by the government's obligation to meet minimum standards for refugee resettlement as a signatory of the UN Convention.[34]

This is problematic for two reasons. First, the requirements for processing "migrants"—such as numerous

copies of documents that many refugees do not possess, a NZ$700 application fee, and the payment of airfares—are difficult for refugees to fulfill, and place the financial burden upon refugees themselves or their relatives.[35] The New Zealand government thus *makes* money out of these "migrants," rather than *spends* it transporting and accommodating them as refugees.

Second, refugee literature places considerable emphasis on the need to differentiate between refugees and other immigrants on the basis of both their immigration experience and their patterns of resettlement.[36] Immigration for legitimate refugees is not voluntary; nor do they have a great deal of choice over the country in which they will begin their new life. The considerable trauma, loss, and instability that refugees have often experienced also distinguish them from other immigrants, creating a need for specific and comprehensive support to counteract such disadvantages.

By accepting refugees into New Zealand under migrant—rather than refugee—criteria, the government does not have to provide a minimum of resettlement services, as it does for quota refugees. The following discussion describes how this freedom discriminates against non-quota refugees and also highlights how, in a neo-liberal context, poorly funded non-governmental organizations (NGOs) have had to fill the gaps left in government resettlement policy.

Resettlement Policy in New Zealand

Restrictive definitions of "official" refugee numbers in refugee policy have caused further discrimination in resettlement policy. Only quota refugees are eligible for the meagre government-funded facilities available for newly arrived refugees. The New Zealand government provides quota refugees with limited, short-term aid upon arrival, based on a front-loaded model of resettlement that implicitly aims to encourage rapid economic adaptation, particularly employment.[37] Such assistance includes a six-week orientation and English language course at the Mangere Refugee Reception Center, free health screening upon arrival, and subsidization of some other health services. In addition, quota refugees are referred to the only national resettlement organization, the Refugee and Migrant Service (RMS), which the New Zealand Immigration Service (NZIS) contracts to locate and maintain community sponsors for quota refugees.[38]

Beyond this assistance, quota refugees—like other permanent residents—may be eligible for financial aid from the New Zealand employment and welfare agency, Work and Income New Zealand (WINZ). Such aid includes a small (NZ$1200) Re-establishment Grant per family, possible (but recoverable) Special Needs Grants of up to NZ$800 for accommodation, bond, or rent in advance, and likely (although not automatic) eligibility for the Emergency Unemployment Benefit after a one-month stand-down. The last is paid at the same rate as the standard Unemployment Benefit, which cannot be granted until an individual has been resident in New Zealand for two years or more.

Refugees accepted under criteria for asylum or general humanitarian and family reunification are offered no guarantees of resettlement assistance. RMS is technically not supposed to work with asylum seekers, but frequently chooses not to distinguish between this group and other refugees who *are* eligible to use the service. The rights of non-quota refugees to further provisions are hazy. Some receive health screening and some may be eligible for the re-establishment grant from WINZ. Policy states that refugees must meet the usual criteria for permanent residents to receive the NZ$1200, but this issue is not interpreted consistently. This inconsistency is due to a lack of specific training and to office budgets that are insufficient to meet WINZ's legal obligation to provide interpreters when needed by refugee clients. While trials are in place to specially case-manage the employment needs of migrants and refugees, other organizational rules make it harder for easy resettlement. For example, changes to legislation in 1996 made family members of refugees joining their families in New Zealand ineligible for the re-establishment grant.[39]

Chronic Under-Funding of Resettlement Services

The current Labour-Alliance coalition government almost doubled funding for refugee resettlement service in Budget 2001. Yet the yearly allocation still remains limited (at NZ$714,000) and still favours quota refugees.[40] As a consequence of the limited resettlement assistance available from central government, it is non-governmental, often voluntary, organizations that carry the load in attempting to meet refugee needs.

The NGOs do a remarkable job supporting *all* refugees (regardless of immigration category) in the day-to-day aspects of resettlement, rallying communities to support improvements in refugee policy and raising funds for refugee programs.[41] While it has been argued that NGOs are best able to provide to assistance for refugees,[42] without any comprehensive resettlement policy such services range in quality and quantity around the country. Uncertain

funding also constrains and threatens the services offered. Even RMS is not completely funded by the New Zealand government, with the result that it and other NGOs must constantly be searching for new sources of charitable funding and must limit the services offered.[43]

For example, the classes available to quota refugees at the Mangere Center are the only free language tuition directly funded by the government. Thus, once even quota refugees leave the centre after six weeks, they are expected to fund their own learning. As a result, most of the non-commercial ESOL courses available around the country have long waiting lists.[44] Even the two Refugees as Survivors Centers[45] and RMS[46] receive only partial funding from governmental sources, and it must be reapplied for each funding round. As refugees arriving in New Zealand come from increasingly disparate ethnic backgrounds, RMS is finding it more difficult to locate adequate sponsorship for them all, thus placing even greater demand on its services providing interpreters, housing, furniture, health, and education for new settlers.[47] Poor funding also results in high rates of staff turnover and a reliance on volunteers, who often lack adequate training.[48]

It is obvious that New Zealand's first-equal ranking in the number of refugees accepted per capita masks the tendency of New Zealand governments to ignore refugees once they have arrived in New Zealand. Thus, of the ten countries that regularly resettle refugees, New Zealand rates the lowest in post-arrival support. New Zealand governments have shown little initiative in resettlement issues, tending to respond only when under public pressure, such as during the 1999 Balkan crisis.[49] It can be argued, therefore, that government policy has focused on the numbers of people entering the country, rather than on how well people have settled.[50]

Poor Coordination between Refugee Policy and Resettlement Services

Although coordination between the agencies making policy and those implementing it has long been a problem, a neo-liberal emphasis on the decentralization of responsibility for social services, such as those provided by resettlement organizations, has made it even more difficult to achieve. While the current centre-left government is more flexible on refugee issues than previous administrations, it still has no interest in running refugee resettlement services itself, arguing that they would merely compete with those that already exist. Such an approach is considered "inefficient" under a market economy philosophy.[51] As a consequence, no government agency has a specific or consistent policy on refugee resettlement.

NZIS thus continues to decide which and how many refugees come to resettle in this country, largely without consultation with the NGOs who provide resettlement assistance. NZIS often justifies inadequacies in resettlement policy by explaining that, once refugees have entered the country, "they are no longer strictly refugees. They are now permanent residents of New Zealand."[52] This implies that refugees are not considered to need any greater assistance than what is available to all permanent residents in New Zealand.

Refugees are not monitored once they have entered the country, making it difficult to assess such an assumption. The 1987 Immigration Act *does* accommodate an Immigrant Resettlement and Research Fund, but only recently has it been utilized in the study of migrants and refugees.[53] Initial plans for a NZIS longitudinal study of migrants excluded refugees on the basis of their small numbers and difficulties in finding them.[54] Now incorporating refugees, the study is still closely linked to labour-market issues, as are pilot settlement programs in the main cities of Auckland, Wellington, and Christchurch that focus on recent business or professional migrants.[55] Final results for the longitudinal survey will not be available until 2007, leaving a long delay before NZIS is likely to act on any findings.[56]

Non-governmental studies have, however, long suggested that the resettlement needs of refugees are hugely neglected. Research[57] has found that some refugees would prefer to return to their wartorn homelands or refugee camps in a transit country than continue the life of alienation and hopelessness that New Zealand governments have offered them. This is surely the most obvious indication that government commitments to resettlement policy have been woefully inadequate.

It could be argued that the relatively small number of refugees that New Zealand resettles each year should make the provision of a comprehensive resettlement program for refugees manageable; instead this fact is frequently used to justify inaction and minimal funding. Yet refugees who speak poor English have not adapted culturally to New Zealand and exhibit unresolved health problems; for example, they are unlikely to provide the economic "returns" that government expects. Ironically, neo-liberal market philosophies have not offered consumer choice to refugees, and ignoring the need for a government-funded, long-term program to orient refugees to New Zealand life and provide them with basic

English-language tuition will *create* costs further down the line. Such a conclusion is obvious when exploring general policy arenas, where the effects of such inadequate refugee and resettlement policy commonly present themselves. In the case of education policy toward refugees and other non-English-speaking-background (NESB) school-age students, such effects continue to be ignored or underestimated, causing further systemic racism in education.

Refugee and ESOL Education Policy in New Zealand

It is clear that the inadequacies of New Zealand's refugee and resettlement policy have discriminated against refugees, particularly those who have been accepted into the country under immigration categories other than the refugee quota. Problematic in itself, that situation is worsened by a domino effect that occurs in two ways when considering education.

First, the lack of comprehensive resettlement assistance and, in particular, free English-language tuition, for refugees has resulted in a disillusioned and ill-adapted sector of society living in poverty and feeling culturally alienated. As a consequence and through little fault of their own, many refugee students are inadequately prepared for the demands and routines of educational institutions. At the same time, mainstream schools are ill-prepared to cope with refugees living in circumstances that are clearly detrimental to learning within the usual limitations of funding.

Second, policy-makers in education (and other areas of government) have followed by example. Policy for the compulsory education sector has, until very recently, separated out quota refugees for special funding, continuing to enforce "neutral" rules and procedures that discriminate against non-quota refugees. Simultaneously, compulsory education has taken on board the assumption at the basis of refugee and resettlement policy—that refugee needs are the same as those of other migrants. This failure to adequately identify refugee-specific needs has resulted in educators' failing to meet the challenge that refugee students represent, thus contradicting policy statements espousing inclusiveness of and engagement with diversity.

Once again, these inadequacies sit within a context of neo-liberal decentralization of the public sector and state movement towards a market economy. Students have gone from being citizens with rights to a fair education to consumers of a product. In addition, the traditional notion of "equity" has been linked to "choice" for the consumer, without the realization that accommodating the needs of diversity and commodifying education are contradictory.[58] Confusion in policy documents about "equality" and "equity" has left educators stranded when attempting to find how to best meet the differential needs of refugee students.

Refugee Students in New Zealand Schools

School-age refugees, on whom this discussion of education policy concentrates, have often experienced gaps in schooling. Once living in their new host society, many receive insufficient educational support at home because their parents do not speak the host country language or are poorly educated themselves. In addition, school-age refugees have frequently experienced trauma, and their cultural background is usually vastly different from that of the society in which they now live. School-age refugees, like their older counterparts, also tend to experience considerable poverty. All of these factors stem from the refugee and resettlement experiences and can have effects on the educational adaptation of refugee students, although obviously the success of their adaptation varies between groups and individuals, depending on their ethnic, religious, linguistic, and previous socio-economic background.

During the 1980s when large influxes of refugees from Southeast Asia began to arrive in New Zealand, some educators realized that refugees were exhibiting differential needs in comparison to general migrant students. As a result, the Department (now Ministry) of Education introduced a scheme by which one secondary school in each of four New Zealand cities was funded to act as a "reception" class for new refugee students. There they could learn English within their own ethnic group before moving into the regular school system.[59] This funding continues, but only when there are a large number of refugees from one ethnic group arriving in a city at the same time.

As a result, most refugee students now end up in the ESOL program of a mainstream school almost immediately upon arrival. In Auckland, the city in which the majority of refugees reside, refugee students are placed within mainstream classes and withdrawn from class for ESOL assistance and provided with a trained and funded "mentor" to help with homework and academic issues. Over the last few years, the Ministry of Education has also developed a National ESOL team, which includes a national refugee coordinator and four regional refugee education coordinators. Six regional school advisors for new

settlers and multicultural education also assist in-service teachers of refugees and migrants with professional development, visit schools, and help to establish ESOL programs.[60]

Despite such assistance, general ESOL programs and mainstream classes seldom provide refugee students with instruction in the basic practices of learning and teaching utilized in New Zealand education. An example from the experience of Somali students, many of whom have little or no socialization in education even in their own country, suggests that this neglect is highly problematic. Basic tasks such as getting to class on time, maintaining lesson notes in an orderly fashion for examination revision, or working cooperatively within a group are unfamiliar practices for students with little or no education.[61]

Even refugee students lucky enough to have experienced prior education find the pedagogical and cultural differences of New Zealand schools difficult to cope with. For instance, New Zealand prefers teaching methods that encourage independent learning patterns, lateral thinking, problem solving, and group work. Such emphasis contrasts with the more stratified approach prioritized in many countries, in which learning relies on memorization and recitation. Difficulties in learning new conceptual knowledge are exacerbated by a lack of books and teaching material suitable for refugee students. These are just a few of the difficulties that refugee students must face at school, while the inadequacies of resettlement policy ensure that the majority of their parents become increasingly disillusioned with the impoverishment and marginalization they have found in New Zealand.

Refugee and ESOL Student Funding

In trying to cope with the effects that poor resettlement policy has had on refugees, education policy for the compulsory education sector has made some progress in identifying the needs of refugee students. But until very recently, such progress has been limited by a favouring of quota refugees similar to that found in refugee and resettlement policy. In 1998 the Ministry of Education implemented a new funding system for ESOL, which provided more support for ESOL students than ever before, but implemented a supplementary grant that recognized only quota refugees. Funding was also very limited, with quota refugees entitled only to a one-off grant of NZ$500 per student paid to schools rather than refugee families. This one-year-only funding made a mockery of research demonstrating how long it takes to learn a language, and resulted in only 158 individuals, out of 21,619 students funded under the NESB criteria across the country, being eligible for the quota refugee grant.[62]

In July 2000, however, after considerable pressure from refugee and education advocates—and a change in central government—this funding was improved. All refugee students with UNCHR documentation are now eligible for a NZ$1100 (NZ$1700 in secondary schools) per year for their first two years of study, and NZ$500 for the three years following. This funding is guaranteed as long as their English Assessment Score remains below a certain point on the National ESOL scale. Such recognition of the needs and rights of non-quota refugees had resulted in 1534 refugees being funded as such in 2000, a considerable jump from the 158 of 1998.[63]

The change in funding suggests that, when identified, systemic racism may be overcome, even if in only a single policy area. Yet while educators have welcomed the extra funding, it still makes only a dent in the cost of addressing refugee needs, particularly in schools with only a small number of refugees. In addition, the ESOL funding provided by the Ministry "doesn't remotely begin to cover" the real costs of running an ESOL program, and most schools consequently do not regard the Ministry as a reliable source of long-term funding for an ESOL program, but rather as "a bit extra." Thus the change in funding has clearly not eliminated the systemic bias against refugees that stem from poor resources and assumptions that they share the same needs as other migrant students.

Responsibility for Refugee Education

Since the neo-liberal reforms that transformed the New Zealand public sector in the 1980s, the problem of inadequate funding for refugee and ESOL students has increasingly become the responsibility of the educators and administrators of individual schools. When funding is generated by a set amount of money given per NESB *student* on the roll and it is inadequate to cover the actual costs of running an ESOL *program,* school principals and boards of trustees are having to make tough, discretionary decisions. According to the neo-liberal model, they have a "choice" about whether to continue supporting an ESOL program by using general funds, possibly at the expense of other areas of the school, or to discontinue running an ESOL program.

Most schools have discovered that there is no real choice, for rising numbers of NESB students each year make an ESOL program a necessity. Some schools are actively marketing themselves to foreign students to cover the costs of ESOL, but O'Connor[64] suggests that this has

resulted in an English-as-a-Foreign-Language approach to teaching, which does not necessarily meet the ESOL needs of refugee and immigrant students resident in New Zealand.

Just as NGOs have been saddled with the cost of helping refugees to settle in New Zealand, schools have had to stretch their general budgets to cover the costs of ESOL, particularly for the extra programs that refugee students have required. Some have discouraged refugees from attending their school because of the cost and effort needed. Thus, a neo-liberal philosophy reputed to bring about greater educational responsiveness to community needs has precipitated the exit of some schools from the education of refugees. If refugee needs were being met elsewhere, this would not be a problem. But instead, refugee students are increasingly being forced into mainstream classes in which they cannot cope and whose teachers are not trained in dealing with ESOL students, let alone those who are refugees.

Some schools *have* made attempts to bridge this gap in knowledge, but they struggle against the systemic racism found in the education system that favours the mainstreaming of all special-need or disadvantaged groups. In a Christchurch study of Somali secondary-school students,[65] most mainstream schools visited had provided segregated classes and/or subject-specific support in class for Somali and other refugee students so that they were able to receive more individualized attention. Yet such measures were implemented only when a large number of Somali students enrolled at once—forcing schools to acknowledge their presence—and lasted only a short time. In addition, these forms of educational initiative focused on *transmission*—giving Somali students enough "knowledge" to embed them within dominant culture—rather than on *transformation* of the system.[66]

Lack of Information and Policy Guidance

The hesitance with which schools offer refugee-specific classes is partly due to a lack of information. Material accompanying the ESOL funding procedure does provide basic facts about refugee students, the general educational status of various refugee ethnic groups found in New Zealand, and brief suggestions on how to support refugee children in schools.[67] However, more often than not, refugee students have not been identified as a specific group at all.

Refugees are most often encompassed within the very broad grouping of NESB students. This group includes those who are new to New Zealand and have had no previous exposure to the English language or schooling, along with students who have been in the New Zealand education system for some time but have difficulty with English language in the mainstream. The needs of such a wide range of students are clearly difficult to assess and provide for.[68] Recognition of refugee needs has thus been ad hoc and focused solely on the language requirements of such students, while ignoring the process of adaptation through which they must travel.

Poor information has resulted in some educators blaming the lack of conceptual understanding of refugee students on a lack of effort, rather than on cultural or pedagogical differences. As a consequence, the systemic racism that began with insufficient resettlement services for refugees has been translated into school inadequacies that cause some educators to regard refugee students as "lazy" or "troublesome," rather than representing differential needs.

In addition, educators demonstrate ambiguity when offering differential support for the students. Christchurch teachers of Somali, for example, admit that refugee-specific classes appear to have helped Somali students, but emphasize the need for them to be treated "equally" (that is, the same as other non-immigrant students) as soon as possible. Despite a shift away from "equality as sameness" and towards "equity as diversity" within educational policy since 1975, attitudes have not necessarily changed. Rather, the beliefs of many Christchurch teachers appear to be squarely rooted in notions of equality of opportunity.

The lack of information available to teachers has been exacerbated by a competitive market-oriented educational environment, which discourages collaboration and sharing of materials.[69] Without an ESOL curriculum across all educational sectors or a consistent assessment regime for ESOL students, teachers are constantly "reinventing the wheel." According to Glynn, Pongudom, and McMillan,[70] New Zealand teachers lack the level of professional advice and guidance from colleagues skilled in such techniques available to their counterparts in Australia, Britain, and the United States. This is particularly so in the case of refugee students.

In addition, the dominance of neo-liberal understandings of "equity" has provided confusion and ambiguity in education policy. For example, the frequent conflation of individual free choice (unencumbered by state bureaucracy) and individual and community "empowerment" (with state assistance) is problematic,[71] because in the case of refugees there is little evidence of empowerment.

Neo-liberalism has taken traditional liberal pluralist values to the extreme. Such values tacitly assume that what we have in common and what we do or accomplish as individuals is more important that what divides or separates as members of a group.[72]

Such a commitment to universalism and formal equality is empowering where there is a "level playing field." But it is problematic when group-based differences need to be taken into account as a basis for entitlement to attaining true equality and full participation.[73] Education policy in New Zealand fails to clarify the concepts of "equality" and "equity," with the result that educators are employed to interpret and implement policies for which they are unprepared financially, practically, *and* ideologically.

Conclusion

Examination of refugee, resettlement, and education policy provides examples of the systemic racism that exists within New Zealand institutions and discriminates against refugees. Through the application of supposedly "neutral" goals, rules, procedures, and categories, immigration and education institutions have differentiated between quota and other refugees, while simultaneously arguing that refugees should not be treated differently from general migrants. This ambiguity has influenced and is reflected in other policy areas, as the case of the compulsory-education sector has demonstrated. New Zealand has signed a UN convention protecting the rights of refugees through the immigration process and resettlement. The Ministry of Education's[74] National Education Guidelines state that students with "special needs" should be identified, and teaching and learning strategies should be developed and implemented to address them. In both cases, refugee rights remain to be fully recognized and addressed.

For years now, refugees, NGOs involved in resettlement, and educators working with refugee students have called for a centrally funded and integrated refugee resettlement program, which is regarded as the logical outcome of the commitment by the government of New Zealand to the UN convention. Such a program would redefine relatives of those accepted under quota as people equivalent to refugees, would provide adequate resettlement support for all refugees, and would send appropriate messages to policy-makers in all sectors, including education, that the specific rights and needs of refugees must be fully addressed.[75] Yet no New Zealand government has been willing to fulfill this commitment.

Cases of blatant systematic racism are harder to find in New Zealand's institutions since the articulation of bicultural and multicultural agendas and a greater focus on human rights legislation. The subtle and often unconscious and unintended nature of systemic racism, however, makes it more difficult to eradicate. This is particularly so in a country where New Zealanders frequently pride themselves on the egalitarian "colour-blind" rules and "universal" standards that nonetheless discriminate against refugees. In addition, neo-liberal agendas have enhanced the adverse effects of such systemic racism. Yet the policy-makers in education *have* finally listened to calls for ESOL funding that does not discriminate against non-quota refugees. Their attentiveness demonstrates the need for greater awareness of refugee issues and suggests that sufficient pressure could force New Zealand governments not just to "count the numbers," but to ensure that life for refugees in resettlement is better than it was in the world they left behind.

Notes

1. See Louise Humpage, "Refuge or Turmoil? Somali Adolescent Refugees in Christchurch Schools: Intercultural Struggle and the Practices of Exclusion" (M.A. thesis, University of Canterbury, 1998). The examples used from this research will not be further referenced.
2. Augie Fleras and Jean Leonard Elliott, *Unequal Relations: An Introduction to Race, Ethnic and Aboriginal Dynamics in Canada,* 3rd ed. (Scarborough, ON: Prentice-Hall Canada, 1999), 68–9.
3. Ibid., 82–3.
4. Paul Spoonley, *Racism and Ethnicity*, 2nd ed. (Auckland: Oxford University Press, 1995), 22.
5. Fleras and Elliott, *Unequal Relations,* 82.
6. Arvind Zodgekar, *Immigrants in New Zealand Society* (Wellington: Victoria University Press, 1997), 13.
7. Statistics New Zealand, *New Zealand Official Yearbook, 2000* (Wellington: GP Publications, 2000), 211.
8. Fleras and Elliott, *Unequal Relations,* 81–3.
9. In 1984 the Fourth Labour Government came to power and began a radical restructuring of the public sector, which corporatized and then privatized many public assets and services. At the same time, the New Zealand economy was heavily deregulated. Such neo-liberal policies were continued under National Party–led governments throughout the 1990s, rapidly transforming the New Zealand public sector and society.
10. This was the Labour-Alliance coalition government. The introduction of neo-liberal reform under the Fourth Labour Government went against the centre-left ideology traditionally associated with the Labour Party. The Labour-Alliance coalition represents an (incomplete) move back towards these centre-left origins. It is important to point out that all

references to *government* refer to central government structures at the national level.

11. Zodgekar, *Immigrants in New Zealand Society,* 13.
12. Alison Jones, Gary McCulloch, Linda Tuhiwai Smith, et al., *Myths and Realities: Schooling in New Zealand,* 2nd ed. (Palmerston North: Dunmore, 1995), 122–3.
13. Tom Brooking and Roberto Rabel, "Neither British Nor Polynesian: A Brief History of New Zealand's Other Immigrants," *Immigration and National Identity in New Zealand*, ed. S. Greif (Palmerston North: Dunmore, 1995), 23–49.
14. Reg Palmer-Ororwujea, "Refugee Migration: Theory and Experience," *Refugee Resettlement and Wellbeing*, ed. M. Abbott (Auckland: The Mental Health Foundation of New Zealand, 1989), 131–43.
15. Brooking and Rabel, "Neither British Nor Polynesian," 44.
16. Statistics New Zealand, *Official Yearbook, 2000*, 132–4. This vague figure has circulated for many years, but a more accurate statistic is not available.
17. Patrick O'Connor, "Migrants and Refugees: A Christian Response?" *The Common Good: Taking a Preferential Option for the Poor: A Newspaper of the Christchurch Catholic Worker* 9 (spring 1998), 4–5.
18. Zodgekar, *Immigrants in New Zealand Society,* 10.
19. Richard Bedford, Joanne Goodwin, Elsie Ho, et al., *Regulating International Migration: A New Zealand Perspective* (Auckland: Asia-Pacific Migration Research Network/Massey University, 1998), 5.
20. Andrew Trlin, Anne Henderson, Nicola North, et al., "Immigration, Human Capital and Productive Diversity: Contrasts and Issues in the Employment Experiences of New Settlers from China, India and South Africa" (paper presented at Vibrant Voices and Visions for Ethnic New Zealand conference, Auckland, March 9–11, 2001), 2.
21. Ministry of Foreign Affairs and Trade, *Ministerial Press Release*, online: Ministry of Foreign and Trade <http://www.mft.govt.nz/Guide/part4.html1#4.3> (date accessed: 17 April 1998).
22. Max Bradford, *Ministerial Press Release*, online: New Zealand Executive Government <http://www.executive.govt.nz/minister/bradford/mbn0107.htm> (date accessed: 13 June 1997).
23. This statistic was gained by adding figures found in Alexander Trapeznik, "Recent European Migration to New Zealand," *Immigration and National Identity in New Zealand*, ed. S. Greif (Palmerston North: Dunmore, 1995), 77–96, and New Zealand Immigration Service, *Applications, People and Ratio of Approvals for Residents by Category by Calendar Year for 1992–1998*, online: New Zealand Immigration Service <http://www.immigration.govt.nz/research_and_information/statistics/> (date accessed: 6 June 2001).
24. New Zealand Working Party on Immigration, *Report of the Working Party on Immigration* (Wellington: New Zealand Working Party on Immigration, 1991), 3.
25. Patrick Ongley, "Immigration, Employment and Ethnic Relations," *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand*, ed. P. Spoonley, D. Pearson, and C. Macpherson (Palmerston North: Dunmore, 1996), 13–34.
26. Stuart Greif, "Introduction," *Immigration and National Identity in New Zealand*, ed. S. Greif (Palmerston North: Dunmore, 1995), 7–20.
27. Heather Devere, Teuta Kajitazi, Man Hau Live, et al., "Kosovars in New Zealand: A Special Case of Refugee Resettlement" (paper presented at the Sociological Association of Aotearoa (NZ) conference, Hamilton, November 17–19, 2000), 1–2.
28. Ibid., 4, 10.
29. Kath Jamieson and Michael Peters, "Report on Refugee Issues in Christchurch" (Christchurch: Leisure and Community Services Unit, Christchurch City Council, 1997), 10.
30. Lloyd Jones, "The Refugee Door Is Slightly Ajar," *New Zealand Herald,* 29 August 1992.
31. Pat Baskett, "New Life Buys New Struggles," *New Zealand Herald,* 28 July 1995.
32. Lianne Dalziel, "Address to Christchurch Refugee and Migrant Forum" (Christchurch, 21 July 2000), 6.
33. Interdepartmental Committee, *Refugee Resettlement: Actions Expected and Progress to Date,* discussion document at Interdepartmental Committee meeting (Christchurch, 19 October 1998), 15.
34. Jamieson and Peters, *Report on Refugee Issues,* 10–11.
35. Kathryn Brightwell, "Sponsorship and Refugee Resettlement: The Somali Experience" (M.A. thesis, University of Waikato, 1996), 66.
36. For example, Barry Stein, "The Experience of Being a Refugee: Insights from the Research Literature," *Refugee Mental Health in Resettlement Countries,* ed. C. Williams and J. Westermeyer (New York: Hemisphere Publishing, 1986), 5–21; San Duy Nguyen, "Towards a Successful Resettlement of Refugees," *Refugee Resettlement and Wellbeing,* ed. M. Abbott (Auckland: The Mental Health Foundation of New Zealand, 1989), 71–86; Ruben Rumbaut, "Migration, Adaptation and Mental Health: The Experience of Southeast Asian Refugees in the United States," *Refugee Policy: Canada and the United States*, ed. H. Adelman (Toronto: York Lanes Press, 1991), 381–424.
37. Michael Lanphier, "Refugee Resettlement: Models in Action," *International Migration Review* 17, no. 1 (1983), 4–33.
38. Statistics New Zealand, *Official Yearbook, 2000,* 134.
39. Interdepartmental Committee, *Refugee Resettlement,* 13.
40. Lianne Dalziel, "Refugee Resettlement Services Funding Boost," online: New Zealand Executive Government <http://www.executive.govt.nz/budget2001/people-refugees.htm> (date accessed: 28 May 2001). The New Zealand Immigration Service has plans to establish a resettlement unit that will target "migrants": a category said to include refugees. It is unclear at this stage if it will include non-quota refugees.
41. Fran Wilde, "Speech of Welcome to Dr. Haing Ngor," *New Settlers and Multicultural Education Issues* 7, no. 2 (1990), 8–9.
42. See Simon Field, *Resettling Refugees: The Lessons of Research,* Home Office Research Study 87 (London: Her Majesty's Stationery Office, 1985), 12–13; Brightwell, "Sponsorship and Refugee Resettlement ," 24.
43. Statistics New Zealand, *Official Yearbook, 2000*, 134.

44. Patrick O'Connor, *ESOL Provision: South Island 1998* (preparatory notes for Briefing Paper to the Interdepartmental Committee on Refugees , Christchurch, September 1998), 3.
45. Lucy D'Aeth, "Briefing Paper to the Interdepartmental Committee on Refugees" (presented to the Tripartite Consultation on Refugees Meeting, Auckland, 7 October 1998), 1.
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48. Ibid., 28.
49. O'Connor, *ESOL Provision,* 3–4.
50. Dalziel, "Address," 3.
51. Ibid., 4.
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54. New Zealand Immigration Service, *Background Information: Longitudinal Immigration Survey: New Zealand* (Wellington: New Zealand Immigration Service, 1999), 2.
55. Dalziel, "Address," 5.
56. New Zealand Immigration Service, *Background Information,* 2.
57. For example, Humpage, "Refuge or Turmoil?" 28; O'Connor, *The Common Good,* 4.
58. See Jan McPherson, "Approaching Equity through School Language Policy" (M.A. thesis, Palmerston North, Massey University, 1991), 25; Joe Kincheloe, *Toil and Trouble: Good Work, Smart Workers, and the Integration of Academic and Vocational Education* (New York: Peter Lang Publishers, 1995), 17.
59. Wiremu Kaa, "The Department of Education," *Refugee Resettlement and Wellbeing*, ed. M. Abbott (Auckland: The Mental Health Foundation of New Zealand, 1989), 245–6.
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66. Albert Wendt, "An Education System for Whom?" (keynote address at the National Forum on Pacific Island Education in New Zealand, Auckland, Nga Tapuwae College, 1985), 14.
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69. Judi Altinkaya, "Briefing Paper to the Interdepartmental Committee on Refugees: Access to English Language Support" (presented to the Tripartite Consultation on Refugees Meeting, Auckland, 7 October 1998), 2.
70. Ted Glynn, Wilai Pongudom, and Bruce McMillan, "Responsive Feedback for Four Bilingual Learners Writing Stories on Computers," *New Settlers and Multicultural Education Issues* 7, no. 3 (1990), 43–51.
71. Jones et al., *Myths and Realities,* 132.
72. Augie Fleras, "Communicating Together with Our Differences," *Police, Race and Ethnicity: A Guide for Law Enforcement Officers*, eds. B. Cryderman, C. O'Toole, and A. Fleras, 3rd ed. (Toronto: Butterworths, 1998), 59–85.
73. Louise Humpage and Augie Fleras, "Systemic Bias and the Marginalisation of Somali Refugee Adolescents within New Zealand Education," *New Zealand Sociology* 15, 1 (2000): 46–74.
74. Ministry of Education, *Minister of Education: A Report on the Compulsory School Sector* (Wellington: Ministry of Education, 1999), 23.
75. Jamieson and Peters, *Report on Refugee Issues,* 7.

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Change and Challenge at UNHCR: A Retrospective of the Past Fifty Years

Jennifer Hyndman

Abstract

The United Nations High Commissioner for Refugees (UNHCR) is arguably the lead UN agency in complex humanitarian emergencies. But this is a recent role, whereby UNHCR provides assistance to displaced persons both beyond international borders, in refugee camps, and within conflict zones. The agency has evolved, in practice, beyond its original mandate to protect refugees and ensure solutions to their plight. This short article traces the emergence of UNHCR after World War II in the context of cold war geopolitics and provisions of international law. Specific references are made to the OAU Convention on Refugees and the Cartagena Declaration, both of which shape a specific geography of refugee determination in Africa and the Americas respectively. The paper concludes that with the end of the superpower tensions, humanitarian assistance is being delivered in distinct ways and with new meanings.

Résumé

Le Haut Commissariat des Nations Unies pour les réfugiés (HCR) est sans aucun doute au tout premier rang des agences du système des Nations Unies impliquées dans des opérations humanitaires d'urgence. Mais c'est là un rôle récent, où la HCR fournit de l'aide à des personnes déplacées à la fois en dehors des frontières internationales, dans des camps de réfugiés et dans des zones de conflit. Ce court article retrace l'évolution du HCR après la deuxième guerre mondiale dans le contexte géopolitique de la guerre froide et les dispositions du droit international. Référence est faite à la Convention de l'OAU sur les réfugiés et à la Déclaration de Carthage, qui toutes deux façonnent la géographie du droit d'asile en Afrique et aux Amériques respectivement. L'article conclut qu'avec la fin des tensions entre super puissances, l'aide humanitaire est maintenant fournie dans des façons bien spécifiques et qu'elle prend de nouvelles formes.

> *Twenty years ago, the Office of the United Nations High Commissioner for Refugees consisted of some lawyers in Geneva revising and amending the international conventions concerning refugees. Now it is a global rapid-reaction force capable of putting fifty thousand tents into an airfield anywhere within twenty-four hours, or feeding a million refugees in Zaire . . .*
>
> *The United Nations has become the West's mercy mission to the flotsam of failed states left behind by the ebb tide of empire.*
>
> *—Michael Ignatieff*
> *"Alone with the Secretary General"*

The Office of the United Nations High Commissioner for Refugees (UNHCR) is an expression of the interests of and political conditions in its member states. It has experienced enormous change since its inception after World War II. The transformation is all the more remarkable since the early 1990s, as superpower tensions waned and globalization and economic integration intensified. Tracing the antecedents of this UN agency is important because it elucidates the ways in which it is an expression of particular times and places. Despite being an international organization, UNHCR has been shaped by the contingencies of geography and history.

Winner of the Nobel Peace Prize on two occasions, in 1954 and 1981, UNHCR has a considerable international presence based on its historic role of responding to crises of human displacement. This article briefly traces the historical geography and geopolitical antecedents of the international refugee regime as it emerged after World War II. It provides a context for current debate and discussion about UNHCR operations in a post–cold war and increasingly globalized world. As Michael Barutciski has recently

commented, "the agency has recently been engaged in activities outside the original mandate that have proven to be complex and problematic when combined with the promotion of asylum."[1] The idea of "principled pragmatism" has emerged from the humanitarian experience of the 1990s, and its core operating guidelines remain uncertain. Just as the terrain of conflict and displacement has changed dramatically over the past fifty years, so too have the operations of UNHCR. Whereas most casualties at the turn of the last century occurred among soldiers at the battle front, civilian deaths and injuries constituted 60 to 80 per cent of casualties at the end of the twentieth century.[2]

Articles 1, 55, and 56 of the United Nations Charter are a framework for the provision of political and legal protection to refugees, displaced persons, and other vulnerable groups, and UNHCR is one of the international organizations charged with this responsibility.[3] Formally established after World War II in Europe, the Office of the UNHCR was a response to the many displaced and stateless people who required legal protection and material assistance. It replaced the International Refugee Organization (IRO), which had been established immediately after the war. The Office of UNHCR was to complement international law protecting refugees, primarily the 1951 Convention relating to the Status of Refugees.[4]

Despite the fact that 132 states were party to the convention in 2000, it remains explicitly and implicitly Eurocentric.[5] From its conception, the Convention clearly demarcated geographical and historical limits. It was designed to apply to refugees *in Europe* displaced by events that occurred *prior to 1951*. The convention is characterized by its Eurocentric focus and strategic conceptualization.[6] Its definition of *refugee* is spatially coded as European. Substantively, its emphasis on persecution based on civil and political status as grounds for refugee status expresses the ideological debates of post–WWII European politics, particularly the perceived threats of Communism and another Holocaust. In emphasizing civil and political rights, the convention minimizes the importance of other human rights. "Unlike the victims of civil and political oppression, . . . persons denied even such basic rights as food, health care, or education are excluded from the international refugee regime (unless that deprivation stems from civil or political status.)"[7] These features of the convention—its European geographical focus and emphasis on civil and political rights—have generated an uneven geography of refugee asylum which, today, is the source of contentious debate.

The Convention mandate includes anyone who

> as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his *[sic]* nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[8]

Despite its definition of *refugee,* the Convention leaves actual status determination to individual governments. It says virtually nothing about procedure.[9]

The definition implicitly promulgates a hierarchy of rights, giving greater emphasis to political and civil rights of protection than to *persecution* over economic, cultural, and social rights, and to scales of violence broader than individual persecution.[10] The definition was also an expression of a particular geopolitics. "The strategic dimension of the definition comes from successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-Western political values."[11] The Convention definition of *refugee* was based on an ideologically divided world, grounded in relational identities of East and West. The 1951 Convention was designed to facilitate the sharing of the European refugee burden:

> Notwithstanding the vigorous objections of several delegates from developing countries faced with responsibility for their own refugee populations, the Eurocentric goal of the Western states was achieved by limiting the scope of mandatory international protection under the Convention to refugees whose flight was prompted by a pre-1951 event within Europe. While states might opt to extend protection to refugees from other parts of the world, the definition adopted was intended to distribute the European refugee burden without any binding obligation to reciprocate by way of the establishment of rights for, or the provision of assistance to, non-European refugees.[12]

Assistance to non-European refugees was optional. Solutions to the displacement of Europeans after World War II were the focus of the convention.

Complementing this emerging state-based regime of international law, the role of UNHCR is outlined legally in UNHCR's statute. The statute defines UNHCR's mandate as one of protecting refugees, as defined by the Convention, and of seeking permanent solutions for refugees in cooperation with governments through their voluntary repatriation or assimilation within new national communities.

As well, "the work of the High Commissioner shall be of an entirely non-political character . . . "[14] In contrast to the Convention, the statute emphasizes that the work of the UN High Commissioner for Refugees will "relate as a rule, to groups and categories of refugees," not individuals.[15] From the outset, then, UNHCR faced the practical difficulty of a definition of *refugee* based on individual determination, yet the statute outlined responsibilities for "groups and categories of refugees." This disjuncture has been identified by international legal scholars, one of whom notes the increasing slippage between UNHCR and state responsibilities:

> The disjuncture between the obligations of States and the institutional responsibilities of UNHCR is broadest and most clearly apparent in respect of refugees, other than those with a well-founded fear of persecution or falling within regional arrangements.[16]
>
> (I)t was during this period (the early 1980s) that States' reservations as to a general widening of the 'refugee definition' began to confirm the resulting disjuncture between the functional responsibilities of UNHCR and the legal obligations of States.[17]

The vehicle used to bridge the discrepancy between the statute and the Convention mandates was the "good offices" of UNHCR,[18] first employed in assisting people fleeing the People's Republic of China to Hong Kong in 1957 and then made applicable to all potential displacement not envisaged at the time that the original mandate was established. UNHCR's "good offices" were created by Resolution 1673 (XVI) of the UN General Assembly on December 18, 1961. The resolution provided a basis for action, which aimed to be flexible, responsive, and meaningful in emerging refugee situations, and allowed the High Commissioner to define groups as prima facie refugees without normal determinations procedures.[19] Prima facie refugees were to a new category of displaced person that was subordinate to the Convention definition and more likely applicable to crises outside of Europe.

Historian Louise Holborn describes the deployment of UNHCR's "good offices" in Africa as a just-in-time measure, qualified by three observations: (1) the "good offices" would provide material assistance only; legal protection was not provided; (2) UNHCR considered refugees on this continent too numerous, dispersed, and poor to make individual assessments necessary for Convention refugee designation; (3) Europeans considered it too difficult to establish that there was a well-founded fear of persecution in Africa, compared to Europe.[20] Many of these qualifications are, of course, Eurocentric and Orientalist constructions of African people and point to the hierarchy of cultures and continents at the time. The drawback of the "good offices" provision of material assistance is that it can occur only where and for as long as governments *invite* UNHCR to assist.[21] As well, it may be argued that, because of the poverty of many African countries, the *material* needs of refugees have been provided for at the expense of legal status and protection.[22]

This institutional framework speaks from and to a period when African states were beginning to advocate for and gain independence. It created the basis for a hierarchy of refugee definitions later in the century. The Convention amplified the legitimacy of asylum from persecution that was the result of Nazism and Communism:

> [T]he definition of the term 'refugee' . . . was based on the assumption of a divided world . . . The problem of refugees could not be considered in the abstract, but on the contrary, must be considered in light of historical facts. In laying down the definition of the term 'refugee', account had hitherto always been taken of the fact that the refugees involved had always been from a certain part of the world; thus, such a definition was based on historical facts. *Any attempt to impart a universal character to the text would be tantamount to making it an 'Open Sesame'.*"[23]

Despite claims to the contrary, the Convention definition was never intended to be universal. The geographically exclusive definition of *refugee* underplayed violence and material deprivation that was the result of colonialism and imperialism. Only discretionary, ad hoc efforts on the part of UNHCR's good offices were employed to fill the space that geographical and historical differences generated.

The 1967 Protocol relating to the Status of Refugees amended the 1951 Convention. While it rescinded the spatial and temporal restrictions of the Convention by lifting the European-centred, pre-1951 stipulations, it merely created equal access for all member nations to a legal instrument that remained substantively Eurocentric. Emphasis on the abrogation of individual civil and political rights, based on the outcomes of the Second World War, remains central to the Convention definition of *refugee* that is employed today. Technically, the 1967 Protocol made the definition geographically inclusive, yet the imagined geopolitical landscape on which the premises of asylum were founded remained geographically exclusive and Eurocentric.[24]

A diminishing proportion of refugees meet the formal Eurocentric post–World War II requirements. The legacy

of this discrepancy between Convention and "other" refugees is a distinctly unequal system of refugee protection and assistance. Hannah Arendt warns that universal rights fall prey to such divides and that the protection of citizens is imperilled in the absence of a nation state: "The danger is that a global, universally interrelated civilization may produce barbarians from its own midst by forcing millions of people into conditions which, despite all appearances, are the conditions of savages."[25] Arendt, writing during the aftermath of the Second World War, maintains that the rights of citizens as nationals are far more important that those accorded as human rights on a global scale, precisely because they are applicable and enforceable. The Convention definition is decreasingly applicable to the majority of refugees today who face violence on a broader scale and for reasons different from those of post–WWII Europe. For no legal reason, political and civil rights have been underscored at the expense of economic, social, and cultural rights: "those impacted by national calamities, weak economies, civil unrest, war and even generalized failure to adhere to basic standards of human rights are not, therefore, entitled to refugee status on that basis alone."[26] The definition continues to emphasize the importance of civil and political rights based on "fear of persecution"—a concept based on ideological divisions of East and West in Europe, far more than the material, social, and political conditions in other regions.

Geographies of Asylum: Regional Instruments in Africa and the Americas

In Africa, the perceived inadequacy of this pair of legal instruments resulted in the drafting of a legally binding regional policy by the Organization for African Unity (OAU). The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa not only broadened but also reformulated the definition of *refugee*. It included the 1951 Convention definition, but added the provision that

> the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his *[sic]* country or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (Article 1.2).

The OAU definition thus incorporated generalized violence associated with colonialism and other kinds of aggression, including flight resulting from the serious disruption of public order "in either part or the whole" in one's country of origin, as grounds for seeking asylum.[27] James Hathaway explains the significance of this codification in the OAU convention; his inherently geographical analysis is worth citing at length:

> This . . . represents a departure from past practice in which it was generally assumed that a person compelled to flight should make reasonable efforts to seek protection within a safe part of her own country (if one exists) before looking for refuge abroad. There are at least three reasons why this shift is contextually sensible. First, issues of distance or the unavailability of escape routes may foreclose travel to a safe region of the refugee's own state. Underdeveloped infrastructure and inadequate personal financial resources may reinforce the choice of a more easily reachable foreign destination. Second, the political instability of many developing states may mean that what is a "safe" region today may be dangerous tomorrow . . . Finally, *the artificiality of the colonially imposed boundaries in Africa has frequently meant that kinship and other natural ties stretch across national frontiers. Hence, persons in danger may see the natural safe haven to be with family or members of their own ethnic group in an adjacent state.*[28]

The OAU definition translated the core meaning of *refugee status* to the economic and geopolitical realities of the Third World. The definition also recognized in law the concept of group disenfranchisement and the legitimacy of flight where there was generalized danger, not limited to individual persecution.

In 1984, the Cartagena Declaration on Refugees was adopted by ten Latin American states. Written to address the forced migration of people fleeing generalized violence and oppression in Central America, it, too, represents a regional approach to recognizing and improving upon the inadequacy of the Convention definition. The definition derived from the Cartagena Declaration goes further than that of the Convention to include claims based on internal conflicts and massive violations of human rights, and the idea of group designation of refugee. It does not extend as far as the OAU Convention, however, to protect people fleeing disturbances of public order that affect only one part of a given country. While the OAU Convention is legally binding, the Cartagena Declaration—on which the Organization of American States (OAS) definition is based—is not.[29]

The establishment of regional instruments points to an uneven geography of *refugee* definitions in international law. The Convention and Protocol definition speaks to the experience and prevailing conflict in Europe after WWII. The OAU Convention broke new ground by extending refugee status to groups affected by less dis-

criminate violence and public disorder in Africa. While not legally binding on member states, the Cartagena Declaration addressed the distinct regional politics and related human displacement in Central America. On a more modest scale, the Council of Europe has also extended its definition to include de facto refugees, that is, "persons who either have not been formally recognized as Convention refugees (although they meet the Convention's criteria) or who are 'unable or unwilling for . . . other valid reasons to return to their countries of origin'."[30] The 1951 Convention and 1967 Protocol, together with these regional instruments, constitute the major bases of refugee protection in international law.[31]

Nonetheless, a sizeable class of refugees remains outside the scope of this legal codification. While most of these refugees are recognized as having legitimate need for protection, legal scholars have generated considerable debate over whether this international practice of granting protection has become part of customary international law or is simply an institutional practice of UNHCR that is not binding on states. The politics and funding of humanitarian activities provide the most compelling evidence that protection and assistance afforded those who fall outside the scope of international law are institutional and not part of customary law. "Developing states have conditioned their willingness to protect humanitarian refugees on the agreement of the international community to underwrite the costs of temporary asylum and to relocate the refugees to states of permanent resettlement."[32] The refugee crisis in Central Africa in 1996 provides a clear example: the Zairian government would not tolerate Rwandan refugees unless the UNHCR and its First World donors were willing to pay for their support.[33]

To illustrate the regional geography of refugee determination in Africa, it is useful to distinguish between de jure and de facto status, and between prima facie and mandate refugees.[34] There is no definitive application of these terms. They depend on the laws of individual countries, which countries are signatories to what conventions, and the policies of host government towards refugees. *De jure refugees* are those who are defined as refugees in law, either at national or international levels. National laws vary enormously: in some cases, countries may have no definition of refugees; in others, definitions may be wider than those outlined in the Convention. If there is no national legislation, but a country is party to the 1951 Convention and the 1969 OAU Convention, as in the case of Kenya, for example, refugees in the camps—designated as prima facie—are also de jure because they are recognized on the basis of the 1969 OAU Convention in international law. *De facto refugees* are those "who are unable or unwilling to obtain recognition of convention status, or who are unable or unwilling for valid reasons to return to their country of origin."[35] The term technically refers to people who have some kind of need for protection but do not strictly meet the eligibility criteria. De facto status can usually be withdrawn because it has no legal significance.

Mandate refugees are arguably de jure. They have their legal background in the UNHCR statute, which is not a legally binding instrument, but many legal experts argue that international customary law has developed to give UNHCR mandate refugees legal significance.[36] Others are of the opinion that this is not so, and that mandate refugees are de facto. In the case of de facto refugees, status is subject to change and interpretation at levels of national and international law. *Prima facie refugees* are defined in law by the OAU Convention, but may not be recognized as such by individual host states, such as Kenya, despite being signatories to this convention.

UNHCR is often called upon to determine status as well as to protect and assist refugees who do not meet Convention or regional definitions. In Kenya, few are designated "mandate" refugees; most are prima facie refugees. Mandate refugees are assessed individually and are granted temporary protection by UNHCR. Prima facie designation is usually made on a group basis. Individual assessment is the norm for determining Convention status. Outside of the provisions of some international refugee laws but not others, these displaced people can claim some support from UNHCR in terms of material assistance and legal protection. Somali refugees in Kenya have prima facie status because they are in an African country that is a signatory to the OAU Convention. As a "regional" class of refugees, however, they have no special claim to protection under the laws of the 1951 Convention and 1967 Protocol.

As the preceding discussion suggests, there are several instruments, laws, statutes, and bodies applicable to displaced persons in an international context. It is important to distinguish humanitarian law from refugee law and human rights instruments. Humanitarian law consists of the four Geneva Conventions of 1949 and the two additional Protocols of 1977 and is applicable to civilians within their own country during conflict. While humanitarian law codifies standards of conduct during war, which includes protection for internally displaced people, "this provision applies only to persons displaced because

of armed conflict . . . It does not cover inter-communal violence or other cases of internal disturbances that create internal displacement."[37] The existing law is currently under review precisely because it speaks to conditions of internal displacement in another time and place, rather than to the bases of conflict in African locations. International refugee law mainly comprises the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention in Africa. It institutionalizes and enforces the UN Declaration of Human Rights, which declares that a person has "the right to leave," and return, to her or his own country, and "the right to seek asylum."[38] Humanitarian and refugee law draw a clear distinction between the rights and entitlements of internally displaced persons (IDPs) and refugees. These categories are, however, being challenged because only marginal differences in time and space may distinguish an IDP from a refugee. Some policy-makers maintain that refugees and IDPs are often qualitatively part of the same group, divided artificially by a political border.[39] The question of whether IDPs should be included or excluded from an operational definition of *refugee* remains an issue of contentious debate. In practice, however, IDPs have been the focus of humanitarian assistance throughout the 1990s, in places like Iraq, Bosnia-Herzegovina, Sri Lanka, and Somalia.

Stating Human Displacement

Containment and exclusion have been themes in migration for some. Aristide Zolberg organizes economic and political migrations into three epochs: the first spans the sixteenth to eighteenth centuries in Europe; the debut of the second corresponds to the industrial, democratic, and demographic revolutions of the late eighteenth century; and the last begins in the final decades of the nineteenth century. "The emergence of powerful European states in the 15th century inaugurated a distinctive era in the history of human migrations: the conquest by the Europeans of the New World."[40] While the French Huguenots are generally considered the first group of modern refugees, legal formulations of refugee status are a product of more recent Western history. "Prior to this century there was little concern about the precise definition of a refugee, since most of those who chose not to move to the 'New World' were readily received by rulers in Europe and elsewhere . . . This freedom of international movement accorded to persons broadly defined as refugees was adversely impacted by the adoption of instrumentalist immigration policies in Western states during the early twentieth century."[41] This final period, Zolberg notes, has been marked by the development of a gap between a small number of wealthy, technologically advanced, and militarily powerful countries, and a larger number of poorer states. As well, improved communication has rendered information about world conditions more available, and human mobility has increased as transportation technology improves. According to Zolberg, this enhanced mobility has given rise to perceived threats of invasion by the multitudes of poor strangers, providing a strong impetus for exclusionary measures and strict border controls.[42]

Despite regional conventions and international protocols to protect refugees, the nation state is the main unit of international law and the primary site of enforcement in relation to regional and international agreements, and civilian protection. Louise Holborn notes that "states are the subjects of international law; individuals are only its objects."[43] At the end of European empire-building and the cold war, the fragmentation of some states has occurred at the same time that economic and political integration—in the form of regional blocs—have progressed. The porosity of borders is historically and geographically contingent: "The reaction among the receiving nations of the North . . . has been . . . to attempt to contain or 'regionalize' refugee problems; that is, to keep those in need of protection and solutions with their regions of origin."[44]

The modern institution of asylum is rooted in political geographies of displaced populations during WWII. Denial of asylum, and strategies to contain forced migrants, were part of this institution. Camps were the rule, not the exception, for dislocated groups in Europe: "if the Nazis put a person in a concentration camp and if he made a successful escape, say, to Holland, the Dutch would put him in an internment camp . . . under the pretext of national security."[45] Arendt unwittingly anticipates the unequal outcomes of refugee law.

> The stateless person, without right to residence and without the right to work, had of course to transgress the law . . . [N]either physical safety—being fed by some state or private welfare agency—nor freedom of opinion changes in the least their [refugees'] fundamental situation of rightlessness.[46]

Arendt's clairvoyant reasoning points to some of the problems and dilemmas of humanitarian assistance in the international refugee regime today. Most refugees in camps today are prohibited from seeking employment or establishing livelihoods independent of the international assistance provided in camps.

The mobility of refugees and displaced persons remains constrained by borders of the nation state. By definition, asylum requires an international border crossing. If successful in their crossing, refugees become wards of an international refugee regime that relies on the endorsement and financial support of individual nation states. The end of the cold war affected the aid regime by eliminating the rationale for *development* assistance, but it also coincided with neo-liberal measures of fiscal austerity in many of the donor countries.[47] The inverse relation between funding development and funding humanitarian emergencies during the 1990s is interesting. "[I]nternational relief aid for regions in conflict increased fivefold during the 1990s, to a high of $5 billion a year. At the same time, long-term development aid dropped overall."[48] There has been a marked increase in funding for "complex humanitarian emergencies," in which governments voluntarily fund organizations operating at a global level to manage human crises as they arise.[49] This shift marks a transformation from long-term to short-term funding patterns, and from bilateral aid to multilateral assistance. In short, states are exerting their influence on international affairs by different means. And UNHCR's actions are one expression of these means.

UNHCR Then and Now

The UNHCR operates today on a scale unimaginable at its conception. Its initial temporary mandate of three years, 1951–4, has been extended repeatedly at five-year intervals since that time. UNHCR tripled its staff numbers since the 1980s, from 2000 to 6000 at its peak in the 1990s.[50] Annual expenditures of US$8 million in 1970 increased to almost US$1,167 million in 1994, signalling intense growth, much of which has occurred since the cold war.[51] In its 2001 budget, UNHCR requested US$954 million for operating expenses.[52] Displacement in the post–cold war period has contributed to this transformation. The Office of United Nations High Commissioner for Refugees continues to manage crises using the protocol and practices of the international refugee regime as it emerged after the Second World War. Western governments demonstrate remarkable generosity in funding UNHCR's efforts, as well as those of its UN counterparts.

Increasingly, however, UNHCR is faced with economic and political pressures to reformulate its terms of reference and operational mandate. "UNHCR's dramatic expansion since it has re-oriented its activities partly reflects the reluctance of donors to have their own asylum policies scrutinized at a time when they are engaged in restrictive asylum practices."[53] The distinctive geopolitical landscape of the post–cold war period, combined with the rise of fiscal restraint as the mainstay of economic policy in many industrialized nations, signals shifts within UNHCR as an organization and within the internationally funded realm of humanitarian assistance more generally. UNHCR is funded primarily through voluntary contributions from donor governments, so its actions are shaped by the direction and amount of these funds. To blame UNHCR for all the shortcomings of humanitarian assistance in the 1990s would be inaccurate. Donor governments play a major role in determining who will be assisted when and where. The extremely uneven geography of international humanitarian assistance in Africa throughout the 1990s (from Somalia to Rwanda, in particular) attests to the whimsy and politics of international response. While the tenth anniversary of the Gulf War reminds governments that international conflict has not disappeared altogether, the vast majority of conflicts that generate displacement today are civil or internal.[54] "Principled pragmatism" may be the order of the day in the realm of humanitarian assistance, but its meaning and implications for asylum remain unclear.

Acknowledgement

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Notes

1. M. Barutciski, "Confusion about UNHCR's Role," *UNHCR and International Refugee Protection,* by D. McNamara and G. Goodwin-Gill (Refugee Studies Programme Working Paper No. 2, June 1999), 2.
2. J. Boutwell and M. T. Klare. "A Scourge of Small Arms," *Scientific American* (June 2000): 47–55.
3. Francis M. Deng, "The International Protection of the Internally Displaced," *International Journal of Refugee Law* (summer 1995): 74–86.
4. Dennis McNamara notes that UNHCR does have a supervisory role under Article 35 of the Convention Relating to the Status of Refugees. See D. McNamara, "Opening Address," in *UNHCR and International Refugee Protection,* 6.
5. US Committee for Refugees, *World Refugee Survey, 2000* (Washington, DC: Immigration and Refugee Service of America, 2000), 9. Note that four more states are signatories to *only* the 1967 Protocol relating to the Status of Refugees, including the US, Venezuela, Swaziland, and Cape Verde.
6. James C. Hathaway, *The Law of Refugee Status* (Markham/Vancouver: Butterworths, 1991).
7. Ibid., 8.
8. The Convention entered into force April 22, 1954; this excerpt is taken from note 27, Article 1(A)(1), cited in Hathaway, "The

Law of Refugee Status," 6.

9. McNamara, "Opening Address," 8.
10. Fifteen years later, in 1966, two legally binding human rights instruments were created to protect civil and political rights on the one hand, and on the other, economic, social, and cultural rights. The International Covenant on Civil and Political Rights most closely expresses the emphasis of the Convention. It ensures respect for citizens, regardless of language, religion, sex, political opinion, etc., as well as "the right to liberty of movement and freedom"; *The State of the World's Refugees: The Challenge of Protection* (Toronto: Penguin, 1993), 164. The Covenant on Economic, Social, and Cultural Rights includes provisions that are more applicable to the so-called developing world than to Western countries, such as the right to food, shelter, and basic medical and educational services. While the first covenant applies to individuals, the second refers to particular groups of people.
11. Hathaway, "The Law of Refugee Status," 6.
12. Ibid., 9.
13. Article 2 of The Statute of the Office of the United Nations High Commissioner for Refugees (1950) in UNHCR, 1993, op. cit., 162.
14. Article 2 of The Statute of the Office of the United Nations High Commissioner for Refugees (1950) in UNHCR, 1993, op. cit., 162.
15. Louise Holborn, *Refugees: A Problem of Our Time: The Work of UNHCR 1951–72* (N.J.: Scarecrow Press, 1975).
16. Guy S. Goodwin-Gill, "The Language of Protection," *International Journal of Refugee Law* 1, no. 1 (1989), 10.
17. Ibid., 12.
18. *Good offices* referred to the office of UNHCR, which could be called upon on a discretionary basis to undertake special missions or to fill in gaps where the organization's mandate or statute did not apply.
19. Holborn, *Refugees: A Problem of Our Time,* 838.
20. Ibid., 440.
21. Ibid., 294.
22. Ibid., 837.
23. Statement of R. Rochefort of France, UN Doc A/CONF.2/SR.22 at 15, July 16, 1951, emphasis added; cited in Hathaway, "The Law of Refugee Status," 7.
24. Hathaway, "The Law of Refugee Status."
25. Hannah Arendt, *The Origins of Totalitarianism* (Cleveland/New York: Meridian, 1958).
26. Hathaway, "The Law of Refugee Status," 93.
27. Ibid., 18.
28. Ibid., 18–19; emphasis added.
29. As international law, the OAU Convention is legally binding and applicable to all signatory states. The OAS definition is based on the Cartegena Declaration, which, like the UN Declaration of Human Rights, is not binding. The ten states that signed the Cartegena Declaration in 1984 basically agreed to a definition of *refugee* similar to that enacted by the OAU, though not quite as comprehensive in terms of protection.
30. Ibid., 21.
31. The Convention on the Rights of the Child, the Convention against Torture, as well as the Declaration of Human Rights and the two international covenants, are also relevant instruments.
32. Hathaway, "The Law of Refugee Status," 26.
33. *The Economist*, "Get Out, Maybe," reprinted in the *Globe and Mail*, February 20, 1996.
34. Convention refugees, as noted, are those defined in law under the 1951 Convention and 1967 Protocol.
35. The source of this information is an e-mail transcript in response to request for clarification of UNHCR's interpretation of these terms in Kenya, June 12, 1996.
36. Mandate refugees do not meet the eligibility criteria of the Convention definition, yet are designed as in need of protection by UNHCR on the basis of its mandate, as outlined in the statute. Some countries may recognize their protection needs and designate their status as mandate refugees; some may not. I thank Viktor Nylund for his comprehensive tutorials in making this clear to me.
37. Francis M. Deng, "The International Protection of the Internally Displaced," *International Journal of Refugee Law* (summer 1995): 82.
38. Articles 13.2 and 14 of the UN Declaration outline these rights. Article 15 states, "(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his *[sic]* nationality nor denied the right to change his *[sic]* nationality." See Annex II.3 in UNHCR, *The State of the World's Refugees: The Challenge of Protection* (New York: Penguin, 1993).
39. Interview, senior manager, UNHCR, Geneva, October 18, 1994.
40. Aristide Zolberg, "Migrants and Refugees: A Historical Perspective," *Refugees* 91 (1992): 37.
41. Hathaway, "The Law of Refugee Status."
42. This impetus resonates with Canadian immigration law that became exclusionary only in the late 1870s and early 1880s.
43. Holborn, *Refugees: A Problem of Our Time,* 153.
44. Guy Goodwin-Gill cited in James Hathaway, "Reconceiving Refugee Law as Human Rights Protection," *Journal of Refugee Studies* 4, no. 2 (1991): 116. See also Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000).
45. Arendt, *The Origins of Totalitarianism,* 288.
46. Ibid., 286, 296.
47. J. Hyndman, "International Responses to Human Displacement: Neo-liberalism and Post–Cold War Geopolitics," *Refuge* 15, no. 3 (June 1996), 5–9.
48. J. Boutwell and M. T. Klare. "A Scourge of Small Arms," *Scientific American* (June 2000): 51.
49. Comparing both per capita GNP contributions and total contributions over the decade, the US Committee for Refugees (1992, 1995, 2000) documents a steady climb in donations from countries in the North. For example, the US contributed $1.10 per capita or $277.73 million total in 1991; $1.53 per capita or $397.74 million in 1994; and $1.63 per capita or $444.9 million in 1999. Norway, as the most generous non-G-7 country, donated $11.28 per capita or $48.51 million in 1991; $13.53 per capita or $58.2 million in 1994; and $15.62 per capita or $70.3 million in 1999; see US Committee for Refugees,

World Refugee Survey, 2000 (Washington, DC: Immigration and Refugee Service of America, 1992, 1995, 2000).

50. Barutciski, "Confusion about UNHCR's Role," 2. As of January 1, 2001, UNHCR has a staff of 5000; see Mike Crawley, "UN Refugee Agency Turns 50," *Globe and Mail*, January 1, 2001.
51. UNHCR, *The State of the World's Refugees: In Search of Solutions* (Oxford/NY: Oxford University Press, 1995), 255.
52. Crawley, "UN Refugee Agency Turns 50."
53. Barutciski, "Confusion about UNHCR's Role," 3.
54. Rosemary Rogers & Emily Copeland, *Forced Migration: Policy Issues in the Post–Cold War World* (Massachusetts: Tufts University, 1993).

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Sex, Gender, and Refugee Protection in Canada under Bill C-11: Are Additional Protections Required in Light of *In re R-A-?*

Chantal Tie

Abstract

This case comment takes a critical Canadian look at gender-based refugee claims in light of the recent United States Board of Immigration Appeals decision in re R-A-. *The author points out that many of the obstacles for women who are refugee claimants in the United States, which are highlighted in* re R-A-, *also exist in Canada. She argues that when we are forced to define women's gender persecution as persecution on account of "membership in a particular social group," analytical problems are inevitable. These problems arise because our refugee definition does not acknowledge that women are persecuted worldwide simply because of their gender. The author urges that gender persecution be specifically included in the Canadian refugee definition, to bring the definition in line with other domestic and international human rights instruments, which already recognize the importance of women's human rights.*

Résumé

Cette étude de cas porte un regard critique canadien sur les demandes d'asile basées sur des considérations de sexe à la lumière de la décision récente de la Section d'Appels de la Commission sur l'immigration des États Unis dans l'affaire re R-A-. *L'auteure souligne que beaucoup des obstacles confrontant les femmes revendiquant le statut de réfugié aux États Unis, et qui ont été mis en exergue dans l'affaire* re R-A-, *sont aussi présents au Canada. Elle soutient que lorsqu'on est forcé de définir la persécution sexiste des femmes comme persécution du fait de « l'appartenance à un groupe social », des problèmes analytiques sont inévitables.*

Ces problèmes surgissent parce que notre système de détermination ne veut pas accepter la réalité que les femmes sont persécutées dans le monde entier du fait même de leur sexe. L'auteure demande que la persécution sexiste soit incluse dans la définition canadienne du droit d'asile, afin d'harmoniser cette définition avec d'autres protocoles des droits de la personne au niveau national et international, qui reconnaissent déjà l'importance des droits de la personne des femmes.

In September of last year, one of the demands made to the Canadian government by the World March of Women was that persecution based on gender be included as a ground for claiming refugee status in Canada under the Immigration Act.[1] Despite requests by women's organizations across Canada for the explicit inclusion of this protection, an overhaul of our immigration and refugee law contained in Bill C-31 (which died on the Order Paper with the election call last fall) and the new Bill C-11 preserve the refugee definition in the proposed new Immigration and Refugee Protection Act.[2] When members of the Canadian Women's March Committee met with Citizenship and Immigration Minister Elinor Caplan to discuss the Women's March demands in October of last year, she rejected out of hand any amendment of the refugee grounds to make them more inclusive, confident that the Canadian gender guidelines and current legal in-

terpretations from our courts provide adequate protection for refugee women fearing gender-based persecution.[3]

Over the past twenty years there have been significant advances in feminist legal thought and scholarship. A critical examination of refugee law from a feminist perspective would have been unthinkable at the time of the drafting of the 1951 UN Convention relating to the Status of Refugees, or the 1967 Protocol. Indeed, even by 1988, the date of publication of the *UN Handbook on Procedures and Criteria for Determining Refugee Status,* no mention was made of women, sex, or gender as grounds for being recognized as Convention refugees, despite the fact that women and children have always represented the majority of the world's refugees,[4] and women's refugee experiences can be markedly different from those of men.

In addition to those women who are officially counted as refugees in the refugee camps or claiming refugee status around the world, there are countless others who are routinely tortured, beaten, humiliated, mutilated, imprisoned, and even murdered by their spouses. This occurs in some cases with state sanction, in other cases when the state is unable or unwilling to provide protection, or where the state has abdicated responsibility for the protection of women. Extreme domestic violence is one of the most widespread human rights violations committed against women, committed against women of all national, ethnic, and social origins, from all economic conditions.

Despite the fact that women comprise the majority of the world's refugees and that their refugee experience is different from the male refugee experience, it is only recently that the magnitude and the specificity of women's refugee experience has begun to be acknowledged.

In 1991 the United Nations High Commissioner for Refugees adopted guidelines for the protection of refugee women.[5] In the following year, in Canada, a Saudi woman identified by the pseudonym "Nada" was denied refugee status, but her case became the rallying point and eventually the catalyst for change in the treatment of gender-based refugee claims.[6] The strength of public support for Nada, together with a growing international recognition of the nature of women's persecution, led to the introduction of gender guidelines in Canada for the interpretation of the refugee definition.[7] These guidelines permit an interpretation of the refugee definition in a way that incorporates the gender-related claims of women into the enumerated grounds in the Convention. Other Western countries have followed Canada's example of issuing non-binding gender guidelines, while maintaining the original enumerated grounds for claiming refugee status in the Convention. In 1995, the US Department of Justice issued gender guidelines (DOJ guidelines) for officers adjudicating women's asylum claims, publicly acknowledging the Canadian lead.[8]

Both Canada and the United States chose to address gender concerns without amending the refugee definition to include gender or sex as a ground for claiming refugee status. In both jurisdictions the refugee definition is incorporated into domestic legislation, making change possible at the domestic level, but such change has never been likely to be politically acceptable to the electorate. Those who oppose opening the definition to add gender or sex argue that to do so would constitute an open invitation to those who wish to narrow the existing definition. Like the Canadian Minister of Citizenship and Immigration, they argue that such a risk is not warranted when the existing definition is subject to an interpretation that recognizes claims based on gender.

Notwithstanding this optimism, there remain a number of analytical difficulties that arise in gender-based claims when we try to fit the specificity of gender persecution into the existing categories of refugee persecution. Because the definition has not been amended to add sex or gender, claimants must show that their persecution is "on account of" their political opinion, race, nationality, or religion, or because of membership in a particular social group. These difficulties were recently starkly highlighted in the American Board of Immigration Appeal case *In re R-A-*. Notwithstanding US Attorney General Janet Reno's vacation of the decision in the last days of the Clinton administration, the case should serve as a wake up call to other jurisdictions that have adopted non-binding guidelines to address issues raised by gender-based refugee claims.

In *re R-A-*, a majority of ten members sitting on the Board of Immigration Appeals (BIA) overturned the refugee acceptance of a Guatemalan woman under circumstances where they acknowledged the "heinous abuse she suffered and still fears from her husband in Guatemala." The credibility of the claimant was unimpeached, and the litany of torture and abuse she recounted, both physical and sexual, from her violent and domineering husband were fully accepted by the Immigration judge at first instance. These findings were undisturbed on appeal.

Indeed, the BIA stated, "We struggle to describe how deplorable we find the husband's conduct to have been," and, "The respondent in this case has been terribly abused and has a genuine and reasonable fear of returning

to Guatemala."[9] On the facts proven at the original hearing, the BIA was prepared to accept that the treatment experienced was "persecution," and the claimant had made serious efforts to seek state protection, including complaints to the police and court applications, which had proved fruitless. The difficulty for the board arose, however, because the claimant failed, in their view, to demonstrate a link between her persecution and any perceived or imputed political opinion, or because of her membership in any particular social group.

The *In re R-A-* case was highly controversial, in the general media and within the refugee community. Scholars criticized the findings of the board and claimed that its decision brought into question the commitment of Immigration and Naturalization to its own gender guidelines and raised serious concerns about the nature and scope of protection for victims of gender-based persecution.[10] Karen Musalo, director of the Center for Gender & Refugee Studies in the United States, commented,

> The decision in *re R-A-* also goes against a number of significant developments and trends. It is counter to the principles expressed in the INS Gender Guidelines, inconsistent with the Board's own decision in *Kashinga*, contrary to the jurisprudence of countries such as Canada and the United Kingdom, and a repudiation of fundamental understandings regarding the nature of women's human rights, and the relationship between these rights and principles of asylum.[11]

In this case comment, I start from the premise that the BIA decision in *re R-A-* was incorrect and that the strong dissent sets out a preferable interpretation of the law that relies upon domestic law, international human rights instruments, and the United States DOJ guidelines. While this comment discusses some of these interpretation issues, they are not the primary focus. Instead, I am more interested in what this decision would have meant for women seeking protection from severe spousal abuse if it had not been vacated, or if the interpretation of the definition employed gains wider acceptance. Were the barriers the BIA erected so high that they are insurmountable for most refugee claimants seeking protection from severe spousal abuse? Are women seeking protection from spousal abuse at peril of a similar setback here in Canada?

The Immigration Judge's Decision

The Immigration judge found that the claimant was a member of the social group of "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination." She found this group was both cognisable and cohesive, as members shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practices male domination through violence. Further, the judge found that when the claimant resisted her husband's violent acts, she demonstrated the political opinion "that women should not be dominated by men," and that her husband was motivated to commit the abuse because of the political opinion he believed her to hold.[12] On appeal to the BIA, both of these findings were overturned.

The BIA Decision: Political Opinion

The BIA rejected the basis of the claimant's refugee claim upon political opinion, finding that her actions did not illustrate a political opinion—implied or imputed—as there was no evidence that her husband was motivated to harm her on the basis of any political opinion. Because she failed to articulate a political opinion, they were not convinced that she even had a political opinion at all. The Immigration Appeal Board noted,

> At the onset, the respondent never testified that she understood the abuse to be motivated by her political opinion or membership in a group of any description. Her husband never articulated such motivation, and she does not seem to have perceived it independent of the legal arguments now being advanced on her behalf. The dissent itself does not claim that either the respondent or her husband understood the abuse to be motivated, even in part, by the respondent's political opinion or social group membership.[13]
>
> The record indicates that the respondent's husband harmed the respondent regardless of what she actually believed or what he thought she believed . . .
>
> The respondent's account of what her husband told her may well reflect his own view of women and, in particular, his view of the respondent as his property to do with as he pleased. It does not, however, reflect that he had any understanding of the respondent's perspective or that he even cared what the respondent's perspective may have been. According to the respondent, he told her, "You're my woman and I can do whatever I want," and, "You're my woman, you do what I say," and that he "would hit or kick me whenever he felt like it."
>
> Nowhere in the record does the respondent recount her husband saying anything relating to what he thought her political views to be, or that the violence towards her was attributable to her actual or imputed beliefs. Moreover, this is not a case where there is meaningful evidence that this respondent held or evinced a political opinion, unless one assumes that the common human desire not to be harmed or abused is in itself a "political opinion." The record before us

> simply does not indicate that the harm arose in response to any objections made by the respondent to her husband's domination over her. Nor does it suggest that his abusive behaviour was dependent in any way on the views held by the respondent. Indeed, his senseless actions started at the beginning of their marriage and continued whether or not the respondent acquiesced in his demands. The record reflects that, once having entered into this marriage, there was nothing the respondent could have done or thought that would have spared her (or indeed would have spared any other woman unfortunate enough to have married him) from the violence he inflicted.[14]

To accept that R-A-'s resistance, made manifest by her flight from abuse and her search for help and protection, is the expression of a political opinion requires one to understand the role that violence against women plays in the perpetuation of a male-dominated society. Unfortunately, it is only recently that domestic violence has been recognized explicitly as a human rights issue. Human Rights Watch, in its Brazilian report in 1991, charged for the first time that a state was complicit in the crime of domestic violence because of its failure to prosecute it equally with other crimes, and to guarantee women the fundamental civil and political right to equal protection before the law without regard to sex.[15] In the broader sense, women's struggle to overcome the social, legal, and cultural barriers to equality has been waged with a developing appreciation for the role that violence plays in the maintenance of a male-dominated society. If one has an appreciation of this context, and actually accepts it, then the refugee claimant's flight from her abusive husband can be characterized as the expression of a political opinion.

As Rhonda Copeland points out,

> Indeed, domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women. While the legal and cultural embodiments of patriarchal thinking vary among different cultures, there is an astounding convergence in regard to the basic tenets of patriarchy and the legitimacy, if not necessity, of violence as a mechanism of enforcing that system.[16]

Notwithstanding the BIA comments, there was ample evidence upon which the BIA could have found the necessary connection between the political opinion and the actions of the abuser. Indeed, the BIA even touched on some of these connections when they stated, "There is little doubt that the respondent's spouse believed that married women should be subservient to their own husbands . . . On the basis of this record, we perceive that the husband's focus was on the respondent because she was *his* wife." Clearly these statements indicate the spouse's view of the reason he believed he could abuse her. If that were not enough, the dissent added further facts from the record that should have been sufficient to situate the persecution in a political context:

> First, to assess motivation, it is appropriate to consider the factual circumstances surrounding the violence. The factual record reflects quite clearly that the severe beatings were directed at the respondent by her husband to dominate and subdue her, precisely because of her gender, as he inflicted his harm directly on her vagina, sought to abort her pregnancy, and raped her.[17]

These factual findings underpinned the dissent's analysis which led them to conclude that domestic violence is also a means by which men may systematically destroy the power of women—a form of violence rooted in the economic, social, and cultural subordination of women.

The Claimant's Failure to Articulate a Political Opinion

Traditionally it was thought that "political opinion" applied only to those who had formal membership in a political party.[18] However, in recent years we have adopted the more general interpretation advocated by Goodwin-Gill as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[19] We have also recognized that the political opinion need not have been expressed, but can be perceived from the claimant's actions.[20] Notwithstanding this expanded definition, in determining these claims there has always been a focus on establishing the political opinion in the first place. Even the UNHCR handbook notes,

> It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.[21]

This requirement to root out the political opinion of the claimant led the BIA to require the articulation of the political opinion by both the claimant and her abuser. But realistically, how many women who are victims of domestic violence, particularly those coming from countries where feminist scholarship and discussion are not important components of the national debate, can be expected to articulate the significance of their personal situation in this wider political context? How many people

are able to transcend learned patterns of behaviour, to be able to view individual behaviour in its broader social, political, or cultural context? Moreover, how many Immigration judges, board members, or members of the Board of Immigration Appeals would be familiar with such theories, much less accept them?

There is no doubt that part of the board's difficulty in characterising the claimant's actions as political stems from the traditional understanding that political acts are intimately linked to public acts. Actions that are understood to be political—both express and implied—take place publicly, like organizing election rallies, running for office, or expressing opinions on matters of state importance or the rights of citizens or workers. However, escape from domestic abuse is rarely a public act and, significantly, a woman's defiance of male authority in the home is rarely seen as political.

As Doreen Indra commented in a previous *Refuge* article,

> The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. With regard to private sphere activities where women's presence is more strongly felt, there is primarily silence—silence compounded by an unconscious calculus that assigns the critical quality "political" to many public activities but few private ones. Thus, state oppression of a religious minority is political, while gender oppression at home is not.[22]

The Board of Immigration Appeals clearly characterized the harm suffered by the claimant as a private harm, emphasizing how the abuse was directed against only the claimant, not against other members of the public:

> [T]he respondent fails to show how other members of the group may be at risk of harm from him . . . but the record indicates that the respondent suffered and feared intimate violence only from her own husband . . . On the basis of this record, we perceive that the husband's focus was on the respondent because she was *his* wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm . . . Importantly, construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the "on account of" requirement in the statute.[23]

To emphasize the private nature of the harm, the Board of Immigration Appeals went to great lengths to decontextualize the behaviour of the claimant's husband, removing it entirely from the social and cultural context within which he lived and which nourished his male dominance. Ultimately, the BIA attributed the violence solely to the abnormality of the abuser:

> Other factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality, are among the explanations or motivations that may reasonably be inferred on this record for the actions of the respondent's husband. For example, when the respondent resisted her husband's demands for sexual relations, he would accuse her of seeing other men. Notably, he did not accuse her of harbouring opinions hostile to his own or of being part of an abhorrent group.[24]

What this analysis ignores is that domestic violence is hardly gender-neutral, being overwhelmingly initiated by men against women. The very extent of the abuse—in frequency and universality—attests to the underlying social origins and clearly suggests that it cannot be explained by a narrow examination of the abuser, or even the abused. As the United Nations has noted,

> There is no simple explanation for violence against women in the home. Certainly, any explanation must go beyond the individual characteristics of the man, the woman and the family to look at the structure of relationships and the role of society in underpinning that structure. In the end analysis, it is perhaps best to conclude that violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.[25]

In the final analysis, the test for political opinion, and for "on account of" political opinion articulated by the board, constitutes an almost insurmountable hurdle for most victims of spousal abuse. Not only must they prove that they have suffered the abuse and that no state protection is available, they must also be able to fully situate their abuse within the overall political context of their own society and have communicated this sophisticated analysis to their spouse. In other words, they would need to be familiar with feminist scholarship, which argues that in a sexually unequal society, physical and sexual coercion that is based in an institution, such as the family, is an abuse of social and sexual power and is used to underscore women's inferiority to men. Indeed, such a requirement would make mandatory reading of Susan Brownmiller's *Against Our Will: Men, Women, and Rape* for female refugee claimants.[26] It may not be enough that Canadian courts have recognized the relationship between violence against women and the inequality of the sexes, if the woman herself does not understand the relationship.[27]

The individual refugee claimant must therefore be able to articulate the symbolic significance of her resistance to

or flight from abuse, within the context of her own profoundly discriminatory society, which fails to guarantee her the civil and political right of equal protection before the law. Not only must she have understood her individual predicament within this context, she must also have somehow communicated her analysis to her persecutor, so that there is a clear link between his abuse and her political opinion, because the abuse must be "on account of" the political opinion.

What makes this scenario even more incredible is what we know about the dynamics of spousal abuse itself. It has been widely documented that the long-term effects of prolonged physical and psychological abuse include low self-esteem, lack of initiative, and passivity, belief that the husband is all-powerful, depression, anxiety, and suicidal ideation.[28] As Leanne Walker documents, most battered women strive to avoid conflict or provoking anger in their abusers, a strategy that is incompatible with the type of political discussions the Immigration Appeal Board seems to require:

> Often a woman may erroneously take responsibility for starting a battering incident because she said something that she should have known would provoke or anger the man. Most battered women believe that if only they could close their mouth when the man is tense, they would not be battered.[29]

The notion that a woman in this situation would actually confront her abusive spouse with her political analysis of his abuse, and then provide him with the opportunity to abuse her as a direct consequence of her political analysis, is patently absurd.

The BIA Decision: Membership in a Particular Social Group

In finding that R-A- was not part of the particular social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," the BIA was particularly concerned with whether this group had "a voluntary associational relationship."

> Moreover, regardless of Ninth Circuit law, we find that the respondent's claimed social group fails under our own independent assessment of what constitutes a qualifying social group. We find it questionable that the social group adopted by the Immigration Judge appears to have been defined principally, if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever. The respondent fits within the proposed group. But the group is defined largely in the abstract. It seems to bear little or no relation to the way in which Guatemalans might identify subdivisions within their own society or otherwise might perceive individuals either to possess or to lack an important characteristic or trait. The proposed group may satisfy the basic requirements of containing an immutable or fundamental individual characteristic. But, for the group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm . . .
>
> The respondent has shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.[30]

The board found that the four groups explicitly protected from persecution (on the grounds of race, religion, nationality, and political opinion) exhibit characteristics that typically separate factions within countries; are recognized as groupings in a particular society; comprise members who understand their affiliation; and others in that society understand the affiliation.[31] Not surprisingly, when the board applied these criteria to the social group defined by the claimant in *R-A-*, they found that it could not qualify as a social group.

What is particularly disturbing about this finding is that it makes public acknowledgement a precondition for recognition of a "particular social group" under the refugee definition. Public acknowledgement of spousal abuse has been extremely slow in coming, making this a significant hurdle for many refugee women. In cases of spousal abuse women often hide their shame, hospitals do not record or report their injuries, police do not charge and the judiciary do not prosecute or convict the offenders. Because police don't take or act on complaints and abusers are not charged or convicted, the abuse is both socially unacknowledged and statistically undocumented. Where there is nothing but denial and silence surrounding spousal abuse, how can there be social recognition of a group's existence, or any battered woman's place in that group?

It is perhaps the final irony for refugee claimants who are women seeking protection from spousal abuse, that these women cannot, and will probably never be able to satisfy the "voluntary associational" criteria required by *In re R-A-* to prove membership in a social group. Spousal abuse is invisible in many countries such as Guatemala, where domestic assault and abuse are treated as private matters, and men are free to batter and abuse their

spouses with impunity. Unfortunately, ignorance of the extent of spousal abuse most likely goes hand in hand with a lack of support for female victims of spousal violence. How under these social conditions, where the problem of domestic violence is not even acknowledged, can any claimant ever show that there is social recognition of the group?

Further, it is widely acknowledged in the psychological literature on domestic violence that jealousy, over-possessiveness, and intrusiveness on the part of the abuser tend to lead directly to the social isolation of battered women:

> She may cease normal social activities, stop seeing her friends and family, and become a prisoner in her own mind, sometimes without even needing to actually lock the door, although it is not unusual for the batterer to lock her in the house without easy access to a telephone . . . The abuser attempts to cut her off from "the world at large," from social supports and resources, and from people or organizations to whom she might turn for help, understanding or solace. If she is permitted social contacts, the abuser controls who they are and monitors all aspects of the contacts. Increasingly isolated, the woman becomes more vulnerable to the abuser . . .
>
> The isolation that many battered women experience has many sources. Batterers tend to impose isolation on their partners in order to keep power and control, to calm their own fears of abandonment and feelings of intense, irrational jealousy, and to make it less likely that the victim will be able to report the "secret" or find help. A battered woman may believe that the less she and her abusive partner go out into the world of other people, the less likely some social event will trigger another violent outburst. Even when she has a career in which she appears to function well, a battered woman may feel estranged from other people.[33]

The expectation that a group, whose very persecution is achieved and maintained through the imposition of extreme social isolation, would have developed a collective consciousness and social presence within the persecutor society, is simply unrealistic. To make the measure of the group's very existence contingent upon social recognition, is to create an almost insurmountable barrier for those women fleeing domestic violence.

Quite understandably, most claimants like R-A- will probably never have articulated resistance in a traditional political manner, nor have acted in concert with other women opposed to the same or similar abusive practices. It is probably also true for most women fleeing spousal abuse that they are unaware that they are "a member of a particular social group." The irony is that those women seeking protection from societies that provide the least protection for women are predictably the same societies where the level of consciousness and social group recognition for abused women will be at its lowest. This leaves the most vulnerable women with the least protection.

It is worth noting that the BIA also made some disturbing comments preliminary to their main decision, on the failure of the US Congress to change the refugee definition or the asylum statute at the time of the enactment of other relief for women living in, or seeking to escape from, abusive relationships:

> The existence of derivative refugee status for spouses, as well as these non refugee provisions for battered spouses, raises the question of whether Congress intended or expected that our immigration laws, even in the refugee and asylum context, would cover battered spouses who are leaving marriages to aliens having no ties to the United States.[34]

The failure to specifically amend the refugee definition to include gender or sex, was seen as evidence that Congress had no intention of changing the definition to include them.

New Immigration Regulations in the United States

Fortunately, following the *In re R-A-* decision, the American Department of Justice moved to amend the Immigration and Naturalization Service regulations to "clarify" membership in a particular social group criteria and to "remove certain barriers" to the recognition of spousal abuse claims that arose in light of in *re R-A-*. The proposed new rules cover a wide variety of issues related to gender persecution, including social group membership, nexus, the meaning of persecution, state action, and burden of proof. The commentary on *R-A-,* however, accepts the BIA analysis of political opinion and focuses solely on the shortcomings of the social-group findings in that case:

> The Board's analysis of the political opinion claim is consistent with long-standing principles of asylum law and is not altered by this rule. The Board reasoned that the abuse in this case was not on account of the applicant's political opinion because there was no evidence that the applicant's husband was aware of the applicant's opposition to male dominance, or even that he cared what her opinions on this matter were. Rather, he continued to abuse her regardless of what she said or did. This portion of the decision is consistent with the Supreme Court's reasoning in Elias-Zacharias, supra, and with the Board's own precedent that harm is not

> on account of political opinion when it is inflicted regardless of the victim's opinion rather than because of that opinion.[35]

The proposed regulations would, however, alter the "on account of" social group analysis undertaken by the BIA. The BIA found the violence that R-A- experienced was not "on account of" her membership in a particular social group, because there was no evidence that her husband would harm other women who live with other abusive partners. The proposed rules suggest that such group targeting may arise in some cases, but it is not required as a matter of law. Indeed, in some cases a persecutor may target a victim because of a shared characteristic, even though the persecutor acts against only the one victim. The new rule makes the existence of multiple victims with the same group characteristics relevant, but not required.

The final hurdle the rules address is societal recognition of the group as a prerequisite to finding a "particular social group" under the refugee definition. The BIA found the claimant had not shown that the group she said she belonged to "is a recognized and understood to be a societal faction, or is otherwise a recognized segment of the population within Guatemala." When one is addressing this issue, the proposed rules suggest that it is relevant to consider whether there is evidence "about societal attitudes toward group membership or about harm to group members, including whether the institutions of the society at hand offer fewer protections or benefits to members of the group than to other members of society."

This approach breathes life into the evidence introduced in *re R-A-* (which was ignored by the majority of the BIA) that the police did not respond to her calls for help; that she appeared before a judge, but he told her he would not interfere in domestic disputes; and that Guatemalan society still tends to view domestic violence as a family problem. This evidence illustrates that because the claimant possesses a particular characteristic, harm inflicted on her may be tolerated by society, while it would not be tolerated if inflicted on other members of society.

Overall, the proposed regulations are certainly an improvement, as the incorporation of these important principles into regulations ensures their application in refugee claims, in a manner which was never assured with the non-binding gender guidelines. However, the proposals fall disappointingly short of resolving some of the underlying problems in gender-based refugee claims. Indeed, the new regulations specifically avoid creating a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience or fear, preferring a case-by-case approach.[36] Further, they fail to recognize gender alone as a qualifying category of "particular social group," so that the difficulties inherent in defining particular social group can be expected to persist.

Implications here in Canada

What are the implications of the *R-A-* decision for us here in Canada? How well have our gender guidelines worked, and are we at peril of a similar setback? Fortunately, with Mr. Justice LaForest's decision in *Chan,* our Supreme Court has clearly ruled out the approach taken by the BIA in *re R-A-*, on the issue of voluntary association.

> In order to avoid any confusion on this point, let me state incontrovertibly that a refugee alleging membership in a particular social group does not have to be in a voluntary association with other persons similar to him- or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with kindred person. The association exists by virtue of a common attempt made by its members to exercise a fundamental human right.[37]

However, it is clear that the "voluntary association" problem is not the only difficult analytical problem that arises in gender-based claims. The dilemma of classifying the social-group category has also bedevilled the Immigration and Refugee Board in Canada. Here, because being part of the social group of women (who would fit the four criteria set out by the BIA) is not enough, claimants who are women have to show they are part of some particular sub-group of women.[38] This has led the Canadian Immigration and Refugee Board and the Federal Court to define *particular social group* in tortuous ways; "Women in China who have more than one child and face forced sterilization";[39] Trinidadian women subject to wife abuse";[40] "New citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israel society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to the government, and who can demonstrate indifference to their plight by front line authorities to whom they would normally be expected to turn to for protections";[41] "Women who have been subjected to exploitation resulting in the violation of the person and who, in consequences of the exploitation have been tried, convicted and sentenced to imprisonment."[42]

Such definitions, while they may benefit the individual claimants by recognizing their refugee status, do little to advance a comprehensive and consistent understanding

of the refugee definition. Indeed, they create serious analytical difficulties. The BIA in *re R-A-* was rightly concerned about the characterization of the group in that case:

> We find it questionable that the social group adopted by the Immigration Judge appears to have been defined principally, if not exclusively, for purposes of this asylum case, without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever.[43]

In addition to this problem, gender-based social-group definitions often use the persecution experienced by the woman to define the particular social group, a process that leads inevitably to the circular reasoning described by Todd Stewart Schenk:

> Grounds for asylum are established when an applicant proves persecution and connects that persecution to one of the five categories contained in the definition of refugee. This is a two-step approach. If a claimant attempts to define the particular social group of which she is a member in terms of persecution, as is the case when the particular social group is defined as "persecuted women," the argument takes on a circular characteristic. The claimant effectively argues that she is persecuted due to membership in a persecuted social group. What was initially a two-step approach is now a one-step approach.[44]

While the courts in Canada have for the most part accepted this circular reasoning to define social groups, it has not been without difficulty. Indeed, as early as 1992, the Federal Court of Appeal commented,

> A question may be posed for the future: since, in this context, persecution must be feared by reason of membership in a particular social group, can fear of that persecution be the sole distinguishing factor that results in what is at most merely a social group becoming a particular social group?[45]

Since *Mayers* was decided, the Canadian Supreme Court in *Ward* has clearly stated the characterization of a particular social group should not be made on the basis of the persecution feared, leaving open to attack all of these ingenious social-group formulations in gender cases, which are necessitated by our failure to recognize gender as an enumerated ground in its own right.[46]

Unfortunately, judicial supervision of the Canadian Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board is strictly limited. There is no statutory right of appeal from a negative refugee determination, only a limited judicial review with leave of the Federal Court. If leave is granted—and it is granted rarely—the standard of review for a CRDD decision is "patently unreasonable."[47] This means the court will determine only if the CRDD determination was reasonably open to it, not whether the CRDD interpretation of the Convention definition is strictly speaking correct. This limited review produces two distinct results for gender-based claims: few definitive pronouncements on the correct interpretation of the law, and conflicting CRDD interpretations of the law that are never reviewed. Unfortunately, successive law-student surveys of CRDD gender decisions clearly illustrate these consequences, as they show an inconsistent application of the gender guidelines, more influenced by preference of individual board member than consistent legal analysis.[48] When coupled with the lack of judicial supervision, which might correct this inconsistency, there can be no doubt that problems exist for claimants making gender-based claims.

Many of the problems that arose in *re R-A-*, and in others that we see here in Canada, would not arise if gender were a specific ground for claiming refugee status. If such a recognition were granted, no longer would refugee claimants have to show, on a case-by-case basis, that they are part of some exotic "particular social group," or that their battle against domestic abuse is part of a larger political struggle. The insistence upon the construction of new "particular social group" categories that can accommodate gender persecution, treats gender persecution as if it were somehow a temporary or isolated event, instead of the widespread, socially, culturally, and politically sanctioned persecution that it is.

While the 1991 UN gender guidelines, and the Canadian and American guidelines that followed, were undoubtedly groundbreaking at the time, no one can argue that they have been entirely successful. The difficulties highlighted by *In re R-A-* and our own difficulties with circular reasoning, and the inconsistent application of the guidelines are but some of the problems. Notwithstanding the optimism of the Minister of Citizenship about the adequacy of the gender guidelines, these problems are symptomatic of the failure to recognize persecution on account of gender as a violation of human rights. Unfortunately, without recognition of gender as a sixth refugee category, these and other analytical problems will persist, inevitably compromising our ability to comprehensively protect refugee women.

The fiftieth anniversary of the UNHCR is perhaps an auspicious time to consider changing the refugee definition to explicitly add gender persecution. This change would bring the 1951 Convention definition of *refugee* in line with other Canadian and international human rights

instruments that already recognize the importance of women's human rights. To add gender to the definition would formally recognize the worldwide systematic and institutionalized persecution of women on the basis of their gender and send a clear message that discriminatory treatment of women in the refugee process will no longer be tolerated.

Notes

1. Canadian Women's March Committee, "It's Time for Change: Demands to the Federal Government to End Poverty and Violence Against Women" (Toronto: Canadian Women's March Committee, 2000) at 31, recommendation 28.
2. See National Association of Women and the Law, West Coast Domestic Workers Association, La Table féministe francophone de concertation provinciale de l'Ontario, The National Organization of Immigrant and Visible Minority Women of Canada, *Brief on the Proposed Immigration and Refugee Act, Bill C-31 Submitted to the Standing Committee on Citizenship and Immigration* by Sharryn Aiken, André Côté, Audrey Macklin, Chantal Tie (National Association of Women and the Law, August 2000). See Bill C-11, s. 96.
3. Members of the Canadian Women's March Committee met with Elinor Caplan to discuss the immigration demands of the Women's March on October 16, 2000.
4. For a discussion of refugee statistics, see Monica Boyd, "Canada's Refugee Flows: Gender Inequality," on-line: Statistics Canada <http://www.statcan.ca/english/ads/11-008-XPE/refugees.html> (date accessed: 20 January 2001.)
5. Office of the United Nations High Commissioner on Refugees, *Guidelines on the Protection of Refugee Women*, Doc. ES/SCP/67 (1991).
6. Nada had refused to wear a veil in Saudi Arabia and wished to pursue a university education, in defiance of her father's wishes. She alleged that she was liable to public stoning in the streets by Saudi Arabia's unofficial religious police, if she was not veiled. She based her claim on a fear of persecution because she was a woman, because of her gender. In the original decision denying her claim for refugee status, the two Canadian board members, who were male, wrote that Nada "would do well to comply with the laws of her homeland . . . and to show consideration for the feelings of her father, who opposed the liberalism of his daughter."
7. Guidelines issued by the chairperson pursuant to section 65(3) of the Immigration Act, R.S.C. 1985, chapter 31. Immigration and Refugee Board, "Women Refugee Claimants Fearing Gender-Related Persecution" (Ottawa: IRB, 9 March 1993).
8. Phyllis Coven, "Immigration and Naturalization Service Gender Guidelines: Considerations for Asylum Officers Adjudicating Asylum Claims from Women" (1995) 7:4 Int. J. Ref. L. at 700.
9. Interim Decision #3403, at 30.
10. Karen Musalo, "*Matter of R-A-:* An Analysis of the Decisions and Its Implications," *Interpreter Releases* 76, no. 30, 9 August 1999; Karen Musalo, *Gender-Based Asylum: An Analysis of Recent Trends* 77, no. 42, 30 October 2000.
11. Musalo, *Matter of R-A-,* at 1186-87.
12. *Supra* note 9 at 7 and 8.
13. *Ibid.* at 27.
14. *Ibid.* at 12-13.
15. "Criminal Injustice: Violence against Women in Brazil," *Americas Watch* (New York: Human Rights Watch, 1991).
16. Rhonda Copeland, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1994) 25 Colum. H.R.L. Rev. 291 at 305.
17. *Supra* note 9 at 43.
18. *Jim Martin Kwesi Mensah,* IAD v 79-6136. FCA Decision A - 524-80, and *Manuel Jesus Torres Quinones,* FCA (1982) 45 N.R., 602.
19. Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1989) at 31.
20. *Ward* v. *R. (Minister of Employment & Immigration)* 20 Imm.L.R. (2d) 85, at 126-30.
21. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1988) at 20, n. 42.
22. Doreen Indra, "A Key Dimension of the Refugee Experience" (1987) 6:3 Refuge.
23. *In re R-A-,* 16.
24. *Supra* note 9 at 28.
25. *Supra* note 16 at 304.
26. S. Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon and Schuster, 1995).
27. *Conway* v. *R.,* [1993] 2 S.C.R. 872, at 877, per LaForest J.; *Oslin* v. *R.,* [193] 4 S.C.R. 595, at 669, per Cory J.; *Janzen and Govereau* v. *Platy Enterprises Ltd. et al.* [1989] 1 S.C.R. 1254, at 1284, per Dickson CJ.
28. The UNHCR Executive Committee Guidelines on Refugee Women discuss the symptoms of rape trauma syndrome as including "persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss of distortion." See UNHCR Executive Committee Guidelines, *Note on Women and International Protection,* EC/CP/59 (28 August 1990) at 27.
29. Leanne Walker, *Abused Women and Survivor Therapy: A Practical Guide for the Psychotherapist* (Washington, DC: American Psychological Press, 1994) at 55.
30. *In re R-A-,* 16.
31. *Ibid.,* 17.
32. Walker, *Abused Women.*
33. *Ibid.*
34. *Supra* note 9 at 11.
35. Department of Justice, Immigration, and Naturalization Service, 8CFR Part 208 [INS no. 2092-00; AG order no. 2339-2000] RIN 1115-AF92. Federal Register: December 7, 2000 (vol. 65, no. 236) Proposed Rules, pp. 76588-76598. From the Federal Register online via GPO Access [wais.access.gpo.gov].

36. Department of Justice, Immigration and Naturalization Service, at 76595.
37. *Chan* v. *R. (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 595.
38. See *Mayers* v. *R. (Minister of Employment and Immigration)* 97 D.L.R. (4th) 729, where in the context of the review of a credible basis hearing, the Federal Court of Appeal approved of an analysis that found that the social group of women, or Trinidadian women, do not constitute a particular social group, "constituting as they do about half of humanity."
39. *Cheung* v. *R. (Minister of Employment and Immigration)* (1993), 19 Imm.L.R. 81 (F.C.A.).
40. *Mayers* v. *R. (Minister of Employment and Immigration)* 97 D.L.R. (4th) 729.
41. *Lithinov, Svetlans* v. *S.S.C. (F.C.T.D.)* No. IMM-8488-93, Gibson, 30 June 1994.
42. *Cen* v. *M.C.I.* [1996] 1 F.C. 310 (T.D.).
43. *In re R-A-*, 16.
44. T.S. Schenk, "A Proposal to Improve the Treatment of Women in Asylum Law: Adding a 'Gender' Category to the International Definition of 'Refugee,'" online: Global Legal Studies Journal 11 <http://www.law.indiana.edu/glsj/vol2/schenk.html> (date accessed: 20 January 2001).
45. *Supra* note 37.
46. *R. (A.G.)* v. *Ward* [1993] 2 S.C.R. 689, at 729.
47. *Sivasamboo* v. *R. (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 (T.D.).
48. See Rell De Shaw, *The Gender Guidelines Two Years On: Where Can We Go from Here?* (1995) [unpublished student paper in hands of author]; Sylvia Valdman, *The Immigration and Refugee Board Gender Guidelines and the Analysis of Culture and Gender at the Convention Refugee Determination Division* (1996) [unpublished student paper in hands of author]; Student #1049877, *On Gender Persecution* (1999) [unpublished student paper in hands of author]; Brigitte Chan Sui Hing, *Gender-Related Persecution: A Look at the Past, Present and Future* (1999) [unpublished student paper in hands of author].

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Book Review

Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection

Gregor Noll
The Hague: Kluwer International, 2000
643 pages, including appendices and bibliography

If timeliness were the sole measure of a book's value, then *Negotiating Asylum* should be worth much more than its weight in gold. For not only are the numbers of people who are displaced from their countries of origin alarming, but refugee-receiving states have for a while now displayed an ever-increasing propensity for creativity and doggedness in their single-minded efforts at deflecting and excluding protection seekers from their territories. This much is evident, even from the very title of Noll's extremely important intervention in this hitherto under-studied area. And despite its focus on the states that constitute the European Union (EU), Noll's book should be of interest to scholars, policy makers, and practitioners the world over.

Negotiating Asylum sets off with brief narrations of three historical cases of refugee protection. The first, which concerns the 1933 German laws that began the defining, marginalizing, and eventually excluding and dehumanizing of German Jews, reminds us all of the ways in which the construction of a discrete ethnic or racial group as a social, political, economic, or health "threat" to the mainstream population of a country almost invariably leads to the exclusion and dehumanization of that group. This is an important warning, even in contemporary Canada, where it is becoming somewhat fashionable (again) to justify attempts at disproportionately excluding certain groups of people from Canadian soil on the basis that they constitute "threats" to the "security," health, or some other vital interest of Canadians. It is an argument for the exercise of extreme caution when deploying such justificatory rhetoric.

The second narrative concerns the 1938 Swiss–German agreement controlling the entry of German Jews into Switzerland just when they had begun to flee the intolerable conditions to which they were then being subjected by the Nazis. This account also reminds us of the ways in which too many richly endowed states too often stand aside and do nothing, or very little, to protect protection seekers who are fleeing the most intolerable conditions imaginable. It also highlights the tragic paradox that, more often than not, it is precisely at the moment that a sharp rise occurs in the protection needs of persons from a particular country (the moment of greatest need) that potential countries of refuge impose border controls, visa requirements, carrier sanctions, and all kinds of pre-entry and post-entry demands and conditions, all designed to stem the numbers of those arriving at the edges of their territories in order to seek protection. And this is so, despite international agreements that impose obligations on such states to protect a class of such persons in need of asylum. As Noll argues, the imposition of such pre-entry and post-entry conditions amount to devices aimed at preventing protection seekers from being in a position to file protection claims in the relevant country, and may in fact violate the international legal obligations of such states.

The third narrative concerns Sweden's imposition of visa requirements on citizens of Bosnia-Herzegovina in 1993, shortly after granting permanent residence to a large group of Bosnian protection seekers. The latter act led the rest of Europe to similarly impose restrictions on the entry of Bosnian citizens. This difficult situation was exacerbated by Croatia's decision a year earlier to close its borders to Bosnian refugees, despite the fact that it was the main refugee-receiving country in that conflict region. The lessons to be gleaned from this narrative are

similar to those already articulated when describing the second narrative.

The book also discusses more normative and interpretive deflection and exclusion devices that have been widely deployed by EU states. For one, it calls attention to the inimical uses they make of the "safe third country" concept. States understand (or interpret) this concept to require that if the protection seeker could have sought protection in a "safe" third country through which she passed, her claim shall be rejected, and she shall be returned to that third country. Under the scheme on which this concept is based, such a protection seeker's fate is determined by the nature of her travel route and other allocative factors (stated in the Dublin Convention), thus denying her the right to choose the country in which to lodge her application for protection. Part of the genius of this book is the convincing ways in which it debunks the "efficiency"-based logic that underlies this regime of deflection and shows how its implementation leads too often not just to results that are manifestly absurd, but as well to the possible endangerment of protection seekers. Noll's point is appreciated even better when one considers that in Europe, as in much of the rest of the world, the success or failure of one's application for protection depends all too often on the luck of the draw—on the identity of the country in which the application is processed and how that country chooses to interpret the requirements of international law in that regard. That is why there is such a wide variation among EU states in the acceptance rates for protection seekers who are fleeing precisely the same situations or conditions. Just as interesting is the fact that none of the inter-European agreements on the regulation of migration seem to have much to say about the harmonization of the substantive normative regime that guides decisions on immigration control in individual countries.

Similarly, Noll also maps and critiques the ways in which too many of those protection seekers that have been lucky to penetrate the fortress of deflection devices mounted by states, and who have lodged protection claims in an EU state, are denied access to full-fledged administrative or judicial procedures for the determination of their claim. Here the most popular devices deployed by EU states are the concepts of "safe country of origin" and "manifestly unfounded claim." Like the other deflection devices, these ones are also partly aimed at keeping down the length of time devoted to the determination of protection claims and to ensuring that the costs associated with those processes are also reduced. While these objectives are, of course, understandable in the abstract, as Noll has ably demonstrated, such efficiency "gains" are almost always obtained at the cost of deflecting far too many protection seekers. Viewed in this light, such measures are, in general, unsupportable.

Another important contribution that the book makes to the literature in this area is its detailed and thought-provoking consideration of the inequities of the current burden-sharing arrangements, one that the UNHCR has long pointed out, and one to which a number of scholars such as James Hathaway and Alex Neve have already devoted some attention. Noll highlights the need for a more equitable burden-sharing arrangement among states by pointing out the fact that Iran, for instance, bears the grossly disproportionate burden of sheltering over 2 million refugees, while Germany (which is by far richer) shelters just over 1 million refugees. We might even add that a much poorer state like Tanzania shelters an even greater number of refugees. By pointing out and seeking ways to ameliorate these gross inequities, Noll delivers a sharp, if unintended, rebuke to many in Canada (one of the world's richest countries) who seem to believe that each new refugee who appears at the Canadian border is one too many.

As admirable as Noll's substantive work in this book is, his scholarly approach to the material is also commendable. It is quite evident to the reader that Noll has strived to be fair and balanced in his presentation. He describes and critiques the protection mechanisms that states have adopted, as well as the devices that states deploy to ensure the deflection of protection seekers from their territories, from the perspective of the state as well as from the perspective of the protection seeker. He has tried very hard to present an objective analysis of the opposing views, with the goal of finding a workable middle course that might meet the practical difficulties faced when protection is unavailable to those who need it most. For this reason, and many more, his work is likely to be a useful resource to *all* of those interested in this area.

However, despite its obvious and considerable strength as a piece of scholarly writing, the book may be seen as deficient in one or two respects. At the outset, Noll declares that the book is "a work on law, using the language of law." This statement is understandable, of course. But in toeing too faithfully a "legal" line, Noll's work leaves the reader with the impression (intended or otherwise) that it is easy in this area to neatly separate legal analysis

from other related forms of analysis, especially those common in the other social sciences. While we believe that this impression is somewhat misleading, ours is not merely a methodological quibble. We are convinced that this mindset might have been responsible for the fact that Noll did not grapple as much as he should have with the non-legal factors, structures, and stories that undergird and shape the turn within EU states to what he aptly terms "a common market of deflection." That these stories, structures, and factors have a high level of explanatory power, even within a "legal" piece of writing, is almost palpable. For instance, if Noll's ambition is to inspire in some way a transformation in this regime of deflection, it becomes relevant whether or not *legal* regimes of deflection largely owe their creation to the fears associated with the effects of non-legal factors such as economic depression, or are chiefly a matter of racial or cultural xenophobia, or of both. If any one of these permutations is correct, then it may not be as fruitful as we think to invest *all* of our scarce time in critiquing the nature of the legal regime of deflection. For, in this case, the nature of the legal texts that create a regime of deflection do not matter as much as the willingness of the administrative tribunals or policy implementers to adopt the most restrictive of the several possible interpretations of the legal text. And this willingness, and often zeal, to read the text in the most restrictive way possible, or to read it as authorizing a device of deflection when it could be read otherwise, is hardly ever rooted in the nature of the text itself but in social attitudes and pressures, and in the particular state's self-understanding (as constructed in public discourse). This is not to suggest that "legal" analysis is not possible, but to argue that, in this case at least, legal analysis would have benefited tremendously from a less marginalized consideration of the social, economic, and cultural determinants of interpretive, policy, and adjudicative behaviour.

Also largely missing in Noll's work is a paradox that might help us understand not just refugee law discourse, but also international law and international human rights discourses. This paradox relates to the inconsistent understandings of sovereignty among EU states. It is interesting to note that from Noll's account, the area of refugee law (and migration law) is perhaps the one where European states still hold doggedly to the sovereignties! Despite their adoption of several regional international instruments in this area, it is quite clear to the reader that most of the devices that European states use to deflect potential protection seekers from their territories are firmly grounded in the self-image of these states as Westphalian sovereigns. This is so, despite their insistence in other international forums that the affirmation of sovereignty so notable among Third World states is now an unqualified anachronism. The question then is, Why do EU states still hold on so tightly to their own sovereign rights to exclude (mostly Third World) protection seekers? This is also another example of how a more socio-legal analysis might be important to a project like Noll's, because a possible explanation for this paradox is that EU states, just like other states, will deploy their self-images as sovereign states when these states perceive that social, economic, and political factors so necessitate. Here again, if the sovereignty of EU states is an obstacle of sorts to the effective protection of protection seekers, it is because such extra-legal factors have shaped a mindset that makes the deployment of sovereignty a necessity.

Again, despite these inadequacies, the book remains an excellent piece of scholarly writing, one that makes an original and timely contribution to the relevant literature. We suspect that most scholars and activists will surely find much to concur with, and little to dissent from, in this meticulously written and extremely well thought-out volume. While we cannot say the same with as much confidence for many policy implementers in EU states and beyond, some of them will be impressed by Noll's thoroughness and balanced presentation. It is a book that is not meant only to inform and educate, but also to provoke and challenge. It can also be seen as a form of encouragement to those working in the field of refugee protection to continue with their relentless struggles for a more humane protection regime. For although there is a great deal of knowledge of the notorious tendency common among many EU states towards "deflection" of protection seekers, not only does this book exhaustively substantiate that critique, it also proposes concrete and practical means of influencing urgent reforms, no matter how seemingly far-fetched and difficult. We highly recommend it to all those who are interested in the subject of asylum and migration law.

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