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## SPECIAL FOCUS

# *Age Discrimination in Forced Migration Law, Policy, and Practice*

# Refuge

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## Introduction

# Special Focus on Age Discrimination in Forced Migration Law, Policy, and Practice

CHRISTINA CLARK-KAZAK<sup>1</sup>

### Abstract

*This special focus of Refuge highlights the widespread but under-researched occurrence of age discrimination in forced migration law, policy, and practice. Using a conceptual lens of social age, authors analyze the ways in which people in situations of forced migration are treated differently on the basis of chronological age, biological development, and family status. By framing this differential treatment as discrimination, this special focus approaches age as an equity issue. Such an approach differentiates the articles presented here from other recent scholarship on specific age groups, which is framed largely in terms of their vulnerabilities and needs. This special focus is intended to stimulate further research and activism on age discrimination in all its forms in varying contexts of forced migration.*

### Résumé

*L'accent particulier accordé à ce sujet dans Refuge souligne l'incidence généralisée, bien qu'insuffisamment étudiée, de la discrimination fondée sur l'âge dans la législation, la politique et la pratique concernant la migration forcée. À l'aide de l'optique théorique de l'âge social, les auteurs abordent une analyse du traitement différencié accordée aux personnes en situation de migration forcée en fonction de leur âge chronologique, de leur développement biologique et de leur statut familial. En considérant ces différences dans le traitement par l'entremise du cadre de*

*la discrimination, l'âge est conçu en tant qu'enjeu d'équité dans l'optique de cette approche particulière. Une telle approche dans les articles présentés ici se démarque des travaux et recherches récentes sur les groupes d'âge spécifiques qui se conceptualisent plutôt en fonction des vulnérabilités et besoins des sujets concernés. Cette approche particulière vise à inciter des recherches ultérieures ainsi que des activités politiques concernant la discrimination fondée sur l'âge dans toutes ses manifestations dans les divers contextes de la migration forcée.*

### Conceptualizing Age Discrimination in Contexts of Forced Migration

Most migration law and policy—both domestic and international—use chronological age as the predominant definition of generational categories. For example, Article 1 of the UN Convention on the Rights of the Child defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>2</sup> These chronological age-based categories are reproduced in migration laws and policies. For example, at a domestic level, Canada’s Immigration and Refugee Protection Act (IRPA) for the most part uses chronological age definitions of children and older people.<sup>3</sup> While intended to provide a clear-cut way to justify inclusion in (and exclusion from) age categories, this predominant reliance on chronological age is problematic for many reasons.

First, as Kimberly Seibel and Stephanie J. Silverman point out in their articles in this volume, people in situations of forced migration may not necessarily know their chronological birthdate and/or may not have documents to prove it. In the absence of “proof” of their chronological age, displaced people faced with entering demographic data on migration forms may be obliged to invent what Seibel calls “bureaucratic birthdates,”<sup>4</sup> with far-reaching administrative consequences in access to services structured according to chronological age categories. Absence of proof for unaccompanied minors in the United Kingdom has also led to the use of controversial age assessments as an imposed “solution” to age disputes in order to legitimize the conception of “real” children, as Silverman explains.

Second, chronological age categories are arbitrary in the sense that they really only mark the passage of time. While in Western medical, psychological, and educational circles, there has been a tendency to assume that chronological age is a proxy for biological, cognitive, and social development, recent research in these fields indicates a wide range of variation on all these issues due to a combination of genetic and environmental factors.<sup>5</sup> Another indicator of the arbitrary nature of chronological age categories relates to the wide variation of definitions even within the same document. For example, in IRPA, while children are generally defined as under the age of eighteen, there are different chronological age requirements for application processes.<sup>6</sup>

Third, in many contexts, other biological and social markers of age are as, if not more, important than chronological age. These include puberty, marital status, parenthood and child rearing, formal employment, enrolment in education, and menopause.<sup>7</sup> It should also be noted that some age categories—such as children—refer to a period of human development, as well as a social and familial relationship.

In response to these flaws within the prevailing chronological approach to age, authors in this volume have adopted the complementary concept of social age. Social age refers to “socially constructed meanings applied to physical development and roles attributed to infants, children, young people, adults and elders, as well as their intra- and intergenerational relationships.”<sup>8</sup> Being attentive to these power relations, articles in this special focus analyze discrimination on the basis of chronological age, social age, and family status. By highlighting age discrimination, we are interested in politicizing age and recognizing it as an equity issue. This approach differentiates our scholarship from many studies in migration literature, which frames age primarily in terms of vulnerability and needs.

### *Age as an Equity Issue:<sup>9</sup> Defining Discrimination*

In this special focus, authors address direct and indirect, as well as positive and negative discrimination. According to Article 2(2) of the European Council Directive 2000/78/EC, direct discrimination occurs when “one person is treated less favourably than another has been or would be treated in a comparable situation.” Here, the idea of equality centres on “the Aristotelean notion that likes should be treated alike.”<sup>10</sup> Direct discrimination is evident in, for example, age-based criteria for migrants in “skilled worker” categories in Australia, Canada, and New Zealand.<sup>11</sup> Indirect discrimination, in contrast, involves “instances of apparently equal treatment which impacts more heavily on people of a certain age.”<sup>12</sup> For example, fixed timeframes for residency requirements have differential impacts on people in different stages of their lives and are relatively more significant for younger than older people.

While scholarship, litigation, and advocacy against gender and racial discrimination in immigration are prevalent, age issues have received much less attention, both domestically and internationally. Fredman argues that one of the reasons that age is belatedly considered in equality discussions and legislation is that it “does not define a discrete group. We have all been young, and we will all, if we are fortunate, become old.”<sup>13</sup> This has led some to make the “fair innings” argument: age-based discrimination will affect all of us at some point in our lives and, therefore, there is no real inequality on the grounds of age. Indeed, some argue that equity considerations dictate that older people receive less access to employment<sup>14</sup> and health care<sup>15</sup> so as to ensure that younger age groups get their “fair share” and reduce intergenerational inequity.

However, the “fair innings” argument is problematic for a number of reasons. First, as Fredman argues, “two life-spans cannot be genuinely compared” because there are too many variables in each individual’s life and because of evolving legislative and policy changes, which will affect some people in certain age categories while others were not affected at that stage of their life.<sup>16</sup> These issues are particularly relevant for our discussion of migration, where migration status intersects with age categories and where people are subject to different national jurisdictions at different stages of life as they cross borders. Second, Fredman points out that “the same event might affect two people of different generations quite differently, even if it occurs to both at the same age.”<sup>17</sup>

In a widely cited Canadian case of *Gosselin v Quebec (Attorney General)* one of the dissenting judges, Bastarache (4 SCR 429) argued,

While age is a ground that is experienced by all people, it is not necessarily experienced in the same way by all people at all times. Large cohorts may use age to discriminate against smaller, more vulnerable cohorts. A change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Moreover, the fact remains that, while one's age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change.

However, it should be noted that this was a dissenting opinion, and many policymakers and judges continue to use variations of the “fair innings” argument to justify discriminatory practices on the bases of age.

A second argument that is sometimes advanced to justify differential treatment is that this is necessary to recognize the different capacities and/or situations of different age groups. Indeed, in some cases, this differential treatment is positive, according particular age groups specific provisions and protections on the basis of their evolving capacities or loss of adaptability. For example, in 2012, the UN Committee on the Rights of the Child recommended that states “expeditiously and completely cease the detention of children on the basis of their immigration status.” Not all differential treatment on the grounds of age is inherently discriminatory or negative. However, in some cases, assumptions about difference are not empirically proven, nor applicable to the particular individual. As argued above, biological aging processes differ across individuals based on both genetic and environmental factors. Moreover, difference should not preclude equality of opportunity. Feminists have long argued that equality does not mean sameness.<sup>18</sup> According to Fredman, the focus should be on “the facilitation of choice or autonomy, the protection of dignity and the enhancement of participative democracy or social inclusion,” despite differential experiences.<sup>19</sup>

### ***Literature on Age Discrimination in Migration Law, Policy, and Practice***

There is only an emerging body of literature and case law on age discrimination generally, with even less on age discrimination in migration contexts. In Western liberal democracies, the impetus for much of the work on age discrimination came from a concern about discrimination against older people in the labour force. The Age Discrimination in Employment Act (ADEA) was passed in 1967 in the United States to outlaw discrimination on the grounds of age in employment against workers over the age of forty. The Irish Employment Equality Act of 1998 prohibits age

discrimination in employment against workers aged eighteen to sixty-five. The EU adopted a non-binding Code of Practice on Age Diversity in Employment in 2000. All of these provisions set important precedents, but are limiting: they address employment exclusively and apply to specific chronological age groups.

International human rights conventions are based on the principles of equality and dignity for all human beings. As Article 1 of the Universal Declaration of Human Rights states, all human beings are “born free and equal in dignity and rights.” Age as a ground for discrimination is found more broadly in some national constitutions.<sup>20</sup> Where the provisions of the constitution extend to all people in that country—regardless of citizenship—this opens the door for advocacy on eliminating age discrimination against migrants.

However, very little attention has been paid to the pervasive and systematic age discrimination in migration law, policy, and practice. Some literature exists on the limits to rights of children born in countries of asylum/migration to non-citizens. Claire Breen<sup>21</sup> analyzes age discrimination in relation to Irish-born children of asylum-seekers, while Jacqueline Bhabha<sup>22</sup> has similarly exposed the “citizenship deficit” of American-born children of migrants without status and children globally who are “functionally stateless” as the result of the irregular immigration status of their parents.<sup>23</sup> Thronson has also extensively analyzed the rights of migrant children in the United States and argues that immigration law lags behind other areas of law in the implementation of children's rights.<sup>24</sup>

Research in Australia<sup>25</sup> and Canada<sup>26</sup> has challenged discrimination against migration of older people, on ethical, family reunification, and economic grounds. Importantly from a policy perspective, both studies provide empirical evidence that refutes assumptions that older people will be economic “burdens” to host communities.

While there is thus a nascent interest in age discrimination in migration, the literature is patchy—limited to specific issues (e.g., citizenship status and employment) and countries (Ireland, Australia, Canada, and the United States). Articles in this special focus begin to partially address knowledge gaps by covering a wider range of issues and countries, but much more research is necessary, as discussed in the final section.

### ***Key Themes in This Special Focus***

The four articles in this special focus address different thematic areas in different contexts of forced migration, but they share some common themes that help to advance understanding of discrimination on the basis of chronological age, biological development, and family status. One such

theme is intersectionality: “the interrelation of multiple, crosscutting institutionalised power relations.”<sup>27</sup> Grossman-Thomson’s article specifically addresses the intersection of gender and social age in contexts of patriarchy and paternalism in Nepal, which lead to discriminatory laws preventing the out-migration to Gulf States of females under the age of thirty. Her analysis indicates that social norms about age and migration are conditioned by perceptions of gender and religion. Similarly, Silverman argues that the intersection of age, gender, and nationality results in “triple discrimination against male Afghan ‘imposter-children.” These articles demonstrate that age groups—whether defined by chronology or social markers—are not homogenous categories. There is diversity within age-related experiences based on other characteristics, particularly gender, religion, race, class, and migrant status. These power relations intersect to create overlapping experiences of discrimination.

Another important finding across the articles in the special focus is related to family status. Both Kanics’s and Silverman’s articles draw attention to “accompanied” vs. “unaccompanied” children. While the latter are often assumed to be particularly vulnerable, Kanics demonstrates how children who migrate with their parents are routinely denied access to migration-related decisions, despite “best interests of the child” provisions within the Convention on the Rights of the Child and domestic legislation. Indeed, the relative privileging of unaccompanied minors within national and international legislation may lead to what Silverman has cynically described as the “imposter child syndrome.”

All articles address, in different ways, how legal categories have real consequences in people’s everyday lives. Seibel’s research underscores the transformation of “bureaucratic birthdates”—invented for administrative purposes—into unquestioned biographical “facts,” which determine people’s access to social services and funding. Silverman demonstrates how young migrants without documentation navigate legal definitions of childhood.

The research presented in this special focus highlights the pervasiveness of age discrimination in migration contexts across the world and across the age spectrum. In some cases, age discrimination is in contravention of age-related provisions, such as the “best interests of the child,” as demonstrated by Kanics. At other times, age discrimination is explicitly part of national legislation, as per Grossman-Thomson’s research in Nepal.

### ***Recommendations for Future Work on Age Discrimination and Migration***

The articles in this special focus thus make important contributions to the emerging literature on age discrimination

and migration, but much more remains to be done. First, research should build on these and other studies to implement a more holistic understanding of age, beyond chronologically defined essentialized age categories. We need to be thinking of age across the life course, and developing tools and understandings of age that take into account individual and cross-cultural variations in experiences. Given the pervasiveness of chronological age categories as efficient administrative indicators, there is a practical imperative to develop alternatives.

This leads to a second recommendation: the need for both normative and utilitarian arguments and advocacy against age discrimination. At a normative level, one can argue that age discrimination is unjust. However, policy and legal change is more likely to occur when these social justice arguments are accompanied by more pragmatic discussions of why age-biased laws and policies do not work in practice. For this, we need more empirical evidence to test assumptions upon which age-based differentiations are made. The literature reviewed above and the articles in this special focus provide some important case studies, but larger-scale quantitative initiatives would help to complement the literature, which relies mostly on smaller scale case studies in particular places and/or about specific age groups or immigration categories.

Third, there is a need for deep interdisciplinary collaborations in research on age discrimination. Even within the small number of articles in this special focus, the disciplines of law, philosophy, anthropology, and political science are represented. We need more of this interdisciplinary dialogue, with increased collaboration across the social and natural sciences. In particular, psychologists and physicians have much clinical evidence to offer and should be invited into discussions with legal and social science scholars to better understand the pervasive and multi-faceted areas of age discrimination.

Finally, we need concerted, international efforts to advocate for more attention to age discrimination. Scholars would benefit from partnerships with interested groups from outside of academia, including child rights and age rights organizations. To effect change, we need a broad-based movement that challenges age-based stereotypes and assumptions, which are deeply entrenched in law and policy and normalized in everyday social interactions.

### **NOTES**

- 1 The author gratefully acknowledges the research assistance of Emily Leahy and Neena Sethi. The workshop on which this special focus is based was funded by a grant

- from the Social Sciences and Humanities Research Council of Canada.
- 2 United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25, 20 November 1989, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.
  - 3 Johanna Reynolds and Christina Clark-Kazak, "Restructuring Canadian Refugee and Settlement Policy to Reduce Age Discrimination? A Social Age Analysis of the Canadian Immigration and Refugee Protection Act (IRPA) and Its Regulations" (paper presented at the Canadian Association for Refugee and Forced Migration Studies Conference, 17 May 2012, Toronto).
  - 4 Seibel, this volume; see also Faith Nibbs, *Belonging: The Social Dynamics of Fitting In as Experienced by Hmong Refugees in Germany and Texas* (Durham: Carolina Academic Press, 2014).
  - 5 John Gimley Evans, "Age Discrimination: Implications of the Ageing Process," in *Age as an Equality Issue*, ed. Sandra Fredman and Sarah Spencer, 11–20 (Oxford: Hart Publishing, 2003).
  - 6 Reynolds and Clark-Kazak, "Restructuring Canadian Refugee and Settlement Policy."
  - 7 See, for example, Christina Clark-Kazak, *Recounting Migration: Political Narratives of Congolese Young People in Uganda* (Montreal and Kingston: McGill-Queen's University Press, 2011).
  - 8 Christina Clark-Kazak, "Towards a Working Definition and Application of Social Age in International Development Studies," *Journal of Development Studies* 45, no. 8 (2009): 1–18.
  - 9 As indicated in the referencing, this section draws extensively on the seminal work of Sandra Fredman and Sarah Spencer and their edited volume *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart Publishing, 2003). However, while Fredman and Spencer frame age as an equality issue, I have chosen to use the term *equity*. *Equality* connotes treating everyone equally, while *equity* recognizes and accommodates differential experiences and ability.
  - 10 Sandra Fredman, "The Age of Equality," in Fredman and Spencer, *Age as an Equality Issue*, 38.
  - 11 Simon Biggs, Marthe Fredvang, and Irjaa Haapala, "Not in Australia: Migration, Work and Age Discrimination," *Australasian Journal on Ageing* 32, no. 2 (2013): 125–9.
  - 12 Claire Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Leiden: Martinus Nijhoff Publishers, 2006), 21.
  - 13 Fredman, "Age of Equality," 21.
  - 14 Samule Issacharoff and Erica Worth Harris, "Is Age Discrimination Really Age Discrimination: The ADEA's Unnatural Solution," *New York University Law Review* 72, no. 4 (1997): 780.
  - 15 Alan Williams, "Intergenerational Equity: An Exploration of the 'Fair Innings' argument," *Health Economics* 6, no. 2 (1997): 117–32; Dennis McKerlie, "Equality between Age-Groups," *Philosophy and Public Affairs* 21, no. 3 (1992): 275–95.
  - 16 Fredman, "Age of Equality," 38.
  - 17 Ibid.
  - 18 Joan W. Scotty, "Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism," in *Feminist Theory Reader: Local and Global Perspectives*, ed. C. McCann and S.-K. Kim (New York: Routledge, 2003), 389.
  - 19 Fredman, "Age of Equality," 38.
  - 20 Anne-Marie Mooney Cotter, *Just a Number: An International Legal Analysis on Age Discrimination* (Hampshire, UK: Ashgate, 2008).
  - 21 Breen, *Age Discrimination and Children's Rights*.
  - 22 Jacqueline Bhabha, "The Citizenship Deficit: On Being a Citizen Child," *Development* 46, no. 3 (2003): 53–9.
  - 23 Jacqueline Bhabha, "Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?," *Human Rights Quarterly* 31 (2009): 410–51.
  - 24 David B. Thronson, "Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law," *Ohio State Law Journal* 63 (2002): 979–1016; and David B. Thronson, "Entering the Mainstream: Making Children Matter in Immigration Law," *Fordham Urban Law Journal* 37 (2010): 393–413.
  - 25 Biggs, Fredvang, and Haapala, "Not in Australia."
  - 26 Madine VanderPlaat, Howard Ramos, and Yoko Yoshida, "A Preliminary Investigation of the Contributions of Sponsored Parents and Grandparents in Canada," *Canadian Journal of Ethnic Studies* 44, no. 3 (2012): 79–96.
  - 27 Johanna Brenner, *Women and the Politics of Class* (New York: Monthly Review, 2000), 293.

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# Bureaucratic Birthdates: Chronometric Old Age as Resource and Liability in U.S. Refugee Resettlement

KIMBERLY SEIBEL

## Abstract

*This article examines age in refugee resettlement by connecting it to the bureaucratic contexts in which refugees acquire and become categorized by birthdates found in their documents. Frequently used as an objective metric, chronometric age takes on new meaning in migration and determines access to work and welfare. This article traces the trajectory of age documents of refugees in a program for “seniors” (sixty and up) in Chicago, Illinois. Drawing upon anthropology and critical gerontology scholarship, I resituate chronometric age in the dynamic relationship between institutions and definitions of old age in the United States. My purpose is to call attention to the consequences of applying U.S. concepts of age to refugees with limited resources.*

## Résumé

*Cet article étudie la question de l'âge dans la réinstallation des réfugiés en la reliant aux contextes bureaucratiques à travers lesquels les réfugiés sont identifiés et classifiés selon la date de naissance qui se trouve sur leurs documents. L'âge chronométrique, d'usage fréquent comme mesure objective, acquiert une signification nouvelle dans le contexte de la migration et détermine l'accès à l'emploi et à l'assistance publique. Cet article retrace le parcours des documents portant sur l'âge des clients d'un programme pour « personnes âgées » (60 ans et plus) qui sont réfugiés à Chicago (Illinois). En faisant appel aux recherches en anthropologie ainsi qu'en gérontologie critique, je recontextualise le concept de*

*l'âge chronométrique dans la relation dynamique entre les institutions et les définitions de la vieillesse aux États-Unis. Mon objectif est d'attirer l'attention aux conséquences qui en résultent si les concepts de vieillesse aux États-Unis sont appliqués à des réfugiés disposant de ressources limitées.*

## Introduction

“Do you know how old you are?” I asked at the very opening of an interview with a couple from Burma/Myanmar. My interpreter translated my questions into Karen as we sat at a small table in the living room of their one-bedroom apartment. Saw Ker Por<sup>1</sup> received Supplemental Security Income (ssi) because his documents established his age as seventy-two. Naw Nee Ah, who took care of their disabled daughter, was fifty-nine according to her documents and, therefore, not eligible. Looking at them both, I found it hard to believe that she was not the same age as her husband, but neither seemed to care as much as I about their numerical ages.

“My age is sixty,” Saw Ker Por said initially, laughing before calling to his wife, “Where has she gone to?”

“I don't know how old you are,” Naw Nee Ah answered.

“Sixty,” he said, “It is in the papers.” In interviews with refugees like Saw Ker Por, I learned that the date in one's documents created a potential gap between refugees' and the U.S. resettlement program's understandings of age.

Carried through airports often in plastic 10M<sup>2</sup> bags, the documents of newly arrived refugees sometimes contain generic birthdates—1 January for many, 1 July for some Iraqis. Whatever their significance in home countries

or displacement contexts, these birthdates take on new meanings in the United States. Chronometric age enables U.S. resettlement bureaucracies to process refugees from diverse backgrounds and displacement experiences primarily through mainstream social services. The goal of refugee resettlement is economic self-sufficiency through employment as soon as possible. According to federal policies, refugees eighteen to sixty-four years old are “working age,” and sixty-five and older are “non-employable” and “retirement age.”<sup>3</sup> The characteristic “work or welfare”<sup>4</sup> approach of U.S. resettlement relies upon categorizing refugees by age.

Documents with chronometric age enable newly arrived refugees to apply for mainstream programs like ssi, but this approach creates some problems. Refugees under sixty-five who did not fit disability standards were expected to work or rely on family members. As “older” workers, they struggled to find and keep appropriate jobs. Case managers had little incentive to help refugees eligible for ssi who still wanted to work. Those who received ssi were vulnerable to losing benefits after seven years unless they were able to pass the citizenship exam. To get around this problem, resettlement programs and refugees sought medical exemptions for this exam with varying success. This tactic reinforced the tendency to limit efforts to integrate refugees deemed non-employable by age, rather than address underlying issues, such as a lack of English language or other skills or unrecognized education credentials or work histories. These are increasingly issues for current incoming groups<sup>5</sup> and pose a problem to address under current ways of organizing resettlement.

Exploring how bureaucracies provide and process refugees according to birthdates in their documents brings attention to how U.S. constructions of age and aging become transposed onto refugees. I explored the role of age in bureaucratic processes while conducting research at a program serving refugee “seniors” (sixty years and up) in Chicago.

Bureaucratic processes ascribe certain ideas of old age in the U.S. context to refugees. Birthdates provide a means of calculating chronometric age whose significance arises from the assumption that it “will give the most precise and objective information about persons.”<sup>6</sup> The term *chronometric age* best describes my observations of the resettlement process as it functioned as “a pseudo-exact labelling device” by which in “a single tick of the clock, one finds oneself in another category.”<sup>7</sup> In the United States, age is used to assign people status, presenting similarities or differences where there often are none.<sup>8</sup> I view this approach as a sort of mistranslation that raises the need to examine the cultural ideologies in which chronometric age is embedded.

Anthropology can provide cross-cultural and critical perspectives to make visible the influence of age ideologies

in refugee and migration policies. Research has countered the idea of aging as universally chronological.<sup>9</sup> Collapsing age into chronometric age is a problem, because ultimately “chronometric time is just one, quite limited, way to conceive time” that is “important because of its instrumental and calculative qualities.”<sup>10</sup> Categories such as “youth” or “elderly” are also not stable, neutral, or objective but linked to political-economic changes and interactions with the state.<sup>11</sup> To address such issues, age should be considered as an explicit analytic—on the level of gender, race, and class—for examining power dynamics in migration and globalization processes.<sup>12</sup>

Research on the categorization of refugees is important, because “these attempts to figure out who refugees are reveal a great deal about the categories that Americans use to assign people to their proper place.”<sup>13</sup> Scholars have linked the “productive citizenship” emphasis in resettlement<sup>14</sup> with employment as the basis of social citizenship to processes of inequality based on gender, race/ethnicity, and class, “categories and mechanisms that daily produce the norms of differential belonging.”<sup>15</sup> Age and aging belong among these considerations. My approach is to trace the actual processes of ascribing age to refugees and the ideas and resources attached to it.

### **Research Context: The Senior Program**

Midwest Migration Services (MMS) was one of two Senior Programs in all of Illinois after a reduction in the state’s Services to Older Refugees discretionary grant in 2012. The goal of these programs was to provide refugees<sup>16</sup> with case management services to facilitate their access to a shifting cast of targeted and mainstream social services subject to funding changes and cuts. In addition to case managers, the program relied on volunteers, family members, friends, and clients themselves to perform the paperwork and advocacy needed to achieve access to such programs.

From 2013 to 2015<sup>17</sup> I took on an active participant-observer role at the Senior Program at MMS. I accompanied clients to appointments at local Social Security and Illinois Department of Human Services offices, assisted with monthly senior workshops and field trips, and attended relevant meetings. I also interviewed staff members and volunteers at Midwest Migration Services and other local resettlement agencies, community-based organizations, advocacy organizations, and relevant government resettlement and social services agencies.

I conducted life history interviews of refugees enrolled in the Senior Program and reviewed their case files and identification documents. My participants were thirty refugees from twenty-three households: ten (five men, five women) from Iraq,<sup>18</sup> eleven (five men, six women) from Bhutan,<sup>19</sup>

and nine (seven men, two women) from Burma/Myanmar.<sup>20</sup> These three groups were the largest nationalities in the Senior Program and also accounted for more than half of refugee admissions in recent years.<sup>21</sup> I hired community members to interpret, transcribe, and translate interviews conducted in the refugees' homes, often with family members present. All of the participants were in their sixties to eighties according to their documents and had been in the country for seven or fewer years. In formal, semi-structured interviews, I asked about their work and education histories, migration trajectories, English language learning, and feelings of in/dependence in the United States. I also asked them to compare ideas of age and later life support systems in their countries of origin with those in the United States.

My research participants would have been difficult to locate outside of a context such as the Senior Program, which faced difficulties reaching out to seniors not resettled by their agency. It is unclear whether refugees not included in the program would have been different from those in my study. Like many refugee programs and researchers, I also relied on interpreters working in many different languages (Karen, Burmese, Assyrian, Arabic, and Nepalese) to reach my non-English-speaking participants. Still I was able to interact with my participants and their family members outside of the program in greater depth. My combination of active participant observation and interviews enabled me to gain access to a diverse group of refugees and their encounters with U.S. resettlement bureaucracy.

### ***Chronometric Markers of Old Age in the United States***

Divorced from the political, economic, and social contexts, chronometric age distinctions in refugee resettlement raise questions about the basis upon which the U.S. government and associated agencies grant assistance to refugees and U.S. citizens. Preconceived categories are a problem in attempts to understand and assist refugees.<sup>22</sup> Labelling refugees as "youth," often according to Western criteria and norms, can obscure their engagement in political and economic activities.<sup>23</sup> In terms of aging, the supposed precision of chronometric age "obstructs the acknowledgment of constitutive narratives about aging and reproduces them without any critical reflection."<sup>24</sup> The hidden assumptions of chronometric age are essential to understanding how refugee resettlement programs "read" the birthdates on refugees' documents.

Perspectives from recent critical gerontology scholarship show how understandings of old age take on meaning in relation to the historical and institutional contexts of working and retirement in the United States. Through the development of the welfare state, age became a basis upon

which governments managed the productivity of a population as well as identified and addressed social problems arising from the risks of industrial capitalism.<sup>25</sup> Bismarck first instituted retirement age—seventy years—in Germany in 1889.<sup>26</sup> Later than European countries, the United States established Social Security in 1935, followed by the Older Americans Act (OAA) in 1965, and these policies greatly reduced the poverty of older Americans.<sup>27</sup>

Over time these retirement policies became the markers of old age itself<sup>28</sup> and contributed to negative characterizations of the elderly.<sup>29</sup> The transfer of social welfare from the family to public institutions,<sup>30</sup> processes that were related to a growing middle class,<sup>31</sup> helped produce age grades or norms and contributed to the greater uniformity of the life course in segments of U.S. society in the post-Second World War era.

Concepts of old age continue to reflect shifting relationships between individuals and the labour market. The linking of old age to employability can reinforce government practices that use retirement age as a means of managing surplus labour.<sup>32</sup> In many Western countries, a fixed age of retirement "encouraged the view that, past a certain age, an individual's economic and social worth is diminished."<sup>33</sup> A cultural legacy of these policies was to transform the social meaning of aging to labour market criteria such as employability and open the doors to the devaluation of older people in the labour market.<sup>34</sup> The United States has legislated against age discrimination, beginning with the 1967 Age Discrimination in Employment Act (ADEA) and banned mandatory retirement at any age altogether in 1986.<sup>35</sup>

Chronometric age is an example of governmentality implicating self-knowledge and personal conduct<sup>36</sup> in its new social and personal meanings.<sup>37</sup> Expressions such as "looking good for your age" or "aging badly" express disjuncture between aging and chronometric age but still reinforce the use of age as a guidepost in the United States.<sup>38</sup> Chronometric age continues to be used as an indicator of health, productivity, vulnerability, and, of course, aging, despite the fact that it is not a determinant of any of these.<sup>39</sup>

Chronometric definitions implicate social inequalities, even as they treat old age as genderless and stripped of class and race/ethnicity, rendering forms of privilege, such as retirement, invisible.<sup>40</sup> Race and class inequalities in the labour market contribute to differences in later life resources, such as African Americans having to rely on disability rather than retirement.<sup>41</sup> Gender-based discrimination, including lifelong income inequality and retirement policies based on the male breadwinner, disadvantage women in later life.<sup>42</sup>

Concepts of old age can enforce normative ideas of aging, despite the fact that the prosperity and consumer lifestyles

associated with retirement are often limited to a privileged segment of the population. For example, middle-class prosperity and the mass consumer youth culture of the baby boomer generation contributed to “third age,” meaning “life after the responsibilities of paid employment and child rearing are over,”<sup>43</sup> defined in contrast to “fourth age” or “dependence, decrepitude and death.”<sup>44</sup> In the 1990s and 2000s, neo-liberal policies and changes in the labour market have eroded the income pillars of retirement security—welfare, employers, and personal savings.<sup>45</sup> Lifelong employment is more rare, and employers take less responsibility for the old age of their employees.<sup>46</sup> Recent “anti-aging” and “successful aging” discourses suggest that that “fourth age” is within one’s power to avoid or delay and reinforce aging as a personal responsibility whose risks are to be managed individually rather than collectively.<sup>47</sup>

Conducting life history interviews with refugees serves as a reminder that retirement is not a universal life stage but a privilege based on resources. Labelling refugees dependent upon ssi and family members as “retirement age” masks such differences in later life circumstances.

### *Establishing Age in Refugee Settings*

Retirement can often evoke a fixed age or life stage, but Mr. Karim Hussain had moved in and out of retirement in his lifetime. A divorced musician from Iraq, he was unique among my research participants in having had one lifelong career. When this livelihood put him at risk of violence in Iraq, he moved to Syria, where he spent eight years living on retirement money from Iraq while still practising his profession. After being resettled to the United States, he supported himself with ssi based on age (seventy), which he referred to as his “retirement money.”

Sitting in the living room with Mr. Hussain and his son, I talked to the elder about age and retirement in the United States and Iraq, with the help of my interpreter. When I asked him what age he thought people should retire at, he said fifty or fifty-five. When I said that in the United States it was sixty-five, he responded, “Well, I come from Iraq. So I feel that I am retired.” I asked him about his birthdate, and he said that he knew his birth year but not the day. He explained that many Iraqis have 1 July birthdates through some process that happened a long time ago for some people in his generation. The date of one’s birth was not important. “They forget about it actually,” Mr. Hussain said.

Using chronometric age in refugee resettlement presumes that everyone knows his or her birthdate. Given that refugees are by definition people who have fled their countries under fear of persecution,<sup>48</sup> the dates in their documents can reflect complicated, exclusionary, or absent relationships to bureaucracies.

When refugees do not have these documents, UNHCR and its affiliate NGOs must provide them with one before they can refer cases for resettlement to the United States. Some refugees never knew their birthdates, and they can provide only a year or a best guess. A staff member or translator might make an error during processing, or refugees might purposefully disguise their birthdate during different points in their displacement trajectories.<sup>49</sup> The de facto generic birthdate provided by UNHCR or affiliates is 1 January. But as in the example of Mr. Hussain, even generic birthdates vary culturally, and registration before and during displacement can affect subsequent processes.

As universal as it might seem at times, documenting age varies with culture as well as a country’s resources, politics, and bureaucratic organization. The UN statistics department in its annual Demographic Yearbook raises some of the difficulties involved in documenting age and forming comparisons between countries. These include “differences in the method of reckoning age,” such as in the Chinese system, in which “a child is considered one year old at birth and advances an additional year at each Chinese New Year,”<sup>50</sup> and “a general tendency to state age in figures ending in certain digits (such as zero, two, five and eight).”<sup>51</sup> Different traditional calendars<sup>52</sup> and conversions between them can also create problems.

Having statistics on age, birth, and death in a country requires a functioning government with a good relationship to its people—something that is by definition a problem for a country whose members are violently excluded. As in Bhutan and Burma/Myanmar, governments can exclude by denying or revoking documentation.<sup>53</sup> In Iraq, conflicts from the 1990s onward have limited civil registration activities and shaped the birthdates encoded through them. A report by the UN in 2007 noted incompetence as well as deliberate actions by the population:

The system is unreliable—sometimes people intentionally give out inaccurate information to avoid compulsory military services or for certain financial benefits. Administratively, there are not enough registration offices around the country. There is one headquarter office located in Baghdad and 11 suboffices in the city. For the rest of the country, only 1 office exists in each province to cover the registration. The registrars are lack of [sic] qualifications and experiences and most of them are just barely literate. The registration of vital events is not complete, nor does it cover all areas in the country. From the most recent studies on fertility and mortality, the coverage of birth and registration in Iraq is 68% and 34%, respectively.<sup>54</sup>

Whether one is from a rural or urban area, born in a hospital or at home can affect birth registration. UNICEF notes a

concern that “only half of the children under five years old in the developing world have their births registered.”<sup>55</sup> Some Iraqis were never given nor sought out documentation of their births. Even the former dictator of Iraq, Saddam Hussein, did not know his birthdate, which is listed in one official biography as 1 July 1939. He later established it officially as 28 April 1937 to appear more authentic and to make himself appear older.<sup>56</sup> The connection between birth and date is not always so clear-cut.

Because refugees often move through different contexts, a birthdate given in one setting for skirting labour laws or conscription into military service could become a problem for accessing government benefits immediately or decades later. Ages cannot be objectively assessed,<sup>57</sup> but bureaucratic processes create a basis for certainty and precision. Many refugee, asylum, and other migration processes hinge on determining age and categorizing people based on it, creating opportunities or disadvantage in different places and life stages.

### ***Entry to the United States: Age Categorization in Refugee Resettlement***

Refugees carry their ages in physical documents into the U.S. system, usually in the form of a passport or travel document and an I-94.<sup>58</sup> The last is a small white card that documents the entry of non-citizens by the Department of Homeland Security and includes birthdate, first and last name, country of origin, date of arrival, and an A or “alien” number on the back. This number serves as an important identifier in resettlement until refugees can apply for and receive a Social Security number. The stamp on an I-94 indicates that the person is a refugee and authorized to work. Such documents prove that a refugee is an “eligible non-citizen” and can receive public benefits.

Chronometric age is important because of U.S. resettlement policies and the larger structure of the welfare state. To help “older refugees” (sixty and over), the federal Office of Refugee Resettlement (ORR) provides discretionary grants to individual states to help refugees access mainstream OAA and other local aging services. The result is that age becomes a means by which refugees and their families gain income and other resources that can serve as an important element of “self-sufficiency” plans.

Once in the United States, refugees and their family members face short timelines for becoming self-sufficient. Every refugee has a primary case manager, who works with families to establish a self-sufficiency plan, as well as apply for a Social Security card and basic benefits, such as Refugee Cash Assistance (for eight months), Medicaid, the Supplemental Nutrition Assistance Program (or Food Stamps), and Temporary Assistance for Needy Families. At Midwest

Migration Services, primary case managers referred clients to two in-house age-based programs: the Senior Program (refugees sixty and older) to apply for OAA and other benefits, and the Youth Program (refugees under eighteen) to enrol in school, day care, or other activities. Case managers refer “employable” or “working age” refugees to the Employment Program, and if enrolled, the staff and the refugee client are held to assessments based on finding and keeping employment.

At every intake to the Senior Program, staff asked refugees for all of their documents, photocopied them, and then placed them in paper case files to be used to apply for mainstream OAA and other government benefits. These case files as well as the number of clients served and the number of referrals to outside programs were the focus of evaluations of the Senior Program. Caseworkers must refer all refugees who are sixty-five and older to apply for Supplemental Security Income, and they may also help refugees under sixty-five apply on the basis of disability. Applying for SSI on the basis of age is considerably easier. It requires less documentation and takes only a few months, compared to the six months to several years to apply for disability, sometimes with the help of an attorney. Age parameters also define eligibility for other OAA benefits in Illinois: senior subsidized housing (sixty-two or disabled, or fifty-five and over for “Reduced Age” Senior buildings), Free Ride transportation pass (sixty-five and more or disabled), Meals on Wheels (sixty and more), and the Low-Income Home Energy Assistance Program (priority application period for sixty and more or disabled).

OAA benefits helped caseworkers as they negotiated limited timelines and self-sufficiency standards. In Illinois, the Community Care Program (CCP) enables family members (other than spouses) to work as caregivers for their older relatives or friends. Eligibility was based on age (sixty and more) and an in-depth assessment whose translation posed a problem for migrants.<sup>59</sup> Caseworkers at Midwest Migration Services regularly made use of CCP, which, along with SSI, formed part of a strategy of “patchworking”<sup>60</sup> a variety of resources for resettlement. Budget issues continue to affect Illinois social services, including CCP, and such resources have grown increasingly scarce under the current governor and his pro-business agenda.<sup>61</sup>

The Senior Program relied on mainstream and targeted programs vulnerable to budget cuts, which affected services clients received. In general, funding for programs for refugees other than employment services was not consistent. For example, a neighbourhood English Language Training program served clients that MMS staff described as “not likely to be employed.” It began as a Women’s Empowerment Program (that admitted men) until MMS received funding to

implement a program designed specifically for “older” refugee learners. After this program was cut in 2012, the class remained through the efforts of a volunteer, still teaching some of the same students for the last ten years. Her unpaid work provided consistency in the English-learning efforts of these refugees.

Without programs to support their pathways to citizenship, refugees cannot depend on government benefits as a means of self-sufficiency. Maintaining benefits, like ssi, requires knowledge of English and bureaucratic processes to avoid reduction or cancellation of benefits. Refugees can lose ssi in seven years if they do not receive citizenship, which requires passing a citizenship test. More than half of refugees arriving in the past several years are not literate in their native language and thus face considerable challenges to learning English.<sup>62</sup> Another option is to have a doctor fill out a medical waiver describing why a refugee is physically or mentally incapable of learning English. To receive approval requires very thorough descriptions, and I learned that doctors were sometimes unwilling to fill out this form, especially for patients whom they hardly knew. In 2008, Congress approved a temporary extension of the time limit to nine years,<sup>63</sup> a stopgap measure that did little to address the root problems underlying the challenges to gaining citizenship. The extension expired in 2011 affecting an estimated 11,000 people.<sup>64</sup> In my research, I encountered several refugees beyond the seven-year limit, and the Senior Program helped them apply for Aid to the Aged Blind and Disabled (AABD), a state program that provides an even lower income than ssi. In 2014, Illinois had just over 100 refugee/asylees on AABD.

Refugees face additional problems that mainstream OAA and other programs do not address, such as the loss of traditional status or role reversals.<sup>65</sup> Refugees arrive with physical and mental health issues linked to displacement, poor nutrition and health care in refugee camps and third countries. They are often more isolated in the United States than they were in their home countries.<sup>66</sup> Resettlement and the experience of undergoing aging in the United States can be a source of stress for refugees.<sup>67</sup> Clearly policies for mainstream Americans are not set up to address these issues.

### ***Non-Employable by Age***

Despite the resources available to refugees, the use of chronometric age reinforces an uncritical treatment of older persons in the United States as unproductive. Case managers apply for ssi for all refugees over sixty-five, regardless of their ambitions to work. Researchers of U.S. refugee resettlement have noted the strategic use of the “non-employable” category in resettlement agencies as a way to manage limited resources and performance outcomes.<sup>68</sup> Over twenty-five

years ago, Gozdzia reported this problem for older refugees in the United States: “Since it is easier to reach performance goals when working with younger, better educated clients, the agencies may be reluctant to serve more difficult clients.”<sup>69</sup> It reflects the idea that in resettlement, “any ‘difficult’ new case, whether because of age, health, education, or socioeconomic background, is a potential threat to the success of the resettlement program.”<sup>70</sup> Making use of a non-working, “retirement” role is certainly easier.

Resettlement staff often pointed to the fifty-to-sixty-four age group as the most difficult to help. Staff at Midwest Migration Services told me that refugees in their sixties who sought assistance in finding employment were rare. Members of the Employment team talked about holding easier positions, such as cleaning up at a local theatre, for people who would otherwise have trouble finding work. I learned from my interviews with refugees that sometimes caseworkers told them that they could not work. For example, Dhanraj Thapa, a man from Bhutan, told me, “I was expecting to work, but my caseworker ... said to me that I would not be able to work.” Entering the labour market can be difficult, even for Americans perceived as “older.”<sup>71</sup> Refugees who wanted to or had to work faced challenges, from getting hired, to the physical demands of a job that was inflexible to fluctuations in health.

The sharp distinction between working and retirement was also new for refugees from rural backgrounds that would have transitioned to easier tasks before stopping work, if at all. Not having a job can make it difficult for refugees to feel integrated.<sup>72</sup> The standard of sixty-five years as “retirement age” was higher than Mr. Hussain and some others expected. Many of my participants felt that better health care and other conditions made aging happen more slowly in the United States than it had for them. Still others expected to work their whole lives. As a form of later life support, getting ssi was more reliable than relying on family members, but it also limited my refugee participants’ overall integration.

### ***Generic Age in the Social Security System: What Does “Aged” Mean?***

Getting a Social Security Card was an important initial step in resettlement and an entry point into an enormous government program and bureaucracy that currently provides benefits for 61 million Americans.<sup>73</sup> These include retired and disabled workers, their dependents, and survivors.<sup>74</sup> A generic redbrick building with small, square windows and glass front doors was the preferred local office for Midwest Migration Services. It housed two programs: employment-based Social Security, and means-tested ssi. Both programs employ chronometric age distinctions, but only people with

a recognized employment history have access to Social Security. The ssi program defines “aged” as precisely sixty-five years and older.<sup>75</sup>

On an early January morning, I accompanied a Congolese man to apply for ssi. He had just turned sixty-five, according to his documents. He, an interpreter from Midwest Migration Services, and I were seated on grey metal chairs clustered around the desk of a Social Security caseworker. As we passed over the documents for him and his family members, I noticed that his entire family had 1 January birthdays. When I asked him about it, with the help of the interpreter, he explained that he had told the interpreter at the refugee camp his birthdate, but the UNHCR representative wrote 1/1 anyway. Despite this discrepancy, his documents had now indicated his status as eligible for ssi, a moment that Midwest Migration Services had been eagerly anticipating. With ssi, the family would no longer need rent assistance, but they could only schedule an appointment to apply after his bureaucratic birthdate.

Social Security is a form of social insurance. Workers in the United States earn points towards their retirement, and they need at least ten years of work in the United States (or in countries with agreements with the United States) to qualify for these benefits. Supplemental Security Income is a means-tested program funded through general government revenue. Established under the Nixon administration, ssi federalized state programs for people who are blind, disabled, or “aged,” and have limited income or assets. Since 1974, ssi has provided income at three-quarters of the poverty level: currently \$733 for an individual and \$1100 for a married couple. Rates of accessing ssi are lower than those for Social Security, as “means-tested programs such as ssi have generally had difficulty in achieving high rates of participation among those eligible.”<sup>76</sup> Programs like ssi are always made through “a claim based on a socially produced understanding of what is fair treatment.”<sup>77</sup> Managing program constraints, resettlement caseworkers use refugees’ ages to access ssi, reinforcing an arbitrary definition of “aged” applied to refugee newcomers. Without recognized work histories, refugees have no access to Social Security, and as a result, their future incomes and conditions of aging are pinned to their families or this federal program.

### Conclusion

U.S. resettlement programs use chronometric age to integrate and assign status to newly arrived refugees with a self-sufficiency focus that clearly implicates age. The “work or welfare” paradigm in U.S. resettlement supports the narrow scope of the program, and age categorization obscures a host of challenges to integration. The refugees I studied struggled to find meaningful roles and to learn English

in order to get citizenship and maintain benefits that supported them and their families. Chronometric age was the basis for securing access to mainstream OAA and other services, but the age guidelines created an arbitrary division between refugees worthy of assistance and those who were not. Such guidelines create problems for refugees who rely on family or finding appropriate work as a newcomer and “older” worker.

Chronometric ages can appear neutral but are inherently linked to the moral and political economy of the welfare state. Governments have used the institutional life course and chronometric age parameters to manage the risks and relationships to the market, and one result is that concepts of age, including chronometric age, are laden with normative ideas. By assigning characteristics to individuals, ideas of age can obscure hidden forms of privilege and inequality in later life, such as retirement. Refugees lack the place-based work histories that form the basis of Social Security claims, but they are still considered “retirement age” if they receive a meagre income through ssi. U.S. resettlement and associated programs gloss over these issues when they use refugees’ bureaucratic birthdates as the basis of categorization and assistance.

This article has focused primarily on “older” refugees, but its findings highlight the need for critical analysis of the underlying assumptions and ideological framings of age and aging in refugee policies and practices and what these patterns indicate about structural inequalities in the United States. Examining the bureaucratic basis of ages in refugees’ documents is the approach I have taken. Birthdates and chronometric ages make refugees “legible”<sup>78</sup> to different bureaucracies. This process, however, assumes that refugees have an age, divorced from context that is true and consistent as they move through different migration contexts. Refugees are in flux, crafting new identities, and adapting to new social and economic conditions; therefore, a more useful approach is to consider how concepts of age might limit or enable refugees in accessing rights and resources for meaningful integration.

### NOTES

- 1 Following standard ethnographic practices, I have given a pseudonym to the research organization and all of my research participants.
- 2 The International Organization of Migration (IOM) is responsible for coordinating all travel for resettled refugees.
- 3 Refugees are also exempt from employment if they are pregnant, disabled, or a primary caretaker of someone at home, such as a child under the age of one. At sixteen, refugees are technically able to work but are usually in school. Office of Refugee Settlement, “Report to the Congress: Proposed Refugee Admissions for Fiscal Year 2016”

- (Washington, DC: U.S. Department of Health and Human Services, October 1, 2015), <http://www.state.gov/documents/organization/247982.pdf>.
- 4 Mansha Mirza, "Occupational Upheaval during Resettlement and Migration: Findings of Global Ethnography with Refugees with Disabilities," *Occupational Therapy Journal of Research: Occupation, Participation, Health* 32, no. S1 (2012): S7–S14.
  - 5 Randy Capps, Kathleen Newland, Susan Fratzke, Susanna Groves, Michael Fix, Margie McHugh, and Gregory Auclair, "The Integration Outcomes of U.S. Refugees: Successes and Challenges," Migration Policy Institute, June 2015, <http://www.migrationpolicy.org/research/integration-outcomes-us-refugees-successes-and-challenges>.
  - 6 Jan Baars, *Aging and the Art of Living* (Baltimore, MD: Johns Hopkins University Press, 2012), 8.
  - 7 *Ibid.*, 32.
  - 8 Chris Phillipson, *Ageing*, Key Concepts Series (Cambridge: Polity, 2013), 57; Baars, *Aging and the Art of Living*, 53.
  - 9 Caroline H. Bledsoe, *Contingent Lives: Fertility, Time, and Aging in West Africa*, Lewis Henry Morgan Lectures 1999 (Chicago: University of Chicago Press, 2002); Susan J. Rasmussen, *The Poetics and Politics of Tuareg Aging Life Course and Personal Destiny in Niger* (DeKalb: Northern Illinois University Press, 1997); Margaret M. Lock, *Encounters with Aging: Mythologies of Menopause in Japan and North America* (Berkeley: University of California Press, 1993); David I. Kertzer and Jennie Keith, eds., *Age and Anthropological Theory*, Cornell Paperbacks (Ithaca, NY: Cornell University Press, 1984).
  - 10 Baars, *Aging and the Art of Living*, 7.
  - 11 Sue Ruddick, "The Politics of Aging: Globalization and the Restructuring of Youth and Childhood," *Antipode* 35, no. 2 (1 March 2003): 334–62; Julia Meredith Hess and Dianna Shandy, "Kids at the Crossroads: Global Childhood and the State," *Anthropological Quarterly* 81, no. 4 (2008): 765–76, doi:10.1353/anq.0.0035.
  - 12 Jennifer Cole and Deborah Lynn Durham, eds., *Generations and Globalization: Youth, Age, and Family in the New World Economy*, Tracking Globalization (Bloomington: Indiana University Press, 2007); Ruddick, "Politics of Aging"; Sarah Lamb, "Aging across Worlds : Modern Seniors in an Indian Diaspora," in *Generations and Globalization: Youth, Age, and Family in the New World Economy*, ed. Jennifer Cole and Deborah Lynn Durham, Tracking Globalization, 132–63 (Bloomington: Indiana University Press, 2007).
  - 13 David Haines, *Safe Haven?: A History of Refugees in America* (Sterling, VA: Kumarian, 2010), 14.
  - 14 Dianna J. Shandy, *Nuer-American Passages: Globalizing Sudanese Migration*, New World Diasporas (Gainesville: University Press of Florida, 2007).
  - 15 Aihwa Ong, *Buddha Is Hiding: Refugees, Citizenship, the New America*, California Series in Public Anthropology 5 (Berkeley: University of California Press, 2003), 145.
  - 16 Although I use the term *refugee* here, the Senior Program served asylees, Special Immigrant Visa (siv) holders, and Cuban/Haitian entrants. My interview participants were all refugees resettled to the United States, except for one from Iraq who came via an siv.
  - 17 IRB Study #STU00092039 approved 10 April 2014.
  - 18 This group included Arabic and Assyrian speakers, Christian and Muslim participants. Two participants were originally born in Syria but lived in Iraq with Iraqi-born spouses.
  - 19 Most of these participants were Lhotshampa from Bhutan, but one woman was born in India.
  - 20 This group was composed of mostly Karen and a smaller number of Rohingya and Mon participants.
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# Challenges and Progress in Ensuring the Right to Be Heard and the Best Interests of Children Seeking International Protection

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## Abstract

*Societal attitudes towards children significantly limit the extent to which they are able to realize their rights and can contribute to discrimination against children. Fortunately, legislative reform as well as changes in policies and practices are slowly leading to progress for children, in line with the Convention on the Rights of the Child. Child-sensitive procedures for children seeking international protection are being developed and implemented. It is crucial that these systems be strengthened so that durable solutions for children and families are secured without discrimination and in line with the best interests of the children concerned.*

## Résumé

*Les attitudes d'une société envers les enfants peuvent limiter considérablement leur capacité de faire valoir leurs droits et peuvent contribuer à la discrimination contre les enfants. Toutefois, des initiatives de réforme législative ainsi que des changements en matière de politiques et pratiques sont heureusement en voie d'aboutir à des progrès pour les enfants conformément à la Convention relative aux droits de l'enfant. Des procédés sensibles aux besoins des enfants cherchant la protection internationale sont en processus d'élaboration et de mise en œuvre. Il est essentiel de renforcer ces systèmes afin que des solutions durables pour les enfants et les familles soient assurées sans discrimination et selon l'intérêt supérieur des enfants concernés.*

## Introduction

The treatment of migrant children and consideration of their claims for international protection in industrialized countries are based on the provisions and implementation of international, regional, and national legal and policy frameworks. In order to understand better the gaps and biases in these frameworks and their application, which may lead to discrimination against children in accessing or receiving international protection, it is helpful to consider the historical attitudes and theoretical approaches towards children and childhood. With changes in society and developments in international human rights law, particularly since the adoption of the Convention on the Rights of the Child (CRC)<sup>1</sup> in 1989, it is now recognized that children are endowed with human rights and should be supported to realize those rights. Nevertheless, how do lingering concepts of childhood and family affect the realization of children's rights in practice, particularly for asylum-seeking and at-risk migrant children?

While there has been a great deal of research and advocacy on the situation of separated and unaccompanied migrant children,<sup>2</sup> there has been far less attention given to the rights and protection of children migrating with their families. Accompanied migrant children are often viewed simply as appendages, rather than as separate individuals, who have rights and who may have international protection needs, perhaps even a stronger claim than that of their parents. According to the guiding principles and related obligations set out in the CRC, states should allow each child to express his or her views and to take that into account when considering the best interests of the child without

discrimination and with a view to ensuring the child's right to life, survival, and development. Yet while there is international law and guidelines, few states assess the cases of accompanied migrant children systematically in international protection procedures.

There is a continuing evolution of law in this field at the international, regional, and national levels. Furthermore, states have been pushed to make progress in practice based on recent jurisprudence, auditing of practice, and authoritative guidance from the Committee on the Rights of the Child, UNHCR, and others. Fortunately, some new policies and practices are emerging that seek to operationalize the best-interests principle and to ensure respect for the rights of all migrant children. Child-sensitive and child-friendly international protection procedures—for both unaccompanied and accompanied children, whether asylum-seeking or irregular—are being established and implemented.<sup>3</sup> It is crucial that these systems be strengthened so that outcomes for children and families are secured without discrimination and in line with the best interests of the children concerned. Such “durable solutions” would ensure that the children are able to develop into adulthood, in an environment that will meet their needs and fulfil their rights as defined by the CRC and will not put children at risk of persecution or serious harm.<sup>4</sup>

### ***Children: Our Most Cherished Possession?***

According to Article 1 CRC, a child is defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Despite this legal marker of the age of majority, it is important to bear in mind other social constructs of age that may lead to different understandings of roles and capacities as well as the reality where vulnerability may have no age limit.<sup>5</sup> In assessing the impact of the CRC, Save the Children expressed concern that children's needs are often subsumed within a family agenda and criticized the traditional approach that leaves children with “no voice and no power within families.”<sup>6</sup>

It is not surprising, therefore, that law and jurisprudence often tend to reflect “confused” societal constructs of age, family relations, and attitudes towards children.<sup>7</sup> Our societal view and perception of children and childhood significantly limit the extent to which children are able to realize their rights, and can contribute to discrimination against children. As Thronson and others have emphasized, “Deeply ingrained ideas about children's rights, often unacknowledged and unexamined, shape the way children are perceived and treated.”<sup>8</sup>

Discrimination against children is in part a result of historical attitudes that view children either as controlled

or protected by their parents. Such attitudes stem from the time when children were viewed as “assets” to be controlled or as “wards” to be protected.<sup>9</sup> While this latter approach, focused on the child's welfare, may give rise to special treatment and protection, it does not signify a true appreciation of the rights of the child. Smyth also highlights this “theory gap” and philosophical criticism of child rights as contributing to the “residual ambiguity in law, policy and practice about the status of the child as rights-bearer.”<sup>10</sup> As will be described below, this ambiguity leads to the neglect of children's rights in law and in practice. Smyth rightly stresses that it is important to be aware of this gap because it persists today and continues to inform the legal and policy framework. Therefore, it also limits the outcomes that are possible for children. On the one side of this moral theory debate are those who argue that children lack autonomy and rights and, thus, require protection and child welfare measures. On the other side, liberationists consider children as autonomous rights-holders, even if they may lack capacity to exercise their rights autonomously.<sup>11</sup> Children may require special assistance and supports in order to participate meaningfully in matters that may affect them. Yet a certain age does not necessarily equate to specific level of capacity or correlate with competency.<sup>12</sup> Moreover, even those children who can demonstrate maturity and competency may still need assistance, such as the support of a guardian ad litem in court proceedings, because as children they usually lack legal capacity.

In order to explain why immigration law does not fully recognize children as individuals with independent rights and interests, Thronson argues that debates about children's rights have largely bypassed immigration law.<sup>13</sup> Similarly, Bhabha asserts that the “notorious invisibility of children in international law applies to refugee law in particular—children have simply not been thought of as appropriate subjects of asylum applications or refugee status grants.”<sup>14</sup> She further claims that migration authorities and children's rights experts are separated in silos and that this isolation has militated against the development of a child-specific refugee law regime.<sup>15</sup> This divergent approach can also be seen in domestic legal frameworks where child protection legislation and immigration and asylum law do not accord with each other. This also means that migration authorities rarely request or consider the opinions of child protection professionals, who are working directly with the children concerned, even when children have been placed in the care of national child-protection systems, as is the case in many European countries.<sup>16</sup>

Furthermore, decision-makers in the immigration and asylum system do not take the child's perspective into consideration, because “children are not expected to have a

role or meaningful contribution.<sup>17</sup> Unfortunately, it is not only decision-makers whose attitudes limit the realization of children's rights, but even advocates and parents may not perceive the need to listen to the voices of children or may try to shield them from the asylum process, which is frequently viewed as traumatizing.<sup>18</sup> According to good practice standards, however, an individual assessment should be made whether it is in the child's best interests to be interviewed. Ironically, measures created to protect a child may mean that the child's story is not heard and that the child does not receive a more durable solution to his or her protection needs. For example, Lundberg found that handling officers at the Swedish Migration Board, who were afraid of re-traumatizing children, avoided talking to children and consequently failed to give due weight to the best interests of the child.<sup>19</sup> In this regard, models from the child protection field, such as the Barnahus or Children's House model, could provide inspiration for less adversarial and more child-sensitive asylum and immigration procedures. Thus far in immigration and asylum matters, it has proven difficult for families and authorities alike to recognize the potential vulnerability and special needs of children, while at the same time respecting their rights and entitlements.

### ***From Child Welfare to Child Rights: A More Holistic Approach***

Yet the CRC does exactly that: it acknowledges not only the special needs and vulnerability of children along with their entitlement to protection, but also recognizes their agency and right to participate. While theoretical debates continue, the adoption of the CRC in 1989, followed by its near-universal ratification, have strengthened our understanding of and the realization of children's rights around the world. From a positive law point of view, there is no longer any debate—children have a variety of non-derogable rights as prescribed in the CRC.

States have demonstrated a real commitment to children's rights and made progress in this field through the "General Measures of Implementation" of the CRC, as outlined in General Comment No. 5 from the Committee on the Rights of the Child. Such measures include legislative reform and removal of reservations to the CRC. In several countries, constitutional reform has enshrined children's rights in the national legal framework.<sup>20</sup> At the same time, additional legislative amendments have resulted in elements of the CRC being incorporated directly into specific national legislation concerning immigration and child protection.<sup>21</sup> Notably, a significant number of reservations and declarations to the CRC have been withdrawn.<sup>22</sup> For example, in 2008, as recommended by all of the UK children's commissioners and the UK Parliament's Joint Committee on Human Rights, the UK government withdrew its reservation to CRC Article 22,

which means that all children in the United Kingdom are now entitled equally to the protections afforded by the CRC, regardless of their immigration status.<sup>23</sup> Likewise, Germany also recently withdrew its reservation on Article 22.

With regards to national enforcement of the CRC, while there are different legal traditions across Europe, some national courts have recognized the CRC as a binding obligation in international law that should guide national and European jurisprudence concerning children.<sup>24</sup> Notably, courts in Europe, Canada, Australia, and New Zealand have specifically considered the best interests of the child in cases related to immigration and international protection, including cases involving the potential deportation or extradition of a parent.<sup>25</sup> However, it should be noted that at the same time there may be a divergence of interpretation of the different articles of the CRC, even within a single country.<sup>26</sup> Additionally, inconsistency of approaches and divergence in the commitment to the CRC has been noted, in particular in federal states.<sup>27</sup> Seeking to address these challenges of application and legal interpretation, the Committee on the Rights of the Child clarifies obligations towards children and provides authoritative guidance on the implementation of the CRC in its General Comments and in its Concluding Observations and Recommendations to State Parties.

### ***Children Seeking and Deserving International Protection***

Today states are responsible for ensuring all rights provided for in the CRC to all children, including children attempting to enter their territory.<sup>28</sup> Even before the adoption of the CRC, children affected by armed conflict were recognized as a group deserving protection.<sup>29</sup> UNHCR's policies and programming concerning children have also evolved over the past decades, since it issued its first *Guidelines on Refugee Children* in August 1988.<sup>30</sup>

More recently, with regards to the challenges that children face in applying for asylum, the 2009 UNHCR *Guidelines on Child Asylum Claims* begin by acknowledging,

The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as part of a family unit rather than as individuals with their own rights and interests. This is explained partly by the subordinate roles, positions and status children still hold in many societies worldwide. The accounts of children are more likely to be examined individually when the children are unaccompanied than when they are accompanied by their families. Even so, their unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account. Children may not be able to articulate

their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so.<sup>31</sup>

This is true for both unaccompanied children and children with their families. Yet, unfortunately, accompanied children rarely receive any attention or special assistance in this regard.

The number of children affected by conflict and seeking asylum has grown significantly in recent years. According to UNHCR, more than half of the world's refugees are now children.<sup>32</sup> The number of unaccompanied asylum-seeking children in the EU has increased from 2010 onwards and nearly doubled from 2013 to reach more than 23,100 in 2014. In 2015, 98,400 unaccompanied children applied for asylum in seventy-eight countries.<sup>33</sup> Sweden alone received applications from 35,369 unaccompanied asylum-seeking children and 70,385 children in families in 2015.<sup>34</sup>

Children may be seeking asylum because they have been subjected to or fear being subjected to persecution. UNHCR's *Guidelines on Child Asylum Claims* describe how a well-founded fear of persecution may include violations of child-specific rights, child-specific forms of persecution, and child-related manifestations of persecution where children may not experience harm in the same way as adults.<sup>35</sup> Child-specific forms of persecution include, but are not limited to, under-age recruitment, child trafficking, female genital mutilation, family and domestic violence, forced or underage marriage, bonded or hazardous child labour, forced prostitution, and child pornography.<sup>36</sup> Despite the fact that child-specific persecution is enshrined in EU legislation<sup>37</sup> and has been transposed into national legislation throughout Europe, only a handful of countries have adopted guidelines to assist decision-makers in assessing protection claims from children.<sup>38</sup>

Specifically regarding persecution on political grounds, Bhabha highlighted how the paucity of child-specific country-of-origin information has "obscured the extent to which children are both active political agents and victims of persecutory acts."<sup>39</sup> Smyth has also described how children are perceived as not having a civil and political status, in part as the result of the Western idealized conception of childhood where children are apolitical and unburdened by "adult" concerns.<sup>40</sup> Yet she debunks this antiquated notion when she points out that at least twenty-one provisions of the CRC enshrine civil and political rights.<sup>41</sup> The UNHCR guidelines also emphasize that "it is important to acknowledge that children can be politically active and hold particular political opinions independently of adults and for which they may fear being persecuted."<sup>42</sup>

It has been well documented that children flee from persecution, conflict, poverty and violence. Still, unfortunately,

there is also evidence to support the claim that "the harshest reality for the child refugee often comes after the fact of flight."<sup>43</sup>

#### *Separated and Unaccompanied Children*

As pointed out by Bhabha and Young, a historical shortcoming of asylum law is that it has failed to acknowledge the unique needs of children seeking refuge from human rights violations, and has required that they meet the same procedural, evidentiary, and legal rules as have been applied to adult asylum-seekers.<sup>44</sup> Thronson has also commented that this "unthinking abandonment of children to adult status serves to silence children by not providing them with the means to assure that their voices are heard."<sup>45</sup> Over the past two decades, such treatment has improved for unaccompanied and separated children in many countries in Europe, following research<sup>46</sup> and advocacy efforts, which led to changes to the EU legal framework, national legislation, and practice.

Still, despite the efforts outlined in the EU *Action Plan on Unaccompanied Minors*<sup>47</sup> and implemented by EU agencies—including training modules on interviewing children by the Europe Asylum Support Office and a handbook on guardianship by EU FRA—there is still a need for more legislative reform and better practice within Europe. One indication of the apparent gap in protection is the insufficient and temporary outcomes, which many separated and unaccompanied children have to endure. Even separated children who receive assistance to make their claim are much less likely to receive refugee status than their adult counterparts or to have child-specific forms of persecution recognized.<sup>48</sup> Many children are left with a temporary status that does not respect their best interests or secure their long-term stability and development. Perhaps this is also linked with the "traditional welfare-based approach" noted in the UNHCR handbook and other policy documents that do not give enough significance to the child's agency and right to participate in the asylum procedure, which may lead to unsatisfactory outcomes.<sup>49</sup> In addition, many countries apply temporary non-harmonized protection status<sup>50</sup> specifically for unaccompanied children, which have been criticized as not being in the best interests of the child, since they do not provide a durable solution and can cause great anxiety for the child.<sup>51</sup>

Worryingly, a study by the Council of Europe and UNHCR found that separated and unaccompanied children who reach the age of majority before the final determination of their asylum claim lose a series of specific guarantees, which may affect their ability to argue their case and therefore the outcome of the procedure.<sup>52</sup> The key safeguards to which children are entitled should be extended to youth turning

eighteen, when deemed appropriate, so as not to undermine the submission and the examination of the child's claim for international protection.<sup>53</sup>

Even more disturbing, in a recent European Migration Network study on unaccompanied children, nine countries reported that the situation upon turning eighteen changes drastically for non-asylum-seeking children and those whose application for protection was rejected. Upon turning eighteen, they may be "found to be illegally present" and forcibly returned to their country of origin.<sup>54</sup> It appears that this also leads to more disappearances of children before they age out and a high risk of exploitation.

### *Accompanied Children*

While there are still gaps in protection to be addressed for age-disputed individuals, those who age out, and those who receive a form of temporary protection, in general there have been improvements for separated and unaccompanied children in Europe in recent years. In contrast, children migrating with their families still remain unseen and their stories untold. Research and advocacy regarding the situation and treatment of accompanied children is sorely lacking in most countries.<sup>55</sup> What research does exist shows that children migrating with their families are not necessarily safe from harm.<sup>56</sup> While family ideally provides a protective environment, this is not always the case. Family may also mean dependency, which often exposes accompanied children to the harsher aspects of immigration control, including detention and forced repatriation, usually without separate legal aid or representation.<sup>57</sup> Indeed, when one tries to examine the situation of detention and forced removal of migrant families, there is a lack of data, lack of transparency, and real concern for the treatment of children involved, which may indeed amount to human rights violations at the hands of the state.<sup>58</sup>

When seeking asylum, most accompanied children tend to be subsumed within their family's asylum application and therefore remain invisible.<sup>59</sup> Indeed, the UNHCR handbook recommends that children accompanied by a parent have their cases determined in accordance with the principle of family unity.<sup>60</sup> Therefore, often for accompanied children, no individualized determination procedure is normally envisaged.<sup>61</sup> Indeed, the UNHCR handbook has remained relatively silent on this point, stating simply that "if the head of family is not a refugee, there is nothing to prevent any one of his dependents, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol."<sup>62</sup> Yet accompanied children do indeed face barriers in accessing international protection.<sup>63</sup> Not only should nothing prevent accompanied children from exercising their right

to seek asylum, but they should also be entitled to it in law and enabled to access it with the support of child-sensitive procedural safeguards.

Additionally, Goodwin-Gill rightly critiques the UNHCR handbook for invoking "mental development and maturity" as the criterion for determining a "well-founded fear" of persecution.<sup>64</sup> He contends that the handbook is misguided in that there is no necessary connection between maturity and well-founded fear: children are as capable as adults of feeling fear; the child's maturity is irrelevant to the question of whether he or she will be persecuted; and, finally, the best interests of the child should be taken as a primary consideration.<sup>65</sup> Unfortunately, this has not been addressed in revisions of the handbook. However, in 2009 UNHCR issued its *Guidelines on Child Asylum Claims*, which complement the handbook and address some of its shortcomings. Certainly, if these guidelines were translated into national guidelines, training materials, and tools, they would support progress towards more child-sensitive protection procedures.

Still, even after UNHCR issued its *Guidelines on Child Asylum Claims*, Bhabha found that for separated and unaccompanied children, being a child reduces the chances of obtaining refugee status, but also reduces the risk of refoulement or return.<sup>66</sup> For accompanied children, this protection against refoulement or return is the exception rather than the norm.

Recent studies by UNICEF and UNHCR highlight European states' disregard for the rights of accompanied asylum-seeking children. UNICEF Germany's study shows how accompanied asylum-seeking children are treated as appendages to their parents rather than as individual rights-holders with child-specific needs.<sup>67</sup> UNICEF Germany found that there is a disregard for the best interests of the child as well as a discrimination in comparison to other children.<sup>68</sup> Accompanied children in Germany are rarely heard in international protection procedures.<sup>69</sup> Notably, the best interests of the child have not been considered before families are returned.<sup>70</sup>

As part of its Quality Integration project, UNHCR UK reviewed the quality of asylum decisions for families seeking international protection in the United Kingdom. The study found good practice as well as shortcomings. Most notably, regarding access to the procedure and identification of claims, it was found that "children being considered for derivative status do not have adequate opportunity to participate and to provide evidence during the asylum process."<sup>71</sup> The audit found no evidence of accompanied asylum-seeking children being heard independently of family members.<sup>72</sup> It was also found that screening measures could be strengthened<sup>73</sup> as well as decision-making better informed through the use of child-specific country-of-origin information.<sup>74</sup>

A second UNHCR UK report based on the audit findings examines how the best interests of children are considered

throughout the asylum procedure in the United Kingdom. That audit found that there is a “lack of any mechanism to obtain the views of the child and give those views weight in line with age and maturity.”<sup>75</sup> As noted in General Comments No. 12 and No. 14 from the Committee on the Rights of the Child, the child’s right to be heard and the best interests of the child are inextricably linked. Indeed, the committee stresses that “there can be no correct application of article 3 if the components of article 12 are not respected.”<sup>76</sup> In this light, UNHCR is “concerned that the findings of an absence of the participation of children within a family unit in the asylum process impacts upon the UK’s ability to assess the child’s best interests.”<sup>77</sup> The findings found that not all accompanied children are having their best interests determined and, if they are, the best interests are not considered fully and appropriately.<sup>78</sup> Alarmingly, the UNHCR audit found that “care, protection and safety of the child were rarely considered when determining the best interests.”<sup>79</sup> While the element of immigration control or other state interests should not be brought into the analysis of the best interests,<sup>80</sup> UNHCR found that it was included directly in a quarter of the claims audited. In summary, decision-makers are unclear when and how to consider the best interests of the child, even though it is required by law and policy.<sup>81</sup>

It has been recognized that other EU member states’ policies and practices also tend to focus on the parents and that the best interests of children are not taken into consideration in a structural and explicitly motivated way—neither in asylum procedures nor in return decisions.<sup>82</sup> Therefore, targeted projects have created tools for monitoring and evaluating the outcomes for children and families, who have been returned, with the aim of providing insight into the effects of current policies and generating new opportunities for improvement such as the application of the Best Interests of the Child Model in the Netherlands that will be examined below.

Unfortunately, the United States is another case where children’s rights and best interests are most often neglected in the asylum and immigration systems. Accompanied children in the United States are “at risk of serious harm, including persecution and torture, because of their invisibility and lack of access to protection.”<sup>83</sup> UNHCR has just initiated a study that aims to shine a light on procedural gaps that jeopardize access to protection for accompanied children in the United States, as well as examples that demonstrate good practices in promoting accompanied children’s access to protection.

### ***Emerging Good Practice: Child-Sensitive International Protection Procedures***

Twenty years ago, Guy Goodwin-Gill wrote, “The CRC uniquely embraces the whole spectrum of children’s rights,

specifically endorsing the principle of the best interests of the child in a total regime oriented to his or her development and self-fulfilment. Today, the child is subject, not object. International law and international instruments do not alone provide the answers, although the CRC can be used as a model of the achievable, somewhat in the sense of a checklist: a review of its provisions expands the concept of protection, while encouraging focus on the possibilities for effective implementation in any situation of forced migration.”<sup>84</sup>

Unfortunately, decades later, much remains to be improved in law, policy, and practice to “expand the concept of protection” for both unaccompanied and accompanied children seeking asylum or facing removal. For unaccompanied and separated children, the Committee on the Rights of the Child reaffirmed that the ultimate aim in addressing their fate “is to identify a durable solution that addresses all their protection needs, takes into account the child’s view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.”<sup>85</sup> According to UNICEF and UNHCR, a durable solution is a sustainable solution that ensures that the unaccompanied or separated child is able to develop into adulthood, in an environment that will meet his or her needs and fulfil his or her rights as defined by the CRC and will not put the child at risk of persecution or serious harm.<sup>86</sup> UNHCR and UNICEF have captured good-practice examples and outlined what states can do to ensure respect for the best interests of unaccompanied and separated children in Europe in their recent publication *Safe & Sound*. The publication builds on CRC *General Comment No. 14* outlining which elements should be considered and weighed in a Best Interests Determination and how to balance the interests of the child against competing interests that are rights based.

Interestingly, in Europe and North America, Best Interests Determinations have in some countries first been developed as part of special measures for trafficked children in order to operationalize the best-interests principle from the law. For example, the EU *Trafficking Directive* requires that a durable solution is found for child victims of trafficking, whether that child is accompanied or unaccompanied and separated. In either case, a durable solution is one that seeks to provide a long-term and sustainable solution for the child based on an individual assessment of the best interests of the child, including taking due account of the child’s views, needs, and concerns.<sup>87</sup> The Council of Europe Convention on Action against Trafficking in Human Beings also requires respect for the best interests of the child, including in decisions concerning the grant of a residence permit.<sup>88</sup> While the best interests standard is mainly absent from U.S. immigration law, noteworthy practice has developed under

the 2008 Trafficking Victims Protection Reauthorization Act, which allows for the appointment of independent child advocates to unaccompanied children. The independent child advocate's role is to identify and advocate for the best interests of the child, and the Young Centre for Immigrant Children's Rights has developed a paradigm for such assessments based in part on guidance in CRC General Comments.<sup>89</sup> Recommendations from a Best Interests Determination Panel are then discussed during immigration court proceedings and considered by the judge deciding the case. Drawing upon this practice as well as experiences with the Special Immigrant Juvenile Status, U.S. practitioners are advocating for the application of the best-interests standard in other immigration contexts, such as in immigration deportation proceedings.

Respecting the best interests of the child requires both procedural and substantive measures.<sup>90</sup> Procedural safeguards, such as the appointment of a guardian and provision of legal aid, ensure that the child's voice is heard, while substantive decision-making should prioritize safety, permanency, and well-being.<sup>91</sup> McAdam and others have noted that states initially applied the best-interests principle in procedural aspects for unaccompanied children and that consideration of the best interests in the substantive determination of refugee status was "widely overlooked."<sup>92</sup> This is still likely to be the case, but practice and jurisprudence are slowly evolving following recent guidance from the Committee on the Rights of the Child and UNHCR, as well as legislative and case law developments at the EU level. Many states, such as Finland, Norway, and Sweden, have included the best-interests principle in legislation and policies concerning asylum-seeking and migrant children.<sup>93</sup> At the same time, the best interests of the child are increasingly being considered by the courts as well.<sup>94</sup>

The Separated Children in Europe Programme, including Save the Children, UNHCR, UNICEF, and many partners, have elaborated The Statement of Good Practice and advocated for better reception, care, and treatment of separated and unaccompanied children.<sup>95</sup> Arguably, the majority of these measures, which reflect CRC obligations and UNHCR guidance, are also relevant for accompanied children. A comprehensive review of the key elements of a child-sensitive international protection procedure is beyond the scope of this article, but a few key elements will be outlined below. Many recent publications and projects could be drawn upon for in-depth analysis. In particular, Smyth provides a detailed review of whether and how the Common European Asylum System complies with the rights of the child.<sup>96</sup> Additionally, Save the Children produced a *Reference Document on EU Law and Policy*<sup>97</sup> concerning unaccompanied children as part of its CONNECT project, which includes tables mapping

how different articles of the CRC are reflected in EU law and policy. This mapping tool could also be used to analyze provisions from national legislation.

Equal rights and protection for accompanied children seeking international protection should be enshrined in legislation and policy at the EU and national level. For example, children's right to have access to the asylum procedure should be guaranteed in law. In its 2010 study on improving asylum procedures, UNHCR noted, "In order to address the absence of national legislation and administrative instructions in some Member States, the *Asylum Procedures Directive* should require Member States to determine in law the circumstances in which children shall be given the opportunity of a personal interview and/or the right to be heard."<sup>98</sup> Unfortunately, this is still not required by the recast directive.

Concerning the right to participation and the right to be heard, the Committee on the Rights of the Child discourages states from introducing standardized age limits in law or policy.<sup>99</sup> In this regard, UNHCR's emphasis on the use of appropriate communication methods and non-verbal means of communication is welcomed.<sup>100</sup>

Regarding interviewing and decision-making, the Swedish practice provides inspiration in law, policy, and practice. Section 10 of the Swedish Alien's Law specifically states, "In cases involving a child, particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general." The subsequent regulation<sup>101</sup> requires the Swedish Migration Board to analyze the consequences for the child before making decisions or other actions concerning the child. Such a child-rights impact assessment is a method to take into consideration the best interests of the child as explained in *General Comment No. 14* of the Committee on the Rights of the Child. The Swedish Migration Board has produced and uses checklists in its work with children to ensure a basis for the child-rights impact assessment as well as Best Interests Assessments throughout the process. The reasoning of the decision must also be documented and the child must be informed. For such measures to be effective, all professionals interacting with children should receive specialized training and guidance. Interview protocols and checklists can be helpful tools to apply principles into practice. A specific checklist has been developed in Sweden for work with children in families. Child-specific country-of-origin information should also be taken into account by the Swedish Migration authorities. UNICEF has been working with UNHCR and partners to further develop a methodology for "Child Notices,"<sup>102</sup> child-focused country-of-origin reports that provide reliable information about child rights and child protection.

The Norwegian authorities have also reformed their laws and policies and have interviewed accompanied children over the age of twelve since 2005.<sup>103</sup> A 2006 government circular outlines the principles for the interview or “conversation” with accompanied children and lowered the interviewee age to seven, in line with other Norwegian legislative provisions related to the child’s right to be heard. Importantly, immigration authorities “stress that the conversation should not check the accounts given by parents, nor include information from the child conversation in the proceedings which could undermine the family’s case.”<sup>104</sup> This crucial safeguard should also find its way into policy and practice. Otherwise, as noted in Lundberg’s study in Sweden, the authorities may be afraid of getting the child to talk about something that contradicts what the parents had said in earlier interviews, and this could become a barrier in practice to interviewing children.<sup>105</sup>

In 2014, UNHCR published *The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union*.<sup>106</sup> While the study focuses on cases involving unaccompanied children in Europe, the learnings and recommendations are relevant also for the treatment of other children applying for international protection. In particular, states could improve decision-making by applying credibility indicators in a child-sensitive manner and recognizing a shared and flexible burden of proof.

Finally, it remains a challenge to gather evidence and to consider children’s claims in a multidisciplinary way. In the Dutch experience, Kalverboer and her colleagues have developed a robust methodology called the Best Interests of the Child Model, which assesses “14 rearing conditions in a child’s life, which must be of sufficiently high quality to enable the child to experience a good childhood and to safeguard his or her development.”<sup>107</sup> Using a questionnaire to assess these conditions in the child’s current environment as well as to compare it with possible alternative future options for the child, the University of Groningen has submitted hundreds of child-oriented social welfare reports to the Dutch immigration authorities and to district courts, who are deciding on the fate of the children concerned. Such detailed analysis assists decision-makers to consider fully the best interests of the child.

### Conclusion

In its 2007 *Conclusion No. 107 on Children at Risk*, UNHCR’s Executive Committee recommended that States, UNHCR and other relevant agencies and partners work: “Within the framework of the respective child protection systems of States, utilize appropriate procedures for the determination of the child’s best interests which facilitate adequate child participation without discrimination: where the views

of the child are given due weight in accordance with age and maturity; where decision makers with relevant areas of expertise are involved; and where there is a balancing of all relevant factors in order to assess the best option.”<sup>108</sup>

In Europe, more than a third of EU member states report that a Best Interests Determination is in place to support the competent authority’s decision on a durable solution for a separated or unaccompanied child.<sup>109</sup> Most likely these procedures will still need to be improved, but states’ recognition of that they have a responsibility to consider the best interests of the child in such circumstances is an important step towards operationalizing the principle into practice. Forthcoming research will assess these emerging practices against good-practice standards and the CRC, as well as examine the outcomes for children and families concerned. As described above, more child rights advocates are coming forward to lobby for a Best Interests Determination to be carried out when deciding on durable solutions for children and their families, who no longer qualify for international protection or who are living in an irregular situation.

Clearly, there is a lot of work ahead in order to make such a reality viable. First, child rights education can empower children, raise awareness of children’s rights, and change attitudes among policy- and decision-makers with the aim of improving law, policy, and practice. The use of the CRC to inform law and policy should continue to be strengthened, including child rights informing decisions on international protection and the CRC being considered as an independent source of status.<sup>110</sup> As McAdam argues, the CRC should be used as the key deciding factor when assessing whether a child needs international protection.<sup>111</sup>

Finally, national human rights institutions and ombudspersons for children can play a significant role in monitoring the treatment of migrant children in their countries.<sup>112</sup> Quality audits that examine the treatment of family claims and children’s claims can provide valuable evidence from which to formulate policy recommendations to improve national systems. The analysis of anonymized decisions can also inform the understanding of the interpretation and implementation of key legal provisions and principles such as the best interests of the child.

UNHCR’s 1993 *Policy on Refugee Children* called on staff to integrate children into the protection and programming processes, explaining that “they are people in their own right, with suggestions, opinions and abilities to participate in decisions and activities that affect their lives. Efforts on behalf of refugee children fall short if they are perceived only as individuals to be fed, immunized or sheltered, rather than treated as participating members of their community.”<sup>113</sup>

No doubt these words were meant for staff working in developing countries or in an emergency, but this policy

advice also holds true for industrialized countries. In line with Article 12 of the CRC, authorities should also consult with children for feedback on their experiences with the asylum and immigration systems and use their advice to change the system for the better.<sup>114</sup>

#### NOTES

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# “Imposter-Children” in the UK Refugee Status Determination Process

STEPHANIE J. SILVERMAN

## Abstract

*This article describes and analyzes an emerging problematic in the asylum and immigration debate, which I cynically dub the “imposter-child” phenomenon. My preliminary exploration maps how the imposter-child relates to and potentially influences the politics and practices of refugee status determination in the United Kingdom. I argue that the “imposter-child” is being discursively constructed in order to justify popular and official suspicion of spontaneously arriving child asylum-seekers in favour of resettling refugees from camps abroad. I also draw connections between the discursive creation of “imposter-children” and the diminishment of welfare safeguarding for young people. Further complicating this situation is a variety of sociocultural factors in both Afghanistan and the United Kingdom, including the adversarial UK refugee status determination process, uncertainty around how the United Kingdom can “prove” an age, and a form of “triple discrimination” experienced by Afghan male youth. Through unearthing why the “imposter-child” is problematic, I also query why it is normatively accepted that non-citizens no longer deserve protection from the harshest enforcement once they “age out” of minor status.*

## Résumé

*Cet article décrit et analyse une problématique émergente dans le débat sur l’asile et l’immigration, que je dénomme d’une façon cynique le phénomène des « enfants-imposteurs ». Mes explorations préliminaires démarquent comment « l’enfant-imposteur » est relié aux politiques et pratiques de détermination du statut de réfugié au Royaume-Uni, et comment il les influence potentiellement.*

*Je soutiens que l’enfant-imposteur est constitué comme discours afin de justifier la méfiance populiste ainsi qu’officielle à l’égard des chercheurs d’asiles qui sont issus des arrivées spontanées, pour favoriser plutôt la réinstallation de réfugiés arrivant de camps à l’étranger. Je trace également des liens entre la création discursive de ces « enfants-imposteurs » et la réduction des aides sociales publiques pour les jeunes personnes. Cette situation est rendue encore plus compliquée par divers facteurs socioculturels en Afghanistan ainsi qu’au Royaume-Uni, dont notamment le processus antagoniste de détermination du statut de réfugié au Royaume-Uni (DSR), l’incertitude autour de la « preuve » d’âge dans le pays, et une forme de « triple discrimination » subie par les jeunes Afghans de sexe masculin. En faisant ressortir les raisons pour lesquelles l’enfant-imposteur est problématique, j’interroge également pourquoi il est normativement acceptable que les non-citoyens ne méritent plus d’être protégés des activités coercitives et d’exécution de règlements les plus sévères une fois qu’ils ont dépassé « l’âge limite » de statut de mineur.*

## Introduction<sup>1</sup>

In the United Kingdom, refugee status determination (RSD) is a declaratory process performed usually in an administrative tribunal to adjudicate whether spontaneously arriving asylum-seekers should be granted asylum and its accompanying protection against removal.<sup>2</sup> RSD is founded on a definition of the refugee elaborated in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention). Along with some other vulnerable groups identified during screening, unaccompanied or separated asylum-seeking children<sup>3</sup> are

granted access to preferential treatment over adults while navigating the UK RSD process. This access includes entitlements to housing and legal aid, and a staying of detention and deportation orders until the claimant “ages out” of the protective shield of child status.

The special protections for children in the RSD process are increasingly valuable and sought out in a world of 65.3 million forcibly displaced people, of whom 11 million are child refugees and asylum-seekers searching for safety. In 2015, 88,245 unaccompanied or separate children applied for asylum in the EU, including 3,045 in the United Kingdom, representing an increase of 56 per cent from the previous year.<sup>4</sup> Recent European Commission data indicate nearly 3,500 asylum applications from unaccompanied or separate children in January 2016 alone.<sup>5</sup> The majority of these children hail from Afghanistan, the Syrian Arab Republic, and Somalia.<sup>6</sup> UNICEF documents the journeys of the thousands of children risking their lives weekly to reach the United Kingdom.<sup>7</sup>

With more than 4,000 unaccompanied or separated asylum-seekers under the age of eighteen coming into local authority care in the United Kingdom,<sup>8</sup> the government is being stretched to meet its welfare needs. Notably, these numbers do not include the equally high number of de facto child refugees who are on UK soil but not registered in the RSD process, as well as the more than 10,000 unaccompanied or separated migrant children in the EU who are “now missing, and are potentially victims of sexual exploitation, trafficking or other criminal activity.”<sup>9</sup>

Beginning in the decade preceding the European migrant crisis, scholars became increasingly interested not only in how but also why liberal states afford protections to child asylum-seekers over and above those of adults in the UK RSD process. Researchers are exploring when and how the idea of children as “moral touchstones” in UK society intersects, dominates, or subverts citizenship, irregularity, asylum, and other statuses in terms of social worlds, legal rights, and policy arrangements at a variety of local, regional, national, and international levels.<sup>10</sup> Children’s rights and protections have risen to the top of many political and social agendas and have been made symbolically and legally meaningful since at least the 1990s with the promulgation of the United Nations Convention on the Rights of the Child (UNCRC).<sup>11</sup> Yet research demonstrates how immigration enforcement priorities can override these rights and protections, leading to “perverse outcomes” that would be otherwise unacceptable for children.<sup>12</sup>

These outcomes also result partially from deeply ingrained notions of “race,” class, and other markers converging with the administrative nature of the RSD process. Despite the fact that women and children are now thought to comprise

the majority of the forcibly displaced worldwide, the Refugee Convention’s binary understanding interprets and privileges “adult male” standards above gender-, sexuality-, and age-based persecution to the exclusion of most other protection claims.<sup>13</sup> Likewise, the RSD process can be blighted by underlying presumptions about the deservingness of some groups in contradistinction to the exploitative tendencies of others. Researchers describe pervasive assumptions about the “bogus refugee” with “socio-economic motivations” who presents a “problem” of genuineness for the RSD process<sup>14</sup> and a “threat” to the British people writ large.<sup>15</sup> As will be explained below, unaccompanied or separated asylum-seeking children who spontaneously arrive present an admixture of deservingness and threat, compounded by their independent migrations to the United Kingdom.

Against such a complex background, this article unearths and analyzes a new “threat” to the UK RSD system: termed here as “imposter-children,” they are asylum-seekers who claim to be unaccompanied or separated asylum-seeking children specifically to receive preferential treatment in the RSD process. I coin the term “imposter-children” cynically. My intention is to reflect the state’s antagonism or, at the very least, non-data-supported suspicion that some foreign nationals are manipulating the RSD process by consciously pretending to be something they are not (children). I am also using “imposter-children” to unearth the government’s conclusion that these actions should be detected and either reversed or punished as a matter of safeguarding the RSD-process (and potentially the British people).

In addition to sketching and describing “imposter-children,” I am also arguing that this imagined community of adults posing as unaccompanied or separated children challenge the RSD process in important ways. The proffered “solution” is the process of age-disputing imposter-children and then conducting age assessments. Long controversial, these assessments continue to play a key role in legitimating “real” children. By cordoning off unaccompanied or separated children and releasing them from the threats of detainability and deportability, but also rooting out the nefarious adults who seek to undermine this system, my argument is that the state is working to make its unjust and unfair RSD process appear more defensible in the face of an escalating global crisis of displaced children.

### ***Children Negotiating the UK Refugee Status Determination Process***

As the most commonly invoked and interpreted area of international law, refugee status determination (RSD) is a manifestation of particularizing global ideas into national-level bureaucratic decision-making.<sup>16</sup> The UK RSD process is notable for featuring a formally adversarial structure, onus

placement of proving Refugee Convention persecution on the asylum-seeker, and no automatic access to legal counsel or translation. Judgments vary across regions and venues.<sup>17</sup> Findings of credibility are pivotal for securing Refugee Convention status and the right to stay.<sup>18</sup> In this hostile setting, young people are “expected to give consistent and coherent accounts of their past, whilst often having no independent adult to support them and sometimes without a legal representative. Many are even forced to repeat the process at the age of seventeen and a half, damaging the new lives they have managed to build in a foreign country.”<sup>19</sup>

While awaiting an RSD outcome, children<sup>20</sup> are granted fuller access to welfare benefits, health care, and educational opportunities than adults. The local authority—usually a district, city, or county council—provides basic accommodation and educational needs, and assumes increased duties towards those aged sixteen years old and younger, than those aged eighteen years. While being of minor age does not confer automatic rights to refuge and permanent settlement, it is more difficult to remove a child refused asylum-seeker than an adult, not least because many receiving states do not have the facilities to care for them.<sup>21</sup>

International law, including the UNCRC, and an array of national UK legislation are designed to protect children, including unaccompanied or separated asylum-seeking children. UNCRC Article 3 elucidates the principle that “in all actions concerning children ... the best interests of the child shall be a primary consideration” and requests complementary protection. Section 55 of the Borders, Citizenship and Immigration Act 2009 acknowledges a duty on the home secretary to make arrangements ensuring that immigration and asylum functions (among others) are discharged having regard to the need to safeguard and promote the welfare of all children. This duty is similar to the public duty of care placed on other agencies by the Children Acts 1989 and 2004: local authorities are required to protect and promote children’s welfare, and the courts are expected to take children’s welfare as the principal consideration in their decisions.

In 2007, Crawley documented the deleterious effects of the RSD process for age-disputed children. She argued that a “culture of disbelief” permeates the UK RSD process and that the legal, welfare, and mental health consequences for children attempting to navigate this system are serious. Crawley emphasized that, even when successfully obtained, the government-provided welfare and support level to children is limited.<sup>22</sup>

Crawley also highlighted the fears of unaccompanied or separated asylum-seeking children of reaching 17.5 or 18 years of age. These youth “age out” of the protections from detention and removal reserved for children. In the United Kingdom, the majority of age-confirmed unaccompanied

or separated children can be granted Discretionary Leave to Remain for three years, or until reaching 17.5 years old, whichever is the shorter period. If their applications to extend their Discretionary Leaves to Remain fail (as “the overwhelming majority” do), they are reclassified as so-called Appeal Rights Exhausted Care Leavers.<sup>23</sup> Without a further legal basis to stay in the United Kingdom and deemed appeal rights exhausted, such young people will become “unlawfully in the UK.”<sup>24</sup>

Aged-out youth lose their Leaves to Remain simultaneous to the unravelling of their access to the relatively rich social fabric of accommodation and support provided by the local authority. UK immigration law prohibits the local authority from providing money, support, or housing to unaccompanied or separated youth 17.5 years of age or older. Aging-out or aged-out youth have to move out of their foster families,<sup>25</sup> and many become detainable, removable, and at risk of destitution.<sup>26</sup> Anxieties about return haunt many young people’s stays in the United Kingdom,<sup>27</sup> and questions remain about whether these youth are being protected or simply held in limbo for a number of years until their claims can be assessed.

Macklin<sup>28</sup> persuasively argues that most liberal states “deplore” spontaneously arriving asylum-seekers: the “spontaneous flow of non-citizens possessing a limited legal claim to entry represents a threat to sovereignty-as-border-control, even though it is an exception to which states voluntarily bind themselves by signing the Refugee Convention.” Accordingly, liberal states position “deserving refugees” as “always already ‘over there’”—with “over there” referring increasingly to camps populated by Refugee Convention-certified persons—and “like magic, the refugee is disappeared from North America, from Western Europe, and from Australia, displaced by the pariah illegal.”<sup>29</sup>

As an independently migrating agent, the spontaneously arriving child asylum-seeker embodies the problematic ellipsis of deservingness being equated with “over there” but also presents an additional series of moral and practical conflicts for liberal states. As evidenced by the consternation around realizing the Section 55 duty, children trigger state-based duties of migration enforcement qua foreign nationals making demands on the state, but also of welfare safeguarding qua “socially constructed attributes of vulnerability, passivity and lack of agency.”<sup>30</sup> Their journeys are not appreciated as valiant efforts to escape camp-life<sup>31</sup> but rather subversions of the international burden-sharing system. In response, the state is being asked to discharge its duties as migration “gatekeeper” but also as *parens patriae*, or the chief welfare agent tasked with acting as a parent or guardian to all children.<sup>32</sup> Language tropes signal these Janus-faced roles: “Where a child is ‘looked after’ by

the Local Authority the Local Authority acts as the child's 'corporate parent' ... under the Children (Leaving Care) Act 2000 the Local Authority will also owe a 'looked after' child longer-term duties as they progress into adulthood.<sup>33</sup> In a period of punitive migration controls and restricted welfare spending, this contestation between roles, duties, and responsibilities will be heightened.

This dilemma adheres to advocates for non-citizen children as well. They tend to position unaccompanied or separated child asylum-seekers as inherently vulnerable actors who deserve the community's compassion and freedom from detention and removal. Following Zetter,<sup>34</sup> this "bureaucratic identity" not only describes how advocates genuinely feel but also constructs them "in convenient images" to achieve certain policy goals. A danger is that a small, socially constructed, age-based minority population is being cordoned off as *deserving* of freedom from detention and deportation, to the exclusion of the rest.<sup>35</sup> By campaigning that children deserve special protections in the RSD process, they inadvertently legitimize an adjudication system that is unfair and unjust to everyone else.<sup>36</sup>

#### **Assessments for Age-Disputed Asylum-seekers**

As mentioned, "age disputing" names the process for determining the biological ages of people whose minor statuses are disbelieved and who are usually without satisfactory identification documents; it is rare for European immigration officials to dispute the ages of persons claiming to be adults but whom they suspect of being children unless in cases of human trafficking or involvement in commercial sex work.<sup>37</sup> Although they invariably produce a range of two to three years, age assessments are meant to settle age disputes.

In the United Kingdom, most age disputes occur at the screening stage, when UK social workers and immigration officials are working to establish the identities of asylum claimants as well as their route into the country. The choice to dispute age is a discretionary decision undertaken by individual officials based on their subjective judgments. In the year ending September 2015, 590 asylum applicants in the United Kingdom had their ages officially disputed; 574 underwent age assessments, of whom 65 per cent were diagnosed as having a birthdate suggesting they were over eighteen years old within the one- to two-year age range.<sup>38</sup> UK process guidance of age instructs immigration officials to afford the benefit of the doubt to asylum-seekers whose age has not been accepted, "unless their physical appearance/demeanour very strongly suggests they are *significantly* over 18";<sup>39</sup> subsequent inquiries have found that the institutional culture of disbelief impedes the benefit of the doubt, however, and that this situation is "of concern."<sup>40</sup>

European age assessments typically adhere to a psychosocial model whereby social workers cooperate with immigration officials to conduct "interviews with and observations of the young people (with contributions by any other professionals working with them), exploring their lives (physical, emotional, familial, educational and beyond) particularly in relation to their social environment, both current and past."<sup>41</sup> If the psychosocial exam is inconclusive, technology-based age assessments may be undertaken. Busler reports that "24 out of 30 [European] countries ... use carpal (hand/wrist) X-rays, with approximately half using collar bone and/or dental X-rays as part of their age assessment process."<sup>42</sup> There are two technologies that may be employed in the United Kingdom: (1) bone age and dental maturity assessment through X-rays and magnetic resonance imaging and ultrasound; and (2) anthropometric measurements without X-rays, including physical size (height and weight growth) and sexual development (e.g., pubic hair or breast development).

There is no statutory procedure for conducting age assessments in the United Kingdom. Justice Sir Stanley Burnton provides broad guidance in the 2003 case, *R (on the application of B) v London Borough of Merton*, [2003], or *Merton*, and most practice is based on subsequent case law. According to *Merton* guidelines, the local authority has a responsibility to "elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years" (para. 37). An interpreter may be used to minimize misunderstanding. Any doubt about the credibility of the young person's information needs to be substantiated and tested (para. 37).<sup>43</sup>

*Merton* encourages holistic assessments while being wedded to precise definitions of age, vulnerability, and maturity predicated on biology. Although it emphasizes credibility, *Merton* legally enshrines the holistic practices of "interaction, social history, family circumstances, education, self-care, and health" when conducting age assessments.<sup>44</sup> *Merton* also holds that once a case reaches court, it is necessary to determine the precise age of the claimant, not merely that the claimant is currently a child.<sup>45</sup> A recent small-scale study found that most young people refused asylum on credibility grounds had also been subject to age disputes.<sup>46</sup> If the holistic determination under *Merton* is unsuccessful, the Home Office may use invasive technologies to determine chronological or biological age, although, as mentioned, a precise level of accuracy on age is virtually impossible to achieve with these technologies, and significant harms may accrue (see "Discussion" section).

Importantly, as mentioned, the likelihood of gaining an accurate age assessment decreases with age,<sup>47</sup> thus

frustrating the Merton aims of determining a precise age. This disconnect is especially important when considering that it is the population of borderline aged-out youth who are subject to the majority of age disputes and for whom the arbitration over one biological year is literally life-changing.

### ***Triple Discrimination against Male Afghan “Imposter-Children”***

Documented identity is thus key to access child-only protections and forgoing age assessments. Birth registrations, for example, are thought to establish identities, provide a link to a particular state, facilitate access to social security and other services, impede risks such as trafficking and illegal adoption, and increase the likelihood of family reunification.<sup>48</sup> Flagging the significance of these documents for RSD processes, UNCRC Article 7 imposes a requirement upon all signatory states to register children immediately after birth.

For many displaced people, however, such vital documents are not easy to obtain, keep, or present. Estimates hold, for example, that about 51 million children born in 2006 have not had their births registered.<sup>49</sup> Substandard bureaucratic infrastructure during times of instability affect displaced people’s abilities to document their biological ages.<sup>50</sup> During wartime, documents may be destroyed intentionally or accidentally, and children may also flee without bringing along their identification documents. Smugglers and traffickers also take away documents during journeys. “Imposter-children” may be falsely accused of destroying their birth registrations or other identity documents when, in truth, they were never provided with any. The scholarly and policy debates over important questions such as whether a biological age coheres with social age, how a person’s maturation ought to be documented, the ethics of states harnessing mobilities through monopolizing documentation, and why migrants without identities are interpolated as threats to citizens remain unsettled; however, “bureaucratic identity” à la Zetter continues to dominate RSD processes, and certain documents form its beating heart.

The problem of documenting biological age is particularly acute for Afghans. The Afghan government did not have bureaucratic or institutional capacity to register births during the protracted wars of the 1980s and 1990s. Since identification cards and driving licences were not commonly used anyway, and because government paperwork requested Islamic calendar dates, families often forewent recording their babies’ exact birthdates.<sup>51</sup> In 2003, coverage of live birth registration was at 6 per cent, making the burden of proof of age determination much more onerous for Afghan nationals than for those from European countries.<sup>52</sup>

Against this background, the United Kingdom is removing an increasing number of aged-out refused asylum-seekers,

of whom a target population appears to be spontaneously arriving Afghans: Gladwell and Elwynn<sup>53</sup> report that 20 aged-out Afghan nationals were forcibly removed from the United Kingdom in 2009, but that this figure increased more than three-fold to 70 in 2010, increasing again to 100 in 2011. In 2016, the minister for immigration admitted that over the past nine years, 2,748 aged-out young people had been removed to Iraq, Iran, Libya, Syria, and other countries, with the majority (2,018) removed to Afghanistan.

In August 2015, a judge issued a blanket ban on removals to Afghanistan because the country was too dangerous; but in the following March 2016, the Court of Appeal overturned the injunction, clearing the way for the Home Office to resume chartered flights for aged-out unaccompanied minors.<sup>54</sup> Common difficulties for aged-out Afghans being involuntarily return to Kabul from the United Kingdom include reconnecting with family and social networks; the psychosocial impact of insecurity and poverty in Afghanistan; lack of education and employment opportunities; actual and perceived “Westernization” of returnees; and risky attempts at re-migration to Europe.<sup>55</sup> The removals occurred in the midst of deteriorating security conditions in Kabul—the site of handover to Afghan authorities—and despite warnings about the dangers of repatriations by a prominent Afghan minister.<sup>56</sup>

Following Macklin, there seems to be cultural disconnect between the levels of tolerance and support being extended to unaccompanied or separated children resettled from camps, versus those who arrive spontaneously to claim asylum through the RSD process. In sum, the former are more likely to be labelled victims, while the latter are threats. In relation to the particular threat posed by aged-out Afghan males, there may also be a gendered and racialized dimension to the characterization: following Rygiel’s conceptualization of “hegemonic masculinity,”<sup>57</sup> these youth are simultaneously innocent victims of the wars in Afghanistan but also illegal and criminal migrants. Their nationality makes both the Afghan children and the Afghan aged-out youth seem less deserving of permanent protection through indefinite leave to remain in the United Kingdom.<sup>58</sup> In a pan-European situation of allegedly scarce resources where asylum is meted out only to a fortunate minority, and where Refugee Convention-certified children from camps are prioritized above spontaneous arrivals, it is likely that Afghan male youths will continue to be age-disputed, and perhaps this treatment will normalize them into becoming ultimate “imposter-children.”

### ***Discussion***

The antipathy towards spontaneously arriving asylum-seekers claiming to be children animates a February 2016

interview that British Member of Parliament for Monmouth David Davies gave to the *Daily Mail* newspaper. In it, the MP spoke of the “complete ruse” of adults posing as children: “These people come over here and get preferential treatment by claiming they’re 12 and no one wants to call them out. We’ve seen how bad things can get with other incidents in Europe ... It’s becoming common place.”<sup>59</sup> The incident that sparked the heated interview was tragic: an Afghan unaccompanied or separated asylum-seeking child allegedly attacked his Welsh foster family. A subsequent age assessment of dental maturity indicated that the Afghan had a chronological or biological age of at least twenty years old, not the age of sixteen years he claimed upon arrival.<sup>60</sup> In October 2016, the minister of state indicated that a twenty-eight-day age verification process may be used for resettled children from the now-raised Calais migrant settlement—many of whom are Afghan nationals—but he ruled out intrusive dental and X-ray checks for this group.<sup>61</sup>

My focus in this article has been unearthing and analyzing *why* MP Davies and others are morally offended when adult asylum-seekers pose as children. I shorthand this logic to the “imposter-children” phenomenon. Surely part of the Welsh tragedy is that the host family was “tricked” into hosting an adult. In a climate of accelerated and punitive border, immigration, and asylum enforcement, child-only protections are increasingly valuable, to the asylum-seeker but also to the moral sense of deservingness felt by the community offering them. Many community members feel that it is wrong for foreign nationals over eighteen years of age to access these protections, and, further, that such unwarranted access is a concerted act of deceit, subterfuge, or criminality. These biological adults are “buying time” in the United Kingdom that they do not deserve, and should be rooted out, exposed, and potentially removed.

Far from extending the benefit of the doubt, and despite repeated injunctions from civil society, the government seems at times overly eager to identify adults in the RSD process whose claims to be children can be “unproven” with age assessments. This eagerness comes at real costs. While they are denounced when they take too long to complete or necessitate too much scrutiny or contact in a non-culturally sensitive manner, age assessments should also be criticized when conducted too hastily or with too much distance. The consequences of either mistake can be exposure to enforcement actions supposedly reserved for adults. Significantly, spontaneously arriving children are consistently co-mingled with adults in UK detention centres and prisons,<sup>62</sup> despite government promises to the contrary. Yet there is also often a feeling of moral outrage when it is revealed that children are co-mingled with adults in detention.<sup>63</sup> However, when the state broadcasts that some adult

foreign nationals are manipulating the RSD process by consciously pretending to be something they are not (child asylum-seekers), the implication is that aspersion should be cast not only on the fraudulent minor status but also on the asylum-seeker’s claim to stay.

Indeed, the trend is real enough that a cottage industry of private, for-profit social workers has coalesced to offer independently contracted and “unbiased” age assessments for a price.<sup>64</sup> The rubrics and rhetoric of age assessments play a key role in discursively legitimating the difference between imposters and “real” children. For example, the term *Merton compliant* has emerged to describe a local authority assessment that has been conducted in accordance with case law. By cordoning off children for special treatment, but also rooting out the nefarious adults who would otherwise undermine this system, the state is able to make its unjust and unfair RSD process appear more defensible.

A final note should be offered on the ethical propriety of invasive age assessments in UK society. Though only used sporadically, they are still in play and their results are respected, such as the dental maturity exam conducted on the Afghan fostered in Wales. The normative acceptance that immigration officials may resort to these technologies at all is worrying. The technologies are invasive and contentious, and they may psychologically harm children.<sup>65</sup> They have an unacceptably high margin of error.<sup>66</sup> There is no standardized approach between or within European states.<sup>67</sup> A precise level of accuracy is virtually impossible to achieve with these technologies,<sup>68</sup> and the likelihood of gaining an accurate age assessment decreases with age.<sup>69</sup> Thus, in addition to the harms incurred, the fact that “experts agree that age assessment is not a determination of chronological age but an educated guess”<sup>70</sup> calls into question the baseline utility of assessing a population almost always verging on minor status by a couple of years.

European governments have been reluctant to acknowledge the damage that age assessments can cause. One reason for the reluctance could be that it would provoke recognition of a paradox: invasive age assessments require informed consent. The *Oxford English Dictionary* defines informed consent as “permission granted in full knowledge of the possible consequences, typically that which is given by a patient to a doctor for treatment with knowledge of the possible risks and benefits.” Since informed consent can be given only by adults, children submitting to invasive age assessments are being forced to do something they cannot legally do: in order to prove their minor status and gain basic rights such as release from detention, protection from removal, and access to welfare support, they must submit to a procedure from which children are legally prevented to consenting. While migration studies has been attuned to

issues of informed consent in research methodologies and ethics,<sup>71</sup> the problematic presentation of “imposter-children” presents a novel opportunity to explore further the role of informed consent as it relates and informs not only to the researcher–refugee relationship but also to the immigration official-refugee dynamic.

#### NOTES

- 1 I wish to extend my thanks to Christina Clark-Kazak for encouraging and shepherding this line of thinking. I would also like to acknowledge the very helpful feedback from Idil Atak and other participants at the August 2015 “Age Discrimination in Migration Policy” workshop at Glendon College; the detailed and constructive reviews by the two anonymous journal referees; the thoughtful comments and discussions on earlier versions with Esra S. Kaytaz, Evelyne Massa, Petra Molnar, and Amy Nethery; and much-needed support from Alice Lowinsky at a critical time.
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# Protection and Paternalism: Narratives of Nepali Women Migrants and the Gender Politics of Discriminatory Labour Migration Policy<sup>1</sup>

BARBARA GROSSMAN-THOMPSON

## Abstract

*This article considers the current age and gender discriminatory migration laws in Nepal in their historical and socio-cultural context. Drawing on eight months of fieldwork and data collected from both migrants and migration policymakers I ask, What are the consequences of discriminatory laws on young Nepali women's migration experiences? And why do gender and age discriminatory laws and policies persist in light of evidence that they may actually endanger migrants? I posit that historically dominant Hindu gender norms provide the basis for the paternalistic migration laws currently in place. I argue that age and gender discriminatory migration policies are rooted in patriarchal concern for women's ijaat (social honour) and sexual purity. The result of discriminatory law is not a reduction in migration but an increase in irregular and illegal migration that exacerbates women labour migrants' vulnerability to a variety of abuses. I conclude that examining discriminatory migration laws with an intersectional lens raises interesting possibilities for theorizing how and why these ineffectual laws persist.*

## Résumé

*Cet article se penche sur la législation discriminatoire actuelle en matière de migration concernant l'âge et le sexe au Nepal et son contexte historique ainsi que socio-culturel. En faisant appel aux données de sondage et de*

*nature ethnographique provenant des migrants ainsi que des responsables en matière de politique migratoire, je considère en premier lieu: quelles sont les conséquences des lois discriminatoires sur les migrantes népalaises jeunes? Et quelles sont les raisons pour lesquelles des lois discriminatoires concernant l'âge et le sexe persistent encore à la lumière des indications démontrant que ces lois risquent en fait de mettre en danger les migrants? J'estime que le sexe hindou dominant sur le plan historique fournit la base sur les lois paternalistes actuelles, et que les lois discriminatoires concernant l'âge et le sexe sont ancrées dans un ordre patriarcal du ijaat (l'honneur social) et de pureté sexuelle chez les femmes. Le résultat est l'augmentation de la migration illégale et irrégulière, ce qui amplifie la vulnérabilité ainsi que divers abus de femmes migrantes. Je conclus sur une discussion portant sur la manière dont une politique plus adaptée pourrait répondre à la législation migratoire actuelle qui ne prend pas en compte la complexité du processus décisionnaire.*

## Introduction

**I**n response to limited economic opportunities in Nepal, migrating abroad for labour has become a common livelihood strategy. In 2014, remittances sent from Nepalis working overseas accounted for over a quarter of Nepal's GDP.<sup>2</sup> While the majority of overseas workers are men, the number of Nepali women migrating abroad has steadily

increased. In an attempt to “protect” Nepali women from exploitation abroad, the state has implemented gender discriminatory migration laws, which restrict women under thirty from leaving the country to work as domestic labourers in Gulf countries.<sup>3</sup> Instead of curbing migration, these laws have pushed women’s migration, both to the Gulf and other destinations, into more precarious and dangerous migration channels.

This article considers the current age and gender discriminatory migration laws in Nepal in their historical and socio-cultural context. Drawing on eight months of fieldwork and data collected from both migrants and migration policymakers, I attempt to answer three questions:

1. What are the socio-cultural and political antecedents that contextualize contemporary gender and age discriminatory migration laws in Nepal?
2. What are the consequences of discriminatory laws on young Nepali women’s migration experiences?
3. Why do gender and age discriminatory laws and policies persist in light of evidence that they may actually endanger migrants?

### Background

Nepal has a population of about 30 million and was, until 2008, ruled as a Hindu kingdom. In 2008, at the end of over a decade (1996–2006) of civil war between Maoist guerrillas and the monarchy, Maoists were swept into power and in short order declared Nepal a secular, democratic republic. Although Nepal is a comparatively small country next to its large neighbours India and China, it is exceptionally diverse. The populace is stratified along lines of caste, class, ethnicity, religion, mother tongue, and extreme geographic difference. Historically, high-caste Hindus living in the central mid-hills of Nepal have exerted political, economic, and social dominance over low-caste and ethnic minority populations. The dominance of high-caste hill Hindus (हचह) lingers to this day and is evident in the ongoing civil unrest that has intermittently punctuated the political landscape from 2006 onwards. Exacerbating Nepal’s troubled polity is the socio-economic condition of many Nepalis. Nepal is considered a least-developed country, and a majority of its population practise subsistence agriculture as their primary livelihood.<sup>4</sup>

Out-migration has a long and storied history in Nepal, most prominently in the form of young Nepali men leaving to work in foreign armies as Gurkha soldiers.<sup>5</sup> In the last thirty years, a chronically depressed economy and a decade of conflict have precipitated a mass exodus of working-age Nepalis from the rural hinterlands into cities and abroad.<sup>6</sup> Walking in any major city in Nepal, one is confronted with countless signs advertising opportunities to work or study abroad.<sup>7</sup> The overwhelming message on billboard after billboard is that

economic opportunities lie outside of Nepal.<sup>8</sup> There is a deep and abiding feeling amongst young Nepalis that working abroad is the only way to earn a decent salary and support their families.<sup>9</sup> Going abroad and remitting has become a normative livelihood strategy and is evidenced in the profound dependence of many families on remitted wages. In 2014, remittances from workers overseas accounted for 29 per cent of the GDP.<sup>10</sup> This astounding figure makes Nepal second in the world for remittances as percentage of GDP.

According to a 2011 World Bank census, approximately 2.1 million Nepalis (over 7 per cent of the population) are working overseas.<sup>11</sup> Reading the many government and NGO reports on migration, an interesting pattern emerges; there are few data on women migrants. The common refrain is that the data that do exist are unquestionably inaccurate.<sup>12</sup> According to Nepal’s Department of Foreign Employment (DoFE), less than 4 per cent of labour permits between 2006 and 2013 were issued to women.<sup>13</sup> In 2013/2014 the DoFE granted 29,152 permits to women.<sup>14</sup> Yet the DoFE and every other organization working on migration estimates that the actual number of women departing each year is considerably higher.<sup>15</sup> The discrepancy comes from the fact that many women migrate illegally. Women who do migrate legally tend to be more affluent, work in higher-tier jobs such as nursing, and migrate to more “desirable” destinations like the United Kingdom and Australia.<sup>16</sup> In short, women with the financial resources and educational background to easily navigate official migration channels use them. However, women who migrate illegally are generally from lower socio-economic backgrounds and are less likely to have the literacy, money, and social capital necessary to facilitate formal emigration. Women who migrate illegally often perform domestic labour such as child care or elder care, food service work, or janitorial services while abroad.

Poor Nepalis are especially likely to migrate to the Middle East. In Nepal, law states that women under thirty cannot migrate to the Gulf countries (Dubai, Bahrain, Oman, Qatar, UAE, Kuwait, Saudi Arabia), which are *the* primary destinations for poor Nepali migrants, both male and female. These discriminatory laws were ostensibly passed to protect women, as the DoFE states explicitly: “The intent [of the ban] is to protect women from many risks, including long working hours, sexual violence, physical abuse and economic exploitation.”<sup>17</sup>

The logic of the ban is that simply forbidding women to go abroad will stop them, thus protecting them from dangerous work conditions. Instead, the law has put women at greater risk. Women in economic need continue to migrate, only now they must do so through informal channels that have few safety nets and little recourse, should the situation prove exploitative or dangerous.<sup>18</sup> There is mounting

evidence that age and gender discriminatory laws are ineffectual and counterproductive.<sup>19</sup> Yet they remain. Why?

Male labour migrants face manifold challenges abroad. Images of coffins returning from Gulf states bearing the bodies of young men are frequently plastered across Nepali newspapers. Despite the clear empirical evidence of dangerous working conditions, the state has yet to pass laws “protecting” male migrants. This failure to pass laws addressing the dangers faced by Nepali men working abroad suggests that bans on women’s labour migration to the Gulf and other states is not just about their protection. In the following sections I explore the socio-cultural underpinnings of gender discriminatory laws and suggest that historically dominant gender ideologies keep these laws in place, despite clear evidence of their failure to protect women.

### **Methods**

This article is based on data collected through eight months of participant observation at an NGO founded by and providing programming for returned migrant women, as well as surveys administered to returned and departing women migrants. The variety of sources provides a triangulation of sorts, which cross-verifies—from the perspective of migrants, policy advocates, and policymakers—the challenges women migrants encounter.<sup>20</sup> The mixed-methods approach employed here is particularly trenchant for a study of migration in Nepal, as previous treatments have tended to focus on modelling migration flows<sup>21</sup> rather than the analysis of fine-grained ethnographic data.

The bulk of the data were collected during participant observation conducted at Gumnu Nepal,<sup>22</sup> a well-established organization run by returned women migrants. The director of Gumnu allowed me to participate in and observe the daily functions of the organization in exchange for ad hoc office work. During biweekly visits to their main office I would speak with Gumnu staff about ongoing projects, shadow the director and assistant director in meetings, and perform services for the organization such as translating Nepali content into English and grant writing. While working with Gumnu I had the opportunity to attend organization meetings, read policy papers not available to the public, and sit in on phone calls and in-person meetings between Gumnu staff and mid- and high-level government bureaucrats.

This article is also informed through additional participant observation conducted while employed as a project manager on a U.S.-funded study concerning countering trafficking in persons (CTIP) programming. In both my voluntary role at Gumnu and my employed role for the CTIP project I did not set out to collect information linking gender discriminatory laws with the experiences of women migrants. Nevertheless a pattern emerged as I observed how

the former profoundly shaped the latter. As an “insider” in my field sites but an “outsider” as a white academic from the Global North, the data I present are inevitably filtered through both my personal standpoint and the institutional lenses of my partner organizations. Nevertheless, participant observation, as a cornerstone of ethnographic method, is also widely acknowledged as a valuable tool, especially for capturing rich, qualitative, experience-based details. Throughout this article I use data collected during participant observation to add nuance and depth to my discussion of migration experiences and to underscore the real-life consequences of policy and law on Nepalis.<sup>23</sup>

Finally, I also draw on survey data collected from returned migrant women. In July 2015 I partnered with Gumnu to look at the effects of the 25 April earthquake on women’s migration decision-making. My primary research questions considered how returned and potential women migrants were (or were not) considering migrating in the face of short- and long-term economic instability. Participants were initially approached at Gumnu’s district offices, which provide services such as legal aid to departing and returning migrant women and their families. Subsequent participants were found using snowball sampling.

I collected thirty-five surveys: fourteen from a highly affected region and twenty-one from a minimally affected region. From the minimally affected region the informants had a mean age of 30.17 years ranging from twenty-two to forty. All were married. Of this community, 14 per cent identified as high caste (Brahmin or Chettri), 43 per cent identified as low caste, and 43 per cent identified as an ethnic minority group. From the highly earthquake affected region the informants had a mean age of 30.07 years, ranging from 20 to 42. All were married. From this community 14 per cent identified as high caste (Brahmin or Chettri), 14 per cent identified as low caste or another ethnic group, and the majority, 72 per cent, identified as part of the historically marginalized Tamang ethnic group. In this study I focused particularly on women’s transit and labour experiences because literature on migration in Nepal is centred mostly on male migration.<sup>24</sup> Scholarship that does focus on women mostly considers women who are “left behind” by male migrants rather than women migrants themselves.<sup>25</sup> Along with data on migration decision-making, the survey queried participant’s knowledge of relevant migration law and policy. Thus, the data I use to inform the arguments below are from eclectic sources; from both Nepali and foreign NGO workers, government employees, and poor migrant women themselves.

### ***Hegemonic Hinduism and Honour Culture***

There is no one “Nepali woman,” and attempts to understand “women’s status” in Nepal or the status of “women Nepali

migrants” can only be partial and necessarily shallow.<sup>26</sup> Yet across the profound diversity of women’s lives<sup>27</sup> there are similarities of experience. In particular, widespread patriarchal norms have circumscribed the privileges and opportunities afforded to women and girls in comparison to boys and men.<sup>28</sup> This is reflected in the gaps in educational attainment, earning, and political involvement between men and women as well as gender discriminatory laws.<sup>29</sup>

Women’s systematic marginalization can, in part, be traced to the founding of Nepal as a Hindu kingdom in 1769. Successive kings codified Hindu doctrine into state law, which used Hindu cosmological understandings of hierarchical social order as the basis for determining social prestige as well as legal standing.<sup>30</sup> Explicit caste- and gender-based discrimination was a structuring component of Nepal’s social and legal system until reforms in 1950 overturned some, but not all, discriminatory laws.<sup>31</sup> Even with legal reforms and social revolutions, the social hegemony of high-caste gender norms persist in institutions and everyday interactions.<sup>32</sup> In 2002, the eleventh amendment to the constitution instituted a series of reforms to promote increasing gender equity. For example, women’s right to divorce and more gender-equitable inheritance rights were instituted.

As the 2000s progressed, it seemed that progressive legislation would continue to erode gender discriminatory policy. The final dissolution of the Hindu monarchy in 2008 followed by the drafting of a new constitution was expected to herald a new era of gender equality. In particular, nagging discriminatory policies such as those limiting women’s ability to pass citizenship to their offspring were to be abolished. And this did happen, at least on paper. In the 2006 Citizenship Act and the 2007 Interim Constitution, a discourse of gender equality is prominently featured. However, at the passage of a new and controversial constitution, a turn back toward conservatism is apparent. Gains outlined in the interim constitution have been rolled back in the newest iteration of the constitution promulgated on 20 September 2015. Most galling, Nepali women cannot pass Nepali citizenship on to their children, effectively consigning women as a group to secondary status.<sup>33</sup> The disappointment from women’s rights activists and progressive Nepali social and political groups is palpable, as it was hoped the new constitution would cement rather than undo democratizing gains made during the transition from monarchy to republic.

While the historically male, high-caste Hindu government has promoted a message of Nepali prosperity through development, access to the promises of development—including education,<sup>34</sup> job opportunities, and political power<sup>35</sup>—have been unequally distributed.<sup>36</sup> The majority of women have been excluded from the public and civil sphere of society for much of Nepal’s history as a state.<sup>37</sup> Consequently, Nepali

women face a tension between meeting normative gender expectations and participating in activities like work abroad.<sup>38</sup> Patriarchal ideas discouraging female mobility, education, or political involvement continue to hold widespread popularity<sup>39</sup> and are still recognized as influencing women’s behaviour<sup>40</sup> and decision-making.<sup>41</sup> These norms provide the basis for the paternalistic age and gender discriminatory migration laws currently in place.

Age and gender discriminatory migration laws are rooted in patriarchal concern for women’s *ijaat* (social honour). Within the context of historically dominant high-caste Hinduism, *ijaat* is a concept that is closely tied to a woman’s perceived sexual purity. According to high-caste Hindu norms, unmarried women are expected to be virginal, shy, and deferential to their parents. As married women they are expected to guard their reputation closely and transfer deference to their husband and in-laws. Further, women’s mobility should ideally be limited to the domestic sphere. In the domestic sphere, a woman’s honour can be assured through social surveillance by her parents and relatives and, after she marries, by her in-laws and relatives by marriage. Being seen outside the domestic sphere is grounds for social censure and an indication that perhaps a woman lacks *ijaat*. This is especially true for young women whose sexuality is considered dangerous to the woman and to those who come in contact with her.<sup>42</sup> Norms of female domestic seclusion vary quite widely throughout Nepal, but there is ample evidence that the ideals that underlie high-caste Hindu practices are recognized if not aspired to across caste,<sup>43</sup> class,<sup>44</sup> ethnic,<sup>45</sup> and religious difference.

While norms limiting women’s mobility have been publicly decried by Nepali social and political activists in the last several decades, and such norms hold much less cultural import than in previous generations, they cannot be called relics of the past. Indeed, many Nepalis still highly value female domestic seclusion to some degree, and such values are apparent in current gender and age discriminatory laws.<sup>46</sup> As the continued struggles to implement women’s full constitutional and legal equality evidence, historically dominant Hindu norms that forward women’s subordinate status still hold considerable influence at the highest levels of policymaking. Age and gender discriminatory migration law and policy reflect a desire to constrain young women’s movements and protect them from their own dangerous sexuality and naïveté. The explicit argument is that women under thirty may fall victim to sexual exploitation, but the subtext is that young women may experience too much freedom on their own terms.

Young women migrants transgress norms of female domestic seclusion on an international scale. Abroad, young women have no social surveillance and, in theory,

could participate in all manner of illicit activity. That this social fear undergirds current law is reiterated frequently by returned migrant women themselves. When I asked them, “In your opinion, is migration safe for women?” I was surprised that few spoke specifically of economic exploitation or abuse—even though many had just told me of encountering such hardships themselves. Instead, a common refrain was, “It depends on you,” or “That is up to your own heart (*man*),” or most explicitly, “To be spoiled (*bigrieko*) or unspoiled, it’s up to you.” These statements connect safety directly with chastity and put the onus of maintaining chastity directly on the migrant woman. The language of spoiled (*bigrieko*) is an overt reference to women who engage in socially unacceptable sexual behaviour. Thus, for the migrant women I spoke with, migration is safe if, and only if, it is done within hegemonic understandings of maintaining *ijaat*.

### ***The Trope of Trafficking***

Frequently splashed across the front pages of Nepali daily newspapers are stories of “traffickers arrested” or “women saved from trafficking.”<sup>47</sup> While some women are trafficked into exploitative labour conditions against their will, there is also a growing consensus amongst migration organizations in Nepal that anti-trafficking operations often conflate trafficking, smuggling, and irregular migration and fail to listen to the women they are purportedly rescuing.<sup>48</sup> In a conversation with the director of Gumnu, she noted that “rescued” women are quite often very aware of the risks they are taking and where they are going. A recent article in Nepal’s leading English newspaper covers the story of twenty-seven women returned to Nepal after being intercepted in India on the way to work in the Gulf. The article describes the women as being “trafficked” and “lured” with offers of employment in the Gulf.<sup>49</sup> The article makes no mention of the agency of these women, that they may have sought out such informal routes because of age and gender discriminatory laws, or that they are now almost certainly in debt with no foreseeable source of income. Instead, the article details their arrest, detainment, and return to Nepal along with their full name, age, and natal village. A focus on “rescue” and lurid details in Nepali media obscures the role of Nepal’s migration law in fomenting illegal migration channels.

The trope of trafficking plays into a narrative of naïve young women with a sexuality that is dangerous to themselves and those they come in contact with. Over the course of my work with Gumnu, several staff members expressed frustration with the disproportionate attention and funding directed towards “anti-trafficking” versus “safe migration.” Trafficking, they informed me, was fashionable, a buzzword that unlocked the gates to all-important international donor

money. Sensationalized reports of innocent Nepali girls trafficked to Bombay brothels and forced into sex slavery make great national and international headlines and is, in a word, “fundable.” Gumnu staff pointed to several very well-funded organizations in Nepal that have garnered international acclaim for their anti-trafficking work, but fail to include safe migration as part of their anti-trafficking approach. Instead, their tactics include border checkpoints where staff arbitrarily pull over young women whom they assess as possibly trafficked and subject them to invasive interviewing. These paternalistic tactics are in line with the discourse of naïveté and dangerous sexuality that underwrite the age and gender discriminatory migration laws.

Government policymakers use the trope of trafficking to justify continuation of age and gender discriminatory laws. The archetype of the trafficked Nepali girl offers the public a horrifying, and ultimately titillating image. Separated from her family and forced into prostitution with foreign men, it is the ultimate loss of *ijaat* for a young Nepali woman. Gender and age discriminatory laws have staying power because they are enmeshed in cultural narratives of gender and social honour. Such laws are held up as a way to protect young Nepali women from a future of ruin and dishonour. The trope of trafficking supports hegemonic gender ideology, as it sits comfortably with norms that limit women’s mobility for their own protection.

### ***The Problem of Papers***

The laws governing out-migration for young women are complex and constantly changing. New memorandums of understanding, treaties, agreements, and temporary closures circulate frequently. For example, in 1999 the DoFE implemented the ban on women under thirty entering Gulf states, the ban was lifted in 2010, then reinstated in 2012. In the meantime, bans have been put in place and lifted for countries like Malaysia, Israel, and Lebanon. These bans sometimes apply to all women under a certain age or just women seeking visas for domestic work. Even experts in the field of women’s migration describe their frustration with knowing what the current laws are. For average Nepali citizens, then, it is a truly daunting task.

Even if a woman wants to migrate legally, navigating Nepal’s bureaucratic system to actually obtain a permit is notoriously difficult. A Gumnu legal-aid staff explained that a potential migrant would have to make approximately seven office visits before securing the right permissions. Stops included the Department of Foreign Employment for initial paperwork, the Ministry of Foreign Labour for further forms, stops at specific country embassies or consulates for labour visas, and then an eventual return to the DoFE for final approval. This is assuming a potential migrant had

already secured a citizenship card, which requires its own lengthy procedure to obtain.

On the other hand, a relatively simple process was described by survey informants who migrated illegally. A typical description involved using a *dalal* (private broker) or manpower agency. In exchange for a hefty fee, the *dalal* or agency arranges travel, documentation, and jobs abroad. Most frequently, after posing for passport pictures and paying their “placement” fee, the women were then given instructions to travel to a destination in India where they would be met at the train or bus station by a partnering agent. Nepalis can cross the open border with India fairly easily and without documentation. Upon reaching the rendezvous point in India, the migrants are furnished with documents allowing their travel overseas, including paperwork and tickets to fly abroad.<sup>50</sup>

Many young women migrants are poor, illiterate, and from marginalized caste and ethnic backgrounds. It makes sense that they prefer to migrate internationally using the services of a broker or manpower agent rather than work through official channels that would be both time consuming and likely involve working with male high-caste bureaucrats with a reputation for gender, caste, and class discrimination.<sup>51</sup> Of the thirty-five women I spoke with, all twenty-eight of the returned migrants had used a broker or manpower agency and informal (illegal) channels. All seven informants who were planning to depart were unanimous in their decision to use a broker or manpower agency to facilitate their migration.

Informal migration channels may be more practical and feasible for young women migrants, but the exorbitant placement fees that accompany such agreements frequently saddle migrants with intractable debt. Further, upon arrival, migrants often find that they have been given work totally different than their original contract and/or given less remuneration than promised. Yet, because their migration is illegal, there is little a migrant woman can do—especially because she is now burdened with debts that must be repaid. In these circumstances, young women regularly find themselves in abusive work environments with little recourse.

### ***Illegal Migration as the Norm***

The regularity of illegal migration was apparent in the survey results. As mentioned above, of the twenty-eight informants who were returned from working abroad, all had migrated to Gulf countries and all had migrated illegally. The Nepali state is well aware of the informal routes young women take to circumnavigate discriminatory migration laws. Relevant state actors are also aware of the dangers of informal migration. Even still, discriminatory laws remain. For institutions like the DoFE and Ministry of Foreign Employment, there

is little reason to change the status quo. Keeping gender discriminatory laws on the books with the full knowledge that women will find ways around them is much easier and cheaper than designing and implementing meaningful migration reform.

In his ethnography of bureaucracy in a Northern Indian municipality, Gupta describes the labyrinthine, impersonal, and literacy-dependent processes necessary to meet basic livelihood in his field site as structural violence.<sup>52</sup> I argue that a similar dynamic is present in Nepal. By instituting laws that drive migrants into informal migration networks and by setting up migration procedures that make even legitimate migration extraordinarily difficult, the Nepali state is pushing young women migrants directly into more dangerous migration pathways. Informal migration is by definition unregulated. In informal migration routes, young migrant women, who are also frequently poor, of low caste, and minimally educated, are extremely vulnerable to exploitation on multiple levels. Their vulnerability may, for some, stem from genuine naïveté, but for many it is a chosen vulnerability, accepted with full knowledge and out of economic necessity. For example, six of the thirteen returned migrant women surveyed from an earthquake-affected district reported wage withholding and/or physical abuse of some kind during their work abroad. Such high rates of exploitation are consistent with what Gumnu staff encounter in their advocacy work. Given that women migrants tend to migrate to places where their family, friends, or community have migrated,<sup>53</sup> it is reasonable to assume that via their own social networks many young women migrants are quite aware of the potential risks and migrate in spite of them.

Policies limiting young women’s rights to unencumbered mobility not only expose women to additional violence throughout migration, but are in themselves a type of psychic violence. In the paternalistic and disempowering spirit of the law, discriminatory migration policies tell young Nepali women that they are not to be trusted, that they are not capable of independent decision-making, that their protection by the state extends only insofar as they submit to a particular gender ideology. Tamang has labelled the paternalism at the root of Nepali law and policy “state patriarchy.”<sup>54</sup> Age and gender discriminatory laws are an extension of state patriarchy and indeed, the Hindu hegemony that continues to shape Nepal’s state-making processes.

### ***“I will see for myself”***

The immediate future does not bode well for young Nepali women migrants. The earthquake of 25 April 2015 and subsequent political unrest has further rattled the economy and it is likely that out-migration will increase as jobs become scarcer.<sup>55</sup> Further, migrating illegally to avoid bureaucratic

hurdles was common before the earthquake. In a post-earthquake context, many young women from earthquake-affected areas have little choice but to migrate illegally, given that official documents confirming age or citizenship may be buried in the rubble. Young women living on the open border with India also have little incentive to go through more congested government queues to access official migration documentation.

Survey informants confirmed a general pessimism about future economic prospects in Nepal. Of thirty-five departing and returned migrant women, 74 per cent (twenty-six) believed that migration abroad would increase in the coming years. As one informant, twenty-three-year-old Sapana Tamang put it, “I have heard [migration abroad] is dangerous for some, but I will go and I will see for myself.” Sapana declared her intention to go while sitting in a small one-room apartment shared with her mother, sister, and husband. Her mother, who was seriously injured in the earthquake and who had herself worked illegally in Kuwait and been beaten and denied pay by her employer, looked on wistfully in agreement with her daughter’s plans. In the strain of economic necessity, young women like Sapana have little choice but to see for themselves. It is unlikely that young women will stop migrating through informal channels unless the Nepali state puts sustained and serious effort into reforming current migration policy and practice. This was improbable before the earthquake and seems even less sure as the government struggles to recover from a major humanitarian disaster.

Nevertheless, there is room for some optimism. First, women’s rights groups and feminist activists continue to press for meaningful change. Online petitions, press conferences, demonstrations, and rallies at government buildings continue almost daily.<sup>56</sup> Second, organizations like Gumnu continue to lobby for policy change. Finally, migrants are doing what they can to ensure their own and other migrants’ safety. For example, one informant, twenty-eight-year-old Kabita Lama, spent four years in Lebanon. During this time she recounts how she became heavily involved in a Nepali women’s group that sought out other young Nepali women migrants. In Lebanon, Kabita ran awareness-raising meetings for migrants and assisted several women in abusive work environments with their escape and return to Nepal. Women like Kabita cannot and will not wait for the state to make better migration policy. Through their organizing and determined efforts, young Nepali women are working to ensure safer migration on their own terms.

### **Discussion**

Gender and age discriminatory policies in Nepal demonstrate that identity in Nepal cannot be parsed into categories

of “gender,” “age,” or “caste” for that matter. Instead, identity and how identity is interpreted by the state is intersectional. Intersectionality, as a theoretical and methodological paradigm, underscores the interconnected and overlapping dimensions of social location—such as gender, age, class, caste, race, ability—that simultaneously shape individuals and communities’ lived experience.<sup>57</sup> Discriminatory laws elucidate how young women migrants’ lives intersect multiple marginalized social categories, resulting in outcomes that cannot be parsed nor addressed without intersectional analysis. For example, the ban on migration to Gulf countries extends only to women under thirty because the implicit assumption of the state is that women over thirty have most likely already married and given their virginity to their husband, thus fulfilling their primary honour expectation. It is not that Nepal has gender *or* age discriminatory laws, it is that these laws are gender *and* age discriminatory.

In Nepal, it is young women who are the target of paternalistic policy rather than all young migrants. It is young women whose dangerous sexuality must be contained through laws limiting their mobility. Further, it is often young women from lower-class and marginalized caste and ethnic backgrounds that are most effected by discriminatory laws. As one Gumnu staff member informed me—and as my own limited sample demonstrates—most women who migrate illegally have limited literacy and, because of their social location, lack the cultural, educational, and monetary capital necessary to use legitimate migration channels. For example, thirty-four of thirty-five survey informants had completed less than a Grade 8 education, and twenty-five of thirty-five informants identified as members of a historically marginalized ethnicity or as low caste. Women like my informants face challenges as young women, as poor women, and as minority women that mutually constitute their vulnerability as foreign labour migrants. Gender discriminatory migration laws exacerbate their vulnerabilities rather than ameliorate them.

Looking at discriminatory migration laws with an intersectional lens raises interesting possibilities for theorizing how and why these laws persist. Within state policymaking bodies that are still heavily influenced by high-caste Hindu gender ideologies, young women are a social category requiring paternalistic oversight. I argue that age and gender discriminatory bans are a symptom of “state patriarchy,” not only in their overtly stated purpose of protecting women, but also in a much subtler and insidious way. First, these bans are in place despite undeniable evidence that they are grossly ineffectual and in fact push women into dangerous migration routes. Nepali women are then “saved” or “rescued” from “dangerous” situations by the same government they are circumventing. So-called rescue

operations provide ample justification for continued paternalistic laws. Second, when stories of migrant women facing abuse and violence are circulated in popular media and through social networks, the state again lays claim to these narratives as further justification for more bans, rather than migration law reform. On an ideological level, both “rescue” missions and tales of abuse abroad bolster high-caste Hindu gender ideologies of female domestic seclusion. A perverse self-perpetuating dynamic results whereby the state sets the stage for unsafe migration conditions and then rushes the stage as the rescuing hero.

In this context, the risks taken by young women migrating illegally and any misfortunes that may befall them are framed as their own doing. In a sense, they had it coming. By transgressing laws that affirm the dominant gender ideology, young women migrants butt up against more than bureaucratic obstacles, they push back against entrenched ideological power. The stated intent of gender discriminatory laws is to protect women, yet the ideological intent seems to be aligned with upholding historically dominant gender ideology. If the dangers of informal migration and the violence women migrants face does not actually stand at odds with the ideological intent of discriminatory migration policy—and indeed furnishes policymakers with evidence of the need for such laws—it may suggest why discriminatory policies persist, despite their failure to ensure safer migration.

#### NOTES

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- 50 Bandita Sijapati, Ashim Bhattarai, and Dinesh Pathak, *Analysis of Labour Market and Migration Trends in Nepal* (Kathmandu: Center for the Study of Labour and Mobility, 2015).
- 51 Subina Shrestha, "Citizenship Nepali Style," *Ekantipur*, 15 September 2014.
- 52 Akhil Gupta, *Red Tape: Bureaucracy, Structural Violence, and Poverty in India* (Durham, NC: Duke University Press, 2012).
- 53 Ganesh Gurung, *Nepali Women Workers in Foreign Labour Migration* (Kathmandu: National Institute of Democratic Studies, 2005).
- 54 Tamang, "Legalizing State Patriarchy in Nepal."
- 55 Democracy Resource Center Nepal, *Aid and Recovery in Post-Earthquake Nepal: Qualitative Field Monitoring* (San Francisco: Asia Foundation, 2016).
- 56 Democracy Resource Center Nepal, "Youth Protest against Proposed Citizenship," *Ekantipur*, 26 June 2015.
- 57 Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1241–99. See also Leslie McCall, "The Complexity of Intersectionality," *Signs* 30, no. 3 (2005): 1771–1800.

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# Should We Presume State Protection?

JAMES C. HATHAWAY AND AUDREY MACKLIN

## Abstract

Professors Hathaway and Macklin debate the legality of the “presumption of state protection” that the Supreme Court of Canada established as a matter of Canadian refugee law in the *Ward* decision. Professor Hathaway argues that this presumption should be rejected because it lacks a sound empirical basis and because it conflicts with the relatively low evidentiary threshold set by the Refugee Convention’s “well-founded fear” standard. Professor Macklin contends that the *Ward* presumption does not in and of itself impose an unduly onerous burden on claimants, and that much of the damage wrought by the presumption comes instead from misinterpretation and misapplication of the Supreme Court’s dictum by lower courts.

## Résumé

Les professeurs Hathaway et Macklin reconsidèrent la légalité de la « présomption de la protection de l’État » que La Cour suprême du Canada avait promulgué comme principe de droit canadien en matière de réfugiés dans le jugement *Ward*. Le professeur Hathaway soutient que cette présomption devrait être rejetée en raison de son manque de fondement empirique rigoureux ainsi que de son incompatibilité avec le niveau de preuve relativement faible impliqué par la norme de « crainte justifiée » établie par la Convention relative au statut des réfugiés. La professeure Macklin estime que la présomption *Ward* n’impose guère en soi un fardeau excessivement lourd sur les demandeurs, et que la plupart des problèmes engendrés par la présomption découlent des erreurs d’interprétation ou d’application de la décision de la Cour suprême de la part des tribunaux inférieurs.

More than two decades later, the Supreme Court of Canada’s decision in *Ward v Canada*, [1993] 2 SCR 689 remains one of the world’s most significant refugee law decisions. *Ward*’s holdings on such matters as the meaning of both “membership of a particular social group” and the relevance of non-state agents of persecution were groundbreaking and of indisputable value to the evolution of refugee protection in Canada and around the world. Indeed, *Ward* made clear the overarching purpose of refugee law, which informs nearly every interpretive question: “International refugee law was formulated to serve as a back-up to protection one expects from the state of which an individual is a national. It was meant to come in to play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged.”

More controversially, however, the Court addressed the question of how best to operationalize the surrogate protection principle. While in *Ward* the home country had conceded its inability to protect, the Court nonetheless opined about how to proceed in the more usual case where there is no such concession: “Clear and convincing confirmation of a state’s inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant’s testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, *as nations should be presumed capable of protecting their citizens*. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus . . . , *it should be assumed that the state is capable of protecting a claimant*” (emphasis added).

While clearly *obiter dicta*, this passage has generated real controversy. First, courts have struggled with the question of whether the adequacy of state protection focuses on the

efforts made by the state to protect, or on whether state action is effective in reducing the risk of persecution below the threshold of “reasonable chance.” Second and more generally, the basic notion of a “presumption” of state protection has led lower courts to impose a significant burden on persons seeking recognition of refugee status. For example, the Federal Court of Appeal in *Carrillo v Canada*, 2008 FCA 94, at [30], interpreted *Ward* as imposing on refugee claimants a burden to “adduce relevant, reliable and convincing evidence which satisfies the trier of fact on the balance of probabilities that the state protection is inadequate.”

In *The Law of Refugee Status*<sup>1</sup> James Hathaway and Michelle Foster argue that the notion that states are “presumed to protect” their citizens, as suggested in *Canada v Ward*, [1993] 2 SCR 689, is unsound. In their view the resultant duty on refugee claimants to rebut a presumption of state protection is at odds with the duty of the applicant to show no more than a “well-founded fear” of being persecuted. More generally, Hathaway and Foster endorse the view of the Full Federal Court of Australia in *A. v Minister for Immigration and Multicultural Affairs*, (1993) 53 ALD 545, at [41] that the *Ward* presumption should be rejected on the grounds that there is no basis in principle for importing a presumption that lacks a solid empirical foundation. They contend that the question of whether a state is unable or unwilling to provide protection is a simple question of fact that must, like all questions of fact, be investigated in line with the shared duty of fact-finding. In contrast, Audrey Macklin contends that, properly interpreted, the presumption of state protection as articulated by the Supreme Court of Canada in *Ward* does not require refugee claimants fearing persecution by non-state actors to rebut a presumption of state protection on a balance of probabilities. Rather, the Federal Court of Appeal has misconstrued and misapplied the Supreme Court’s dictum on the presumption of state protection.

We reproduce here a recent exchange between Hathaway and Macklin on the significance and ramifications of the notion of a presumption that states can and will protect their citizens.

#### **Audrey Macklin to James Hathaway, 25 June 2014**

1. I disagree with you that the Supreme Court of Canada in *Ward* made a critical mistake in talking about a presumption that states are able to protect their nationals, which it derived as an implication flowing from state sovereignty. *Contra* the Australian Full Federal Court in *A*, not all presumptions require a basic fact. Most notably, criminal law presumes sanity without any underlying basic fact. The presumption of innocence is another, albeit more complicated example. So even if it is a presumption without a basic fact, that is not fatal.

2. But more importantly, I think that we *do* presume that states are able and willing to protect their citizens (which they do by refraining from persecuting them and by protecting them from abuses by others). That presumption explains why the burden is on a refugee claimant to make out (on a standard of reasonable chance/serious risk) the elements of his/her claim (well-founded fear of persecution on enumerated grounds). It is true that the court didn’t have to say anything about it and I am persuaded by your critique (not to mention subsequent Federal Court jurisprudence) that it definitely would have been better not to have said anything. Read in its best light, however, the Supreme Court in *Ward* is saying no more than “It is the job of a state to protect its citizens. It’s up to you, refugee claimant, to prove that your state won’t do its job with respect to you.” I think that the mistake in the Federal Court jurisprudence is to double up on that burden by adding a separate (and tougher) burden specific to failure of state protection qua discrete element in the refugee analysis.

#### **James Hathaway to Audrey Macklin, 28 June 2014**

I’m intrigued by your point about whether a presumption needs a factual basis or not. Let me push you a bit on this one.

1. The presumption of state protection is actually a *factual* presumption—and in this sense I think it is quite different from the presumption of innocence, which is really just a means of operationalizing the criminal law’s burden of proof. If, as I think must be the case, entitlement to refugee status ought to be an open-ended inquiry into the merits of the factual need for surrogate protection, it seems to me that the bar for a “factual presumption” would have to be set quite high—something that is usually, perhaps nearly always, the case. If that is not so, I can see no reason to encumber the refugee with the duty to dislodge the presumption rather than simply asking the question.
2. This does not mean, by the way, that I’m not persuaded by *Ward*’s true presumption—in favour of a well-founded fear of being persecuted if an absence of state protection is shown. I think the empirical case is definitely stronger for this than the “states can and will protect” presumption, but not so overwhelmingly clear that the question shouldn’t just be asked. So while we agree that the “double burden of proof” is the most patent manifestation of the problem, it seems to me to flow from the counterfactual factual presumption.

Thoughts?

**Audrey Macklin to James Hathaway, 29 June 2014**

Glad to be pushed on this. The way you framed your response helps me see more clearly where and why we differ in our route to the same outcome.

1. I think the presumption of state protection (POSP) is, like the presumption of innocence (POI), a legal and not a factual presumption. Perhaps the Federal Court's mistake can be rephrased as erroneously treating the presumption of state protection as if it were a factual presumption. I assume that we agree that the presumption of innocence is a legal (and not factual) presumption—after all, about 2/3 of people who are charged are convicted. So as factual presumptions go, it doesn't work. I also agree that the main point of the POI is to allocate the burden of proof: it is the state that must prove that the person committed the offence, and not the individual who must prove her innocence. There are various sound reasons for allocating the burden that way. And the burden is heavy (beyond a reasonable doubt), but for reasons that have little to do with the factual likelihood that the accused committed the offence.
2. Similarly, I think the POSP is a legal presumption that allocates the burden of proof to the claimant to establish the elements of the refugee claim. We express/justify it by saying something like this: The international state system is predicated on the claim that states are able and willing to protect their citizens. That is part of the justification for the allocation of sovereignty to individual states, etc. And that is also why refugee protection is (as you put it) surrogate protection—meant to address the anomalous situation where the state doesn't actually fulfil its obligations. If it wasn't a departure from the "norm" of state protection, we wouldn't call it surrogate. So we put the burden on the one who challenges the norm to show that expected protection will not be forthcoming in his case.
3. To the extent that POSP is a legal and not a factual presumption, it doesn't tell us anything about how "heavy" the burden on the claimant ought to be to make her case. And, for a variety of good reasons, courts have decided that the standard should be relatively light—"reasonable chance" or "serious reasons," rather than balance of probabilities or beyond a reasonable doubt.
4. So we say that the states are presumed able/willing to protect their citizens (because the international state is predicated on it, legal fiction though it may be). That means that the burden is on the claimant to make out the elements of a refugee claim (well-founded fear of persecution on an enumerated ground), according to the standard of proof (reasonable chance) that we

think appropriate. The presumption is not factual, and so tells us nothing about how hard it will be to dislodge it as an empirical matter in any given case. And if the burden is relatively light (in comparison to the criminal or civil standard), this is the product of many factors. One might be the factual weakness of the legal presumption, but I'm not sure about that—I'd have to think about it more deeply.

5. Now, there is another way of coming at this, which you hint at in talking about an "open-ended inquiry." One could imagine a system that did not allocate the burden of proof. It would be a purely inquisitorial system in which the decision-maker was responsible for investigating and determining refugee status. In such a system, there would be no need for a legal presumption, because there is no burden to allocate as between parties. But that is not the system we have—even when interpreted generously to allow for the engaged, inquisitorial decision-maker and a non-adversarial process. I am not commenting on the desirability of such a process, just on whether it exists at present. But more significantly, it is not the system that the Supreme Court thought we had when it decided *Ward*. It operated on the understanding that one party did bear the burden, and that party was the claimant. The presumption of state protection, like the presumption of innocence, is a device for allocating the burden at the outset. It is not pulled out of thin air, but it should not be misconstrued as a factual presumption that applies to a specific element of the refugee test (existence of persecution).
6. So, if I thought the presumption was a factual one, I think I would agree with you. But I don't think it is. And I think that when the Supreme Court talks about clear and convincing evidence, etc., it is only imposing an evidentiary burden on the claimant, as in "If you are from a country where the state apparatus has not broken down (however defined) and you don't show clear and convincing evidence re: lack of state protection, you are at risk of a negative inference being drawn." We could have done without it, in my view, but I don't think it is as damaging as the Federal Court has made it through its own distortions.

So, if I've understood you correctly, our divergence stems from a difference of opinion about whether the POSP is best understood as a legal or a factual presumption. Does that seem right?

**James Hathaway to Audrey Macklin, 30 June 2014**

1. I think your para. 2 is the nub of the issue. The presumption of innocence in criminal law serves a helpful

function in reinforcing in a practical way the agreed legal standard of proof—i.e., proof beyond a reasonable doubt.

2. As your analysis in para. 2 makes very clear, the POSP invented by Canadian courts does exactly the opposite: it undermines the legal standard of proof—well-founded fear, i.e., only a reasonable chance or serious possibility—by requiring more of the claimant than the Refugee Convention allows. Thus, when you say (accurately) that “the POSP is a legal presumption that allocates the burden of proof to the claimant to establish the elements of the refugee claim,” you are right—that’s exactly what it does, and at a high level. But that is also precisely why it is untenable as a matter of international law, since there is a shared duty of fact-finding that requires only that at the end of the day the evidence adduced meets the well-founded fear test. My guess is that this is why other countries don’t go down this road (even if they invent equally awful mechanisms to avoid their responsibilities).
3. So this brings me back to where I began: if this is being treated as a “legal” presumption, it shouldn’t be—that standard is well-founded fear. Hence it would only be appropriate to have a POSP if it were a “factual” presumption—which it can’t be, for the reasons we agree on.

Are we getting closer?

**Audrey Macklin to James Hathaway, 30 June 2014**

1. Almost there, I think. I think, however, that you conflate two separate questions: (a) who has the burden of proof?; and (b) what is required to discharge that burden?
  2. The first is the legal *burden of proof* and it is allocated to the state in criminal law, and the plaintiff in civil cases. The second is the *standard of proof* and could, in principle, be answered in different ways—beyond a reasonable doubt, on a balance of probabilities, whatever. After all, we allocate the burden of proof to the plaintiff in civil cases, but the standard is only balance of probabilities; in criminal law, we allocate the burden to the state, and the standard is higher. But if the state is suing someone in civil court for a tort action, the standard is balance of probabilities. So, knowing where the legal burden lies does not answer what the standard of proof is. What we have in refugee law (on the best reading of *Ward*) is a legal burden on the claimant, on a standard of proof that is “reasonable chance” or “serious possibility.”
  3. I’m not sure if we are struggling with semantic murkiness, but my sense is that you want to endorse what I described in paragraph 5 in my previous email: there can be no legal burden of proof in a refugee claim. The decision-maker is conducting an inquiry more than an adjudication, and so the concept of burden of proof is simply inapposite.
- So I think this is where we come down so far:
1. We agree that the POSP purports to be a legal burden of proof. I think it’s legally permissible (and inevitable in practice, but that’s another story) to put a legal burden on the claimant. You do not.
  2. I think that the POSP puts the legal burden on a claimant to make out a well-founded fear of being persecuted on a standard of proof of reasonable chance or serious possibility. You think that once the legal burden is on the claimant, a higher standard of proof necessarily follows, which cannot be reconciled with “reasonable chance” or “serious possibility.” I think that is mistaken, and this mistake gives rise to the incoherent approach (not yours, the Federal Court’s) of asking whether a claimant has shown on a balance of probabilities that there is a reasonable chance of persecution.
  3. You think that if POSP cannot lawfully operate as a legal presumption, it must be a factual presumption. Factual presumptions are valid in principle, depending on the rationality of the inference from basic fact to presumed fact. But POSP fails as a factual presumption. If I accepted that POSP is a factual presumption, I would agree with you that it fails.
  4. I also think that even if it was accepted as a factual presumption, it could lawfully require no more of a claimant than that she point to evidence that, if accepted, could show that the level of state protection still left a reasonable chance of persecution in her case. That is how an evidentiary burden works and I think this is what *Ward* says (on its best reading). Not sure where you are on this point.
  5. To add to your real world skepticism about what other countries do/don’t do, it is perhaps noteworthy that *Maldonado*, [1980] 2 FC 302 says that sworn evidence is presumed true. So, if taken seriously, that would go a long way to alleviating the concern that a legal burden on a claimant is unduly onerous, since sworn testimony is the main evidence in any case. Of course, *Maldonado* is honoured in the breach, just as other countries without a legal burden of proof on claimants find ways to reject claims anyway.
- I really think our disagreement is about whether it is permissible to put a legal burden of proof on a claimant, and whether that necessarily dictates what I call the standard of proof. You say no/yes and I say yes/no. I’m drawing on

my understanding of how burdens work in criminal law (although I've not taught it in a long time).

I should say that I quite enjoy trying to work out this point, and I also suspect that we are the only people in the world who would find it interesting.

#### **James Hathaway to Audrey Macklin, 30 June 2014**

1. If by "legal burden of proof" you mean who has the burden of production, then by and large—though subject to the shared duty of fact-finding!—I can agree that this lies with the person seeking recognition of status. But a legal burden of proof should not in my view be given any greater substantive role than this, since there is ultimately only one evidentiary question in refugee status assessment and that is defined by the "well-founded fear" standard—nothing more, nothing less.
2. Assuming we're now both speaking about the quantitative question (how much evidence is enough?), then I think that a "presumption" of state protection means that the applicant can in practice only succeed by showing more than the well-founded fear standard requires. For example, in *Cardoza Fonseca*, (1987) 480 US 421, the US Supreme Court rejected the view that anything approaching balance of probabilities was required. Yet how do you overcome a presumption with only evidence of a 10% risk? Any reference to having to show anything on a balance of probabilities, much less to rebut a presumption, seems almost inevitably to drive us to something beyond that standard (a concern that seems clearly borne out in the Canadian Federal Court caselaw).
3. We agree that factual presumptions are valid in principle, depending on the rationality of the inference from basic fact to presumed fact and that POSP fails as a factual presumption. To me the Supreme Court's test is clearly an (unwarranted) factual presumption.
4. I agree that a reading of *Ward* along the lines of what you posit would help to alleviate the problem—but this does not seem remotely what the Federal Court understands it to mean. And perhaps I have a bit more sympathy for the unhappy approach of the lower courts and tribunals because I think that the Supreme Court of Canada unnecessarily complicated things by referencing a presumption when simply leaving it as a neutral question of fact would have been better.

I'm wondering if our difference comes from the fact that you say that you're approaching this from a criminal law point of view, whereas I am not. I don't really understand why you would want to anchor your thinking in such a different body of law, given the quite explicit rejection of

traditional evidentiary standards (criminal or civil) by the decision to adopt the "well-founded fear" standard—*sui generis* to refugee law. Is this at the root of our contrasting points of view?

#### **Audrey Macklin to James Hathaway, 30 June 2014**

1. I think your point about the tendency to require more than "reasonable chance" to discharge a legal "presumption" is interesting and I need to think about it more. I'm not immediately persuaded that the label "presumption" must require more than a reasonable chance to qualify as a presumption, but you may be on to something as a pragmatic prediction of how "presumption" gets used in practice. What follows from that, I'm not sure, but either way it warrants more thought.
2. My reliance on criminal law is only this: my terminology distinguishes burden of proof from standard of proof, and legal burden from evidentiary burden, in the same way that Canadian law (both criminal and civil) does. And I operate from the proposition accepted in Canadian law that the imposition of an evidentiary burden doesn't change the legal burden of proof. I just want to be sure that when you and I use these terms, we ascribe the same meaning to them. I had the feeling we might be invoking the same terms but giving them different meanings. I certainly agree with you that the actual standard of proof in refugee law is *sui generis*, or at least distinct from the civil/criminal standards of proof. As you may know, the legal burden of proof under the Canadian *Immigration and Refugee Protection Act* for inadmissibility is on the government, yet the standard of proof is notably lower than balance of probabilities ("reasonable grounds to believe")—and it only operates to the disadvantage of non-citizens.

#### **NOTE**

- 1 James Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge: Cambridge University Press, 2014).

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# “They didn’t treat me as a Gypsy”: Romani Refugees in Toronto

CYNTHIA LEVINE-RASKY<sup>1</sup>

## Abstract

*With organized hate crime and institutionalized discrimination, thousands of European Roma have fled to Canada, where they claim refugee status. Their arrival coincided with far-ranging reforms to the refugee determination system in 2012–13 in addition to some actions aimed specifically at the Roma. Against this backdrop, former and current Romani refugee claimants substantiate the experience of migration and settlement, beginning with the first moments after arrival, to the tasks of finding housing and work. Agency and resilience are evinced, despite the government’s multiple instruments used against asylum-seekers. Romani refugees’ lives show how, for transnational groups, belongingness is always contested and the meaning of home is always nuanced.*

## Résumé

*En raison des crimes organisés motivés par la haine et de la discrimination institutionnelle, des milliers de Roms européens ont cherché asile au Canada où ils ont effectué des demandes du statut de réfugié. Leur arrivée a coïncidé avec des réformes de grande ampleur en 2012-13 portant sur le système de détermination du statut de réfugié, ainsi que des mesures visant les Roms particulièrement. C’est dans ce contexte que les anciens ainsi que les actuels demandeurs du statut de réfugié d’origine rom réalisent l’expérience de migration et d’installation, en allant des premiers moments après leur arrivée jusqu’aux démarches qu’ils entreprennent pour trouver des logements et du travail. Un esprit d’actualisation et de persévérance se manifeste, malgré les multiples mesures imposées par le gouvernement à l’encontre des chercheurs d’asile. L’expérience des réfugiés d’origine rom démontre que, pour les groupes transnationaux,*

*l’appartenance est toujours soumise à la contestation, et que l’idée de domicile est toujours conditionnelle.*

The Roma are an ethnically distinct social group who originate from the northwestern Indian provinces of Punjab, Rajasthan, and Sindh, from where they departed in the eleventh century. They are the largest minority group in Europe with a population of 10–12 million.<sup>2</sup> The Roma population in Canada has been estimated at 80,000, but with immigration since the 1990s it has likely reached 100,000. They have lived in Canada for over 100 years,<sup>3</sup> but it was only in the 1990s that their immigration status and larger numbers converged to elicit a response from the Canadian government. The demise of state socialism, rampant discrimination, and the rise of anti-Roma violence by paramilitary groups and others are among factors responsible for their migration as asylum-seekers from Europe to Canada. Between 1998 and 2015, 35,015 refugee claims were made by people from Central and Eastern European (CEE) countries with large Romani populations: Croatia, Czech Republic, Hungary, Romania, and Slovakia (comprising 7.3 per cent of claims from all countries). Hungarians represent 67 per cent of that figure, of which perhaps 85 per cent are Roma.<sup>4</sup> Reception to the Romani newcomers in Canada was largely unfavourable as they encountered legislative and policy barriers to their settlement. Those seeking to settle in Canada express agency and resilience while the memory of systemic racism in Europe is fresh, and with the knowledge that their desire to remain in the country may be thwarted at any moment. Ethnographic research with Romani individuals in Toronto produced rich narratives of resourcefulness and optimism. Stories attest not only to personal capacities for endurance during the travails of migration, but also for hope vested in the early foundations of belongingness.

### **Overview of the Research**

During my ethnographic research from 2011 to 2015 at the Roma Community Centre in Toronto, for which I received ethics approval in the summer of 2011, I interviewed forty-six individuals from a cross-section of Roma and collected hundreds of pages of field notes, communications, and documents. As an active volunteer, I was involved in programs and events, grant-writing, organizational development, advocacy, and activism. Recruitment for interviews stemmed largely from my contacts at the Roma Community Centre, but also from some local Romani musicians whom I have known since 1998. I took a grounded theory approach to the qualitative analysis of the data in which seven broad salient categories emerged: the Roma people, the effects of anti-Roma racism, life in Europe, life in Toronto, life as a refugee claimant, personal goals and achievements, and community building. This article focuses on two of these—life in Toronto, and life as a refugee claimant—from the perspective of former and current refugee claimants. Other themes are explored elsewhere.<sup>5</sup> Interviews were about two hours long, recorded and transcribed, and translated where necessary. The fourteen adult refugee claimants and their children (comprising ten families) had arrived between 2009 and 2012 from Hungary and Croatia. By the spring of 2015, four of the ten claimant families had been accepted as refugees, and they had received permanent residence status. One was rejected and had received a repatriation order, three were still waiting for a decision, and the fate of two is unknown.

My aim was to hear individuals' stories and to embed their words in a social context in order to understand this historically oppressed group. Consistent with community-based participatory research, my work is informed by the principle of epistemic privilege of community members in which their critical insights are recognized as authoritative on the basis of their authentic and personal knowledge.<sup>6</sup> Highlighting refugee voices counteracts the tendency to construct refugees as of a universal kind—victims instead of actors engaged at a particular juncture with history. But refugees are the best experts of their situations, and when their experiences are discounted or regarded as untrustworthy, they are rendered speechless.<sup>7</sup> Their experience is depoliticized, even as it conveys crucial narratives of political, historical, and cultural practices on which refugee aid programs and determination decisions are made. For this reason, research must reserve a central forum for refugees' voices.

In Canada, several researchers have respected this approach. While diverging in emphasis, conclusions affirm refugees' productive capacities. Omidvar and Wagner dedicate their exclusive purpose to thirty refugees' stories covering the fullest range of experiences.<sup>8</sup> Lacroix's eight

interview participants in Montreal describe rebuilding their identity out of the stigma, material hardship, loss of status, and subjection to state intervention that they experience.<sup>9</sup> Interviews with ten asylum-seekers in Montreal led Manjikian to affirm refugees' agency as they create meaningful lives on their own terms.<sup>10</sup> Freund shows how the fifty-three refugees in Winnipeg from he obtained oral histories make "home along the journey." Their tethers are just as likely to be to kin or to the local as they are to be the nation.<sup>11</sup> In his field research on Romani refugees in Toronto, Acuña discusses interviews with two individuals and discovers that "resilience can very well mean the capacity of starting anew."<sup>12</sup> A few European authors have captured some Romani refugees' voices about reasons for migration to Canada, work, and challenges to settlement.<sup>13</sup>

Interview participants entrusted me with memories "overwhelmed by occurrences that have not settled into understanding ... events in excess of [my] frames of reference."<sup>14</sup> Stories I heard of life in Europe—homes set aflame, gang rape, a child deliberately attacked by a dog—taxed my capacity to theorize this knowledge. Encouraged by critical race sociologist David Theo Goldberg, I sought to sustain an "openness to the deep and abiding influences of those deemed Other ... and being moved by the positions and ideas of those who have been marginalized."<sup>15</sup> Against the disturbing backdrop of their transnational encounters, their narratives of resilience and optimism are a testament to strength in adversity. The specific nature of this adversity can be learned by examining two sets of conditions for Romani refugee claimants. One is located in CEE in the form of persecution propelling their migration outward. The second is located in Canada in the form of policy changes oriented against asylum-seekers in general, and sometimes against the Roma specifically. Each of these sites is explored in the next sections.

### **Conditions in Europe**

For the Roma, state socialism in CEE was both beneficial and costly. The Roma's socioeconomic status improved with assured employment, housing, and education, but formal equality was granted at the expense of cultural assimilation. Along with centralized states' increased social and political control over them,<sup>16</sup> kinship ties were weakened and traditional crafts were lost.<sup>17</sup> The Roma's manner of life was regarded as divergent from socialist ideals. Soviet leaders implemented programs to suppress it by putting the Roma to work on the socialist production line or as unskilled workers in industry. As a consequence, the entrepreneurship and versatility that had been the Roma's conventional means of subsistence was extinguished. When traditional skills as producers of household products, foresters, blacksmithing,

and music performance were rendered redundant, some Roma turned to scavenging and begging or trade in the black market.<sup>18</sup>

With the collapse of the socialist regime, economic conditions in the region deteriorated for majority and minority groups alike. Hate crime grew as nationalist extremists organized themselves and took violent action against the easiest of targets.<sup>19</sup> Extending the common explanation that extremists scapegoat ethnic minorities, theorists assert that groups like the Roma embody an imagined threat to consensus on political and social values.<sup>20</sup> Minorities are blamed for the state's failure to deliver the rewards of global capitalism and to fulfill the fantasy of a pure nationhood.<sup>21</sup> Situated precariously at the border of the ethnic nation state, the Roma are accused of intrusion, indolence, ill will, criminality, or any such thing "feeding parasitically on the social body."<sup>22</sup> That they allegedly lack a primordial bond to society is feared as an absence of commitment to the common good. Exploiting these fears, national leaders seize the Roma as safe objects with which to demonstrate their political power. When the state is incapable of protecting its citizens from the ravages of global economic forces, it turns instead to the suppression of its national ethnic minorities. States require the continuous renewal of the Roma's vulnerabilities against which they can demonstrate their powers.

This state of affairs gives rise to the Roma's extraordinary susceptibility to violence. In Hungary, the source country for the large majority of recent Romani newcomers in Canada, the European Roma Rights Centre documented sixty-one attacks against Roma and their property between January 2008 and September 2012.<sup>23</sup> An unprecedented series of violent acts occurred in the country in 2008–9. Known as the "Roma Murders," these crimes were carried out as a series of attacks on random Romani individuals in several villages. Canada's Immigration and Refugee Board describes these attacks as "planned with military precision" involving a "pattern of firebombing houses on the periphery of villages at night, and then shooting at inhabitants as they attempted to escape the burning house."<sup>24</sup> These and countless other anti-Roma hate crimes are tolerated by the ruling Fidesz Party and often carried out by a paramilitary movement with deep connections to the far-right Jobbik Party.<sup>25</sup> The problem is not unique to Hungary. Fascist political parties like the Workers' Party for Social Justice in the Czech Republic, Our Slovakia People's Party, Bulgaria's National Union Attack, the Northern League in Italy, Austria's Freedom Party, and Golden Dawn in Greece all promulgate anti-Roma beliefs and often orchestrate actions intended to intimidate the Roma.<sup>26</sup>

Apart from anti-Roma hate crime, institutionalized discrimination against the Roma excludes them from

schools, jobs, housing, health care, and policing. Unemployment rates for Roma in some parts of Hungary reach 85–90 per cent stretching back three decades.<sup>27</sup> Like the rise of organized violence, these conditions are paralleled in other CEE countries. Consolidating research for twelve countries in CEE, the Organization for Security and Cooperation in Europe confirms the precarious or substandard living conditions for Roma.<sup>28</sup> With conditions qualifying as persecution,<sup>29</sup> thousands of Roma flee to Canada, where they claim refugee status. While the largest numbers arrive from Hungary, the Roma also come from the Czech Republic, Romania, Slovakia, Poland, Croatia, Kosovo, Bulgaria, Macedonia, the Ukraine, and elsewhere.

### ***The Political Response to Romani Asylum-seekers in Canada***

Two large movements of Hungarian Roma arrived seeking asylum in Canada—9,569 in 1998–2002, and 11,045 in 2009–12. Their acceptance rates by the Immigration and Refugee Board averaged 33 per cent for the earlier group (compared to a national average of 58 per cent), and 24 per cent for the latter group (compared to a national average of 47 per cent), numbers that fall to 18 and 6 per cent when abandoned and withdrawn claims are taken into account.<sup>30</sup> The numbers reflect some unusual actions taken by political leaders and immigration officials to reject the Roma and to discourage those who remained in Europe from migrating to Canada:

1. The Immigration and Refugee Board's 1998 Lead Case initiative. Designed to ensure consistent decision-making among IRB members and "non-binding guidance" in similar cases, the IRB assembled a Hungarian delegation to advise them on conditions for national Roma and the strength of state protection for them.
2. Repeated imposition and removal of travel visas for Hungary in 2001 and 2007 and for Czech Republic in 1998, 2007, 2009, and 2012.
3. Protecting Canada's Immigration System Act that passed in 2012 included Designated Countries of Origin (DCO) or "safe" countries differentiating classes of refugee claimants, subjecting one group to an expedited determination process, and disqualifying them from important channels of appeal.<sup>31</sup> The system's undue effect on the Roma is evident in the fact that (with the exception of Mexico), Hungary and other CEE countries were the largest source of DCO claims.
4. The actions of Citizenship and Immigration Minister Jason Kenney, including his frequent use of the term *bogus* to describe the "European" claimants.<sup>32</sup> During his diplomatic visit to Hungary on 9 October 2012, intended to stop "the abuse of our system and generosity by bogus asylum claimants,"<sup>33</sup> Kenney was quoted

on the far-right, government-controlled Hungarian television station HIR TV: “Being a refugee is not just about whether they like the state they’re living in or not, and it’s not about whether life is easy there or not, nor is it about occasional acts of discrimination.”<sup>34</sup> Kenney oversaw a \$13,000 billboard campaign<sup>35</sup> in the city of Miskolc, home to large numbers of Romani claimants. The billboards read, “In order to avoid abuse, Canada’s refugee determination system has changed. Those whose claims are unfounded ARE SENT BACK HOME FASTER.”<sup>36</sup> Radio announcements and ads in bus shelters supplemented the campaign.<sup>37</sup>

5. Disqualification of refugee claimants from DCOS from the Interim Federal Health Benefit<sup>38</sup> for any health care other than that required to prevent or treat a “disease posing a risk to public health” or a “condition of public safety concern.”

Some elements in the panoply of policy instruments and other actions aimed at refugees were earmarked for the Roma. What impact, if any, did these initiatives have on those Romani claimants who were accepted? What are their narratives of migration, and what does their content tell us about the will to adapt, to endure, and to flourish despite the state’s response? In order to hear the nuance of meaning and the particularity of experience, we turn to refugees’ narratives. As Malkki asserts, the popular call to give oppressed people a voice is not aimed at a sanguine empowerment, but at filling the policy void with appropriate content informed by the desire for historical accountability.<sup>39</sup>

### *Entering Canada*

In the following excerpts, all names are pseudonyms. While original wording is preserved, lengths of remarks are reduced and consolidated as indicated by ellipses. The only changes made to the excerpts are minor grammatical corrections where it affects comprehension. Speakers are identified after each excerpt with minimal personal details in order to ensure confidentiality.

I had a house from my grandfather ... I was asked if I could sell the property ... for a parking lot to sell cars. Italians ... gave me \$15,000. And that money, I arrived in Poland. And in Poland, some friend came there, and he told me that he can take me anywhere in the world. I gave him my passport and \$10,000 and he took me, the old lady [wife] and the girl [daughter], and we went to the airplane and the same man came with us to Canada. He brought us to Buffalo. He told us to go over there, to the border. I asked for my passport, and he said he’d send it to us by mail, but we never got it. Just a copy ... We saw the Canadian flag, and there was a police there, border guards, and then we signed some documents and were asked where we want to go. I said Toronto. We

were given some money and put in a hotel, the [name withheld] shelter in Toronto. The staff prepared papers for us. It took almost three years with the Immigration and Refugee Board. Now I need a passport and a pension. (Jules, permanent resident, arrived in 2003)

When I arrived, several other Roma families were arriving on the same plane. They put all the Romani people in one room at the airport ... They did not let people go out ... They wouldn’t let me buy a Coke or any drinks for my kids. They didn’t do anything for us ... I felt like I was in a jail. We were there for nine hours ... When they took our pictures, and provided our IDs with our pictures ... I was smiling. Because I was finally free. There were people here we knew from [withheld]. They came to pick us up with two cars and take us to Mississauga where there was a refugee shelter ... I was shocked at the shelter because they were so kind, which I had never experienced before. They were asking a lot of questions like are we hungry, what do we need, they told us everything what we had to do in this shelter. But they were so kind like I had never experienced before. They provided everything we needed. (Ruby, refugee claimant, arrived in 2010)

I want to tell you that they were so rough with us. Everything was by force, to explain long stories to make it very, very short, and just yes or no. You can’t explain anything. They terrorized us. We get so scared. The children think we’re in jail and held for twenty-four hours ... We tell them we’re hungry. They tell us that whatever we ate at home, eat here also ... When he called my name, I go into a small room. There were two police there ... When I ask for help, I gave my interview after maybe four hours, then she said, “OK you are free. You can go.” I said, “Where do I go? I don’t speak English, I don’t have money. I need your help. Some shelter or something.” She said, “You can go out to sleep ... Canada’s free. You can go out from airport” ... I asked people ... This woman helped me ... she called for me one shelter, and a taxi. If not for her, I don’t know what would have happened ... I think they need more patience when they ask who are you and where are you from. A little bit more, I don’t know, heart. But some people are so cold ... When you speak to him, he thinks you are very low ... But you are a person, so is he. We can talk to each other. (Aida and Azra, refugee claimants, arrived in 2012)

These stories of life as a refugee claimant at Canada’s doorstep begin with Jules’s and his family’s flight from violence, a migration spurred by foreigners’ purchase of his property. What comes next sounds suspiciously like a case of human trafficking or at least the shady business of those who “manage” journeys for refugees. Jules gambled almost everything he had to leave his country. His migration to Canada is fraught with uncertainty and vulnerability exploited by unscrupulous handlers. When I met him, his

desire for a Canadian passport was acute. He continues to request advocacy to obtain documents to improve his family's status. Ruby tells of the interminable wait while being processed by immigration officers at the airport. Undefeated by the frightening episode at the airport, she discovers the kindness of settlement staff, remembered with fondness. Ruby strives to belong in the midst of the chaos of refugee life. Her positive experience at the refugee shelter is echoed by single mothers and friends Aida and Azra, who were interviewed together (and with another friend, Tem). Their stories reiterate the poor treatment of refugees at the airport. Unable to call upon a support network for help, Aida searches in vain for the humanity of airport immigration personnel. Azra finds it in a passer-by. After experiencing this utter insecurity, the two women quickly became allies, found housing and employment, and sent their children to Toronto schools. When I saw them, they reported that their children—five in all—were doing well.

Like the refugees interviewed by Acuña, Freund, and Manjikian, the resilience expressed by these four interlocutors conveys a determination to endure the fear and uncertainty of migration and an investment in constructing a sense of belonging to this new place. Their willingness to share their narratives with me, a non-Romani stranger accompanied by a native-speaking friend, is a demonstration of hope. For groups such as the Roma, the memory of historical trauma<sup>40</sup> justifies their skepticism toward researchers. They could feel justifiable concern about jeopardizing their refugee hearing or exacerbating their already uncertain potential to find housing and a job. They have little grounds for believing that they would be treated with respect. But their full cooperation in the interview hints at their urgent wish to feel safe in Canada. It also intimates their optimism in the future, specifically in making Toronto their home. These earliest expressions of belongingness are all the more remarkable in the context of the hostile conditions they left behind, and of their contested status they discovered upon arriving in Canada. The next section explores optimism once individuals have spent sufficient time settling in the city.

### *Life in Toronto*

[My experience in Canada has] never been negative. Even if some people know what a Gypsy is, they would never call me a Gypsy, or say, "ok, I'm going to put my wallet away because you may steal it from me." Or, "I'm not going to give you a job to do the [occupation withheld] because you're going to mess up that job" ... My father had a lot of connections ... But I couldn't get a job ... Not even simple jobs like sweeping streets ... I had to take a chance elsewhere ... I didn't want to stay here, because it [was a] different world. But things worked out well and very quickly for me. I opened a business in a very short period of time, and people

trusted me ... I wasn't discriminated against here ... And people respected me and looked at me like everybody else ... managers came and asked me for my opinion which is very rare in [withheld]... that was an eye-opener for me. So I said to myself, here they treat you as a human being. They don't treat you like an idiot, or someone who doesn't know anything. You can use your brain. They treat you like a normal person ... They didn't treat me as a Gypsy ... The most important thing in my experience was that they treated me as a human being based on what I do, not on the colour of my skin. (Frank, permanent resident, arrived 2000)

[My children] didn't have [withheld] classmate friends ... That's why they're so happy, because the whole class loves them, they love them. But it's not love, it's just a normal treatment. And this is what you can realize in so many people's way of thinking here in Canada. Most of the Romani people said, "They [Canadians] fell in love with me! They love me so much!" ... When I go outside, for walking and they [are] always asking ... It's like a normal fashion. "Where is your baby? How is your kid? How is your life? How are you?" Taking those kind of questions [is] normal here in Canada. But ... my neighbours, back in [withheld], they didn't say even hello to me ... we didn't have any kind of contact with the neighbours. (Katalin, refugee claimant, arrived in 2011)

We once rented a house when we first got here. It was very nice ... we just went there, and at that time no one questioned us. And the landlord rented to us. I saw the question in the application forms that ask where you come from. Most Canadian landlords these days discriminate against Roma tenants ... I really wanted to move into the house, because we were in a shelter. And I wanted to move in immediately. The landlord said we had to wait for two weeks to move in, because they had to paint and clean first. To make the house ready. I offered that our whole family would clean the house if we could move in earlier. So the landlord agreed ... We painted the house and I cleaned all the windows and all the shelves in the kitchen. It was really clean when I finished. When the landlord came in, he took a look around and said the house has never been as clean as this when you did it. And he took off his shoes and sat down to eat soup with us. So was really nice ... We told him that we were Gypsy. He was Italian but there was no problem with us. He said we are all the same. Europeans ... Canadians now disapprove of Gypsies coming from [withheld]... every time we presented the application form to landlords, and they saw that we came from [withheld], they rejected us. (Ruby, refugee claimant, arrived in 2010)

TEM: Believe me or not, whenever I go somewhere, I always tell people I'm Roma. The first time my employer asked me where I'm from, I said [withheld]. Also, I said I am Roma. He didn't say nothing, nothing! No problem! I could walk down the street and scream that I am Roma, sing my song, or something like that.

AIDA: Because everything is mixed here. Africa, America, Europe. Equal.

TEM: And I like it, not just for the people, for what you are. (Aida and Tem, refugee claimants, arrived 2012)

Reflection on life in Toronto produces a spectrum of experiences. Frank and Katalin compare it to their experiences in Europe. Frank contrasts the entrenched discrimination he encountered in seeking a job in his country of origin with the respect he is given by employers in Canada. Not only did he establish himself with much ease in Canada, he revels in his treatment “as a human being” and not as a “Gypsy.” Katalin also aligns her children’s inclusion in the school with “normal treatment” in Canada. For the children, and even for some adults, the absence of hostility is so new that it is mistaken for love. Ruby’s cheerful story of acceptance by the first landlord turns negative when subsequent landlords began to interpret the meaning of “Roma tenant” differently after 2010. Tem and Aida give another positive account of the city’s multiculturalism, boosting their morale. “Coming out” as Roma is entirely novel, and when they take the risk, they are rewarded with a welcome indifference.

These interview excerpts reveal a resilience in the aftermath of anti-Roma racism and an optimism despite multiple means of discouraging migration. What might these responses imply about the meaning of “home” for Romani asylum-seekers? Researchers describe how transnational groups like the Roma have commitments to host and home societies, but not in any kind of balanced or dualistic way.<sup>41</sup> Belongingness is expressed in multiple ways to both host and home, as well as to other locations.<sup>42</sup> For refugee claimants, however, the concept of “host” and (prospective) home is inflected with a supremely provisional belongingness. For the Roma, belongingness to a European “home” is always affected by everyday racism and of nation states that often refuse to protect them from its impact. Like Freund’s participants,<sup>43</sup> their connections may be made not to singular or dual national spaces, but to those that are multiple, regional, local, family, community, and are personally meaningful. This is particularly poignant for the Roma in the antagonistic relations they have with the European countries where they have lived for centuries.

Some observers assert that for many Roma, place may be disconnected from any notion of physical location, ethnicity, or leadership but instead is powerfully tied to the group.<sup>44</sup> Whether the source of economic interdependence, marriage partners, or succour from persistent racism, it is the local Roma community that may constitute the only indissoluble tethering point to place. Home is defined in terms of

communal life that is exportable if necessary. Instead of a primordial or spiritual rootedness to space with its institutions and its historicity, the Roma may be rooted to epi-spatial sites inhabited by their network of attachments. Refugee narratives such as those read here describe the forging of new attachments to community organizations, churches, work associates, and neighbours as speakers take early yet hopeful steps toward settlement. Optimism notwithstanding, the likelihood of calling Canada home is contingent on the quality of their acceptance. Changes are afoot. With the abolition of the bar to appeals for DCO applicants in 2015 and the restoration of the Federal Interim Health Benefit in 2016, there are reasons for hope. Longer-term outcomes are always pending. While DCO claimants are no longer restricted from the Refugee Appeal Division, for example, all other restrictions on them remain. Those on the DCO list are moved through the system more quickly, allocated fewer resources, and ensured insufficient time for processing, compared to those from countries excluded from the list. The impact of policy reforms on Romani asylum-seekers requires further research, as do the implications for transnational practices such as the development of networks.

### Conclusion

Belongingness is not an inevitable reward but an activity, its precepts indeterminate. In these stories of migration, we hear forays in making a new place home, despite the state’s multiple means of discouraging it and despite no European precedent for many. Jules has been waiting four years for a passport and a pension. After their frightening experience of near abandonment at the airport, Aida, Azra, and Tem now participate in the multicultural life of the city. Ruby’s family continues their transition, and Katalin witnesses the social inclusion of her children. Frank has accrued more experience than the others and speaks glowingly of his opportunities and responsibility. These voices express agency and resourcefulness, even an eagerness to establish themselves in this new place. Neither an invention<sup>45</sup> nor an “in-betweenness”<sup>46</sup> of home and homeland, for the Roma, settlement is a necessarily contested process that defies formulation. The implications for local community building is a key concern. It is a project to which grassroots organizations and Romani leaders are dedicating themselves.

### NOTES

- 1 Foremost acknowledgement is directed to my interview participants. Individuals at the Roma Community Centre who enabled my work were Ronald Lee, Gina Csanyi-Robah, Lynn Hutchinson Lee, Nazik Deniz, and Micheal T. Butch. My assistants were interpreters Amdi Asanoski

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- 26 Fekete, "Pedlars of Hate," 6.
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# Tragic and Heroic Moments in the Lives of Forced Migrants: Memories of Political Asylum-Seekers in Post-Apartheid South Africa

ERNEST A. PINETEH AND THECLA N. MULU

## **Abstract**

*This article examines the memories of a group of Cameroonian asylum-seekers in South Africa, analyzing personal accounts of memories of fear, suffering, and pain as well as resilience and heroism during their forced migration. The article argues that the legitimacy of applications for asylum often depends on accurate and consistent memories of specific life-threatening episodes at home and during migration. Drawing on theoretical conceptions such as construction of memory, autobiographical memory, and politics of storytelling, this article teases out how personal memories of asylum-seekers provide a discursive space to access and understand the asymmetries of seeking political asylum in post-apartheid South Africa.*

## **Résumé**

*Cet article étudie les souvenirs d'un groupe de chercheurs d'asile d'origine camerounaise en Afrique du Sud. Il analyse leurs témoignages personnels de souvenirs associés à la peur, la souffrance et la douleur, ainsi que ceux de la persévérance et de l'héroïsme lors de leur migration forcée. L'article maintient que la légitimité des demandes d'asile dépend souvent des souvenirs précis et cohérents de situations spécifiques impliquant un danger de mort qu'ils ont subies dans leurs pays ainsi que lors de la migration. En faisant appel à des conceptions théoriques telles que la construction de la mémoire, la mémoire autobiographique,*

*et la politique des récits narratifs, l'article fait ressortir la façon dont les souvenirs personnels des chercheurs d'asile produisent un espace discursif pour accéder et comprendre la dimension asymétrique inhérente à la recherche d'un asile politique en Afrique du Sud post-apartheid.*

## **Introduction**

In the asylum application process, “the decisions [to grant political asylum] very often rest on a judgement whether or not the claimants and their story are credible.”<sup>1</sup> This entails “the ability to recall specific memories” in a narrative that is deemed consistent and coherent by the asylum determination officers.<sup>2</sup> Although experiences of forced migrants are those of fear, pain, and suffering, which they would rather forget than remember, the inclusion of specific details of key moments in their lives is often construed as a marker of credibility.<sup>3</sup> This approach to asylum narratives lends itself to “the question of the relationship between ‘facts’ and emplotment, truth and representation.”<sup>4</sup>

In the case of South Africa, the legitimacy of claims for political asylum resides not only in the techniques of narrative construction but also in the recollection of life-threatening experiences at home and during the journey to exile.<sup>5</sup> However, because of the inadequacy of resources to manage the increasing influx of asylum-seekers, and the prescripts of the South African immigration policies such as the infamous Aliens Control Amendment Act of 1995 or Refugees Act of 1998, the term *illegal immigrants* remains the dominant discourse and often is used as a pretext to reject applications of

bona fide asylum-seekers.<sup>6</sup> Certain immigration policies have been amended to respond to the changing characteristics of global human mobility, but stories of asylum-seekers from war-torn countries like the Democratic Republic of Congo (DRC) and Somalia are often privileged by the refugee determination officials because of South African media coverage of devastating wars in these countries.<sup>7</sup> For Cameroonians, this process entails remembering moments of immeasurable suffering, fear, and pain, as well as feats of heroism in a country rated by South Africa as politically stable and therefore a non-refugee-producing country.<sup>8</sup>

To understand the subjectivity of Cameroonians' exilic experiences, we need to examine how these experiences are recalled and how Cameroonian asylum-seekers "build themselves into the world by creating meaning [and] by fashioning out of [traumatic images], a sense of what the world is all about."<sup>9</sup> In this article, we discuss how Cameroonian applicants for asylum in South Africa construct memories of personal and collective experiences in a tragic sense and/or as a process of self-styling, to enhance the credibility and reliability of their applications.<sup>10</sup> The article uses phraseology associated with conventional principles of tragedy, but in this case we use the term loosely as a prism through which to make meanings from Cameroonian memories of physical and psychological pain encountered during the process of forced migration.

This article argues that the re-storying of forced migrant experiences is primarily the remembering or forgetting of personal episodes of displacement, whereby the narrators represent themselves as victims at home and heroes during flight to exile.<sup>11</sup> This process of memory work establishes a relationship between the context and individual meanings of the self in the diaspora and of intricacies of political asylum in the South African context. Here, the self can only be understood in relation to the Other, in this case the political or social context of the asylee.<sup>12</sup> The article therefore attempts to connect the dots between personal memories and social realities, showing how Cameroonian memories "function to construct the social reality that constitutes the lived world of social actors."<sup>13</sup>

### ***A Brief Conceptual Framework***

To understand how Cameroonian asylum claimants remember tragic and heroic experiences of displacement, this article uses conceptual lenses such as the process of memory work, autobiographical memory, and the politics of storytelling. For example, recalling exilic experiences is in fact a gradual process of memory work.<sup>14</sup> It is a "journey into the memory and imagination that negotiates between old and new, past and present, self and other, safety and danger."<sup>15</sup> The urgency to engage in memory work is the

result of a major rupture in the life of an individual that needs to be remembered or forgotten.<sup>16</sup> When an experience is remembered, "it assumes the form of narrative of the past that charts the trajectory of how one's self came to be."<sup>17</sup> Thus, memories of asylum-seekers are journeys into their past, which help us to make sense of their present social conditions in exile and predict their futures.

The meanings of our lives are often buried in our memories, and the transformation of memories into narrative gives us a sense of place and time.<sup>18</sup> The "representation of past examples of participation in life events in a life story format, provides continuities of that participation across time and place."<sup>19</sup> These memories "are practices of formation where systems of power are constructed, resisted, subverted and mediated in, and through linguistic agency."<sup>20</sup> In this article, the memories of Cameroonian asylum-seekers "help to secure the identities that enable [them] to navigate, legitimate or resist the present order of things."<sup>21</sup> This means that they are able to use the process of remembering to define who they have been and who they would like to be in the future, and to find comfort during present struggles.<sup>22</sup>

The memories of Cameroonian asylum-seekers detailed here should be read as self-orderings of personal experiences. In recollecting experiences of displacement, narratives of asylum-seekers are indeed autobiographical memories of home, flight, and exile, which entail "an explicit 'memory' of an event [or events] that occurred in a specific place in one's personal past."<sup>23</sup> The concept of autobiographical memory is about making sense of personal experiences that are spatially and temporally based, and therefore "the function of human autobiographical memory is not to remember exact/accurate memories of events," as these can be "subject to distortions as well as failure."<sup>24</sup> Although the determination of asylum leans towards accuracy, consistency, and credibility, Cameroonian asylum-seekers' memories are stories of displacement that are always constructed and reconstructed by individual narrators.<sup>25</sup> Here, Cameroonian recollections of historical and socio-political events at home and in exile as well as the imaging of the self as a hero and a victim in these events articulate a "relationship between individual consciousness and the social world."<sup>26</sup>

Since memory work and autobiographical memory are framed around the way individuals remember and retell episodes of their social experiences, this article has also drawn on the politics of storytelling as a conceptual frame. Human beings make meanings of their worlds through storytelling.<sup>27</sup> The stories that human beings tell about their experiences involve "an ongoing struggle to negotiate, reconcile, balance or mediate ... antithetical potentialities of being."<sup>28</sup> This means human lives are storied lives, in that "telling the story of the life we have lived thoroughly and

deeply shows us the powerful presence of archetypes, those common elements of being human that others, throughout time and across all cultures, have also experienced in their lives.<sup>29</sup> Cameroonian asylum-seekers' memories are therefore stories that provide agency in the process of seeking asylum, a sense of selfhood, and a way for us to make sense of their social existence in a country like South Africa, fraught with anti-foreigner sentiments.<sup>30</sup>

### ***The Challenge of Obtaining Political Asylum in Post-Apartheid South Africa***

One of the many challenges the South African government faces is managing the increasing number of asylum-seekers and economic migrants entering the country.<sup>31</sup> The government's inability to regulate the entry of displaced persons as well as to address critical social problems such as unemployment, poverty, and crime has resulted in powerful anti-foreigner sentiments. These sentiments have been expressed in several gruesome attacks aimed at exorcising particularly African migrants from South Africa.<sup>32</sup> Although the xenophobic attacks on Africans are criminalized, this prevalent culture is arguably "the struggle of the poor for citizenship [which] includes defining who is inside and who is outside."<sup>33</sup> For a perennially poor South African, the presence of Africans poses "an existential threat to South Africa's collective transformation and renaissance."<sup>34</sup> In this context, Africans are repeatedly represented as the demons, "the source of HIV/AIDS, the primary cause of crime, and a threat to South Africa jobs and cultural values."<sup>35</sup>

Interestingly, the discourse of the "rainbow nation" and the celebration of the country's diversity seem to criminalize "blackness" while legitimizing the value of "whiteness" in South Africa.<sup>36</sup> Moreover, media narratives referring to Africans "as masses flooding into South Africa illegally"<sup>37</sup> exacerbate the conditions of African migrants in South Africa. The article thus argues that "despite the transition from authoritarian rule to democracy, prejudice and violence continue to mark contemporary South Africa."<sup>38</sup> Therefore, to acquire political asylum in the new South Africa, applicants are expected to provide accounts that are acceptable by the institutions of the state.<sup>39</sup> In the case of Cameroonians, "the institutional context"<sup>40</sup> plays a key role in influencing the way they narrate their experiences of forced displacement to the South African refugee determination officials.

### ***Methods of Data Collection***

The article attempts to make meanings from the memories of Cameroonians seeking political asylum in Johannesburg, South Africa. Their stories are seen as frames of legitimacy and illegitimacy, whereby the contents are used during the asylum determination process to include and exclude.<sup>41</sup> The

article draws on stories told by twenty Cameroonians who applied for asylum between 1996 and 2004. To select the participants, we contacted a specific group of Cameroonians who entered South Africa between 1996 and 2004 allegedly as political refugees<sup>42</sup> and applied for asylum during this period. Only those who consented were interviewed. One of the researchers lived in the Johannesburg-based Cameroonian community for more than ten years and had access to the participants. As the researcher, his role was to mitigate bias in the interviews and to provide an unrestricted space for participants to speak freely about their experiences of displacement and seeking asylum.

At time of the research, the respondents resided in Berea, Braamfontein, Hillbrow, and Yeoville, intersections of the Johannesburg inner city. We focused on these areas because Africans living in these spaces "share ancestries, traditions and languages."<sup>43</sup> In addition, they tend to cluster in these spaces because they have been appropriated and reinvented as migrant ghettos. In terms of demographics, the participants comprised fourteen men and six women between the ages of twenty-five and fifty-five, predominantly students and professionals as well as formal and informal business owners. These demographics reflect the characteristics of the Cameroonian population in South Africa at the time of this research.<sup>44</sup>

The data were collected by conversational individual interviews, focused on the political atmosphere in Cameroon, the process of fleeing the country, and participants' experiences as forced migrants seeking political asylum in South Africa. Each interview was preceded by an explanation of the purpose of the study, and all the interviewees signed consent forms granting the researchers permission to conduct and record the interviews, and guaranteed confidentiality. Participants are thus quoted as "participant" and a suffix number between 1 and 20.

For data analysis, the researchers use a narrative study approach to unlock the way the participants remembered their lived experiences. This approach focuses on aspects of storytelling, the construction of memory, and autobiographical memory embedded in the stories and the implications for their asylum applications in post-apartheid South Africa. Finally, it concentrates on the linkages between Cameroonian memories and our understanding of Cameroonians' reconstructions of their political identities and life histories as embodiments of pain, suffering, and resilience, at home and in exile.<sup>45</sup>

### ***Memories of Tragic and Heroic Moments in the Lives of Cameroonian Asylees***

In South Africa, the refugee determination process relies on two pieces of evidence: the personal narratives of applicants and the refugee determination panel's knowledge of the

country of origin. As stated above, decision to grant asylum is sometimes based on media images and narratives that classify particular countries as politically stable and therefore not refugee-producing countries.<sup>46</sup> At the time of this research, many Cameroonian applications had been rejected on these grounds. By defining refugees narrowly as victims of politically unstable countries, the South African refugee determination officers were in direct contravention of the 1951 Geneva Convention, which defines asylum-seekers as “individuals in fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>47</sup> This means that Cameroonian narratives had to be compelling enough to dispel these perceptions about Cameroon. The memories of the group of Cameroonians who entered South Africa as asylum-seekers between 1996 and 2004 were meant to counter the hegemonic discourse about Cameroon.<sup>48</sup> One narrative strategy in their stories was the conflicting representation of episodes of resilience, heroism, and victimization in a series of seemingly tragic events. Here, narrators attempt to frame their accounts around tragic characteristics of suffering, fear, and pity, while plotting the narratives in three interrelated phases: the participants’ lives in Cameroon, their experiences of flight, and their days in exile.

To endorse their experiences of forced migration, the participants represent themselves as the main protagonists in their own stories and as victims of tragic circumstances at home, during flight and in exile. For example, one participant commences his testimony by profiling himself as a charismatic and astute student leader at a university in Cameroon and his vision of transforming his university into a “world class” space for learning. For him, this vision pitted him against the university’s top management and eventually against the country’s ruling party. He also describes himself as a partisan supporter of the political ideologies of the main opposition political party in Cameroon—the Social Democratic Front. Choosing the path of student leadership in an undemocratic space like Cameroon means that resistance and conflict with university management are expected.

During the interview, he intelligently reconstructed a familiar story about student leadership in Cameroon into a deeply powerful and emotional testimony, portraying himself as a hero who contributed significantly to fostering student politics in higher education. For him, these moments in his life marked the beginning of an uncharacteristic political history, which eventually resulted in pain, suffering, and despair.<sup>49</sup> The participant’s testimony begins organically with an elaborate and somewhat glamorous account of his political life:

Prior to my being elected the Student Union president, sometime in 1994, I have been actively involved in lots of issues that had clear-cut political implications in Cameroon. I had been actively involved in the Cameroon Anglophone Movement. I led the final struggle that led to the installation of the GCE Board<sup>50</sup> in Cameroon. I led that final demonstration. Everything that took place during that time was purely under my control. I did all the coordination from Yaounde to Buea to Bamenda; it was well known that I was behind everything. So at the point even before I came to the university, I was already noted for such activities, but because it wasn’t really an issue at that time, it did not hamper my entry into the university. But having been admitted and subsequently elected as the Student Union president, due to my beliefs ... I had certain beliefs; I tried to transform the university through these beliefs and my political ideologies. After the Cameroon Anglophone Movement, I immediately subscribed to the political ideology of the Social Democratic Front as a student leader. The university did not like my leadership style and I fell out with the management.<sup>51</sup>

The most important aspect of this testimony is the way the participant shapes his story as that of a man imagining his political identity and destiny. In creating credibility, his testimony focuses on painful actions that elevate his status as political asylee. It represents the respondent as “the only man in action ... action that involves the ultimate risk and pushes him to his very limits.”<sup>52</sup> In the South African asylum determination process, a story about student leadership without any turbulent political twist is not a credible claim for asylum. To legitimate his story, Participant 10 thus uses his student leadership experience to reinvent himself as an iconic figure in democratization in Cameroon. The testimony captures the notion of a tragic vision whereby the ensuing pain and suffering are the consequences of the participant’s dream of transforming his university into a centre of learning, and his grandiose visions of a Cameroon devoid of the marginalization of anglophones.<sup>53</sup>

His testimony exemplifies how Cameroonian memories tended to capture grotesque experiences of political victimization in Cameroon. Here, the story transcends imagining his aspirations to articulating his tribulations as a political figure at home and while fleeing:

I remember sometime in June 1996, there was an attempted secession, a gendarme post<sup>54</sup> was attacked, and the next day I heard over the radio that I was involved in the whole process. Everything that happened around the country I was linked to or blamed for, as I was the master minder. Sooner, I heard I was needed in Yaounde that I was sponsoring these things, inciting violence, but I was never part of the process. At some stage, I felt my life was no longer secure in the country. My access to space and rights were no longer secure. It was a question of whether I could be arbitrarily arrested

and detained or just killed. I knew it was one of the two options. I just thought this was the time for me to leave the country.<sup>55</sup>

Although the narrative indicates a case of mistaken identity or wrongful accusation, the interviewee elevates this experience of insecurity into a life-threatening episode, portraying himself not just as a victim but more importantly as a 'flawless hero and the potent icon.'<sup>56</sup> However, the image of political hero is immediately juxtaposed with the image of fugitive because of his supposed role in the outcome of the political events. Whilst the informant represents himself as an emerging political leader, this identity fluctuates ambivalently with the identity of a victim, again foregrounding the legitimate claimant who achieves his vision through suffering and pain. This narrative style is repeatedly used in many Cameroonian testimonies as the "favourite medium for articulating [their] outrage and frustrations."<sup>57</sup> It highlights the concept of "plurality of identities," a strategy used by forced migrants "for social action and integration."<sup>58</sup> This asylum applicant consciously assumes "different identities sometimes differing and antagonistic"<sup>59</sup> to strengthen and legitimize his case.

To show that Cameroon is indeed a fractured political system, the Cameroonians in the study tended to represent themselves as victims and fugitives in the political struggle in Cameroon. This narrative trajectory was used to establish well-founded fear of persecution as stipulated in the Geneva Convention.<sup>60</sup> For example, the memory patterns involved describing how they escaped a culture of victimization and the imaginative evocations that mirrored their experiences of flight and exile.<sup>61</sup> The escape stories were clearly accounts of extreme pain and suffering. One participant's experience of flight exemplifies such accounts:

At one stage I had a visa to Canada, I had an admission into the University of Toronto, and at the airport I was arrested and my passport seized, and the only explanation was that my name was in the "black book," a book containing names of people who are not supposed to leave the country. Somehow because I had meditated prior to attempting to leave the country, somehow everything was taken from me and I was asked to go back. I just think that everything held constant and typical of how the regime operates, I would have been arrested and detained ... Now, that was actually the second attempt to leave the country; the Canadian attempt I could not make, my passport seized with a visa inside. The Germany attempt was also the same, and so were many others. At that point I knew that I was not ever going to be able to free myself from that bondage.<sup>62</sup>

Narrating his experience of flight, the participant's memory is fraught with moments of psychological and physical pain. This excerpt captures his fear for his life and the figure of a courageous individual struggling through

misfortune and disappointment to find resolution. This participant used episodes of insecurity to represent his life as an embodiment of human suffering. These episodes of disappointment and distress render his experience of flight a narrative of the misfortunes of a sympathetic protagonist faced with the "facts of cruelty, failure, frustration and loss."<sup>63</sup> In this excerpt, fear is used as a metaphor to show how the forced migrant's ancestral home "has created a new order of uncertainty in social life, an order that legitimizes responses of extreme violence and terror."<sup>64</sup>

Episodes of misfortune, pain, and despair dominated the participants' memories of displacement, and the evocation of sympathy was these asylees' main narrative technique. Since judicial testimonies involve judgment, accusation, and defence, they had to ensure that their stories would appeal to the adjudicators.<sup>65</sup> In the testimony of one participant, his journey of survival was constructed as a powerful narrative of sorrow, and his tragic sense of life during this period was that of suffering. His ordeal took him into the DRC, where the journey was made more frightening because of war and disturbing human rights abuses. As he narrated his journey from Cameroon to the DRC,

I had to go across the border to Brazzaville, and there was a huge checkpoint ahead. I knew they would get everybody out and inspect them. So the only thing I had to do was to pay the luggage guys to pack me up as luggage amongst other luggage. That was my worst experience ... I thought I was going to die because it was so hot, and I think I have never been in a hotter environment. It was like in the desert and I was tied up there, and for that I paid the guys 100 dollars ... We went past the checkpoint, the customs actually climbed on the luggage and I was actually under.<sup>66</sup>

Asylum-seekers in South Africa "are pushed by the institutional context to present acceptable accounts of narrated events and of themselves as actors in them."<sup>67</sup> Their stories therefore tend to concentrate on accounts of emotionally and physically challenging events, which they ultimately survive. The painful features of loss of status and value are evident when Participant 8 is dehumanized through being reduced to luggage. Apart from the demeaning treatment of human beings, the quotation also exposes the endemic corruption in francophone sub-Saharan African countries including Cameroon, indicated in the ease with which he could bribe "the luggage guys."

The final stage of the account of another participant's escape from his homeland is seen in his narrative of his journey from the DRC (formerly Zaire) to Zambia:

In Limumbashi, Zaire, my application for a visa was rejected on grounds that I had to seek asylum first in Zaire, but I had a feeling

that if I did so, something would go wrong ... I rejected the Zaire option and went to the UN, said, "Look, these are my fears and please process them the way you want, otherwise I strongly believe that I deserve political asylum." I was interviewed and granted asylum. Two weeks later, I applied to leave the country and I was issued a "laissez-passer," which I used to proceed to Zambia ... I arrived at Kasumbelesa, the border town between Zaire and Zambia, I was arrested. And when I showed the UN "laissez-passer," they said, "We cannot recognize this because the country is under a state of emergency" ... I was simply dumped in jail. I was in jail for six months without any judgment or access to lawyers.<sup>68</sup>

In this episode, the narration of arrest and subsequent imprisonment in Zambia echoes the melancholic experiences of forced migrants. In this case, the narrative of victimhood is again strongly foregrounded, focusing on pain, suffering, and despair. This participant is victimized not for any wrongdoing but for "being a strong character in an exposed position."<sup>69</sup> The image of an existentialist character also emerges as the participant continues to take responsibility for his actions and destiny, thus embracing the possibility of danger, and distress on his journey to exile.<sup>70</sup> This exilic experience is worsened by the degree of human rights abuse captured in this quotation.

While in Johannesburg, Cameroonian memories of this cosmopolitan space, especially in the early days, were reminiscent of the experiences of victimization at home and during the process of fleeing.<sup>71</sup> For example,

When I arrived South Africa, I couldn't get a job immediately, so I had to survive on financial assistance from friends and relatives. After a couple of months, my wife joined me with our baby, and life was even tougher. Then I knew I had to struggle harder because I had a wife and kid to look after. In fact during those days we were living in a single room, sleeping on the floor ... After struggling to get a job for quite some time, I began to think Johannesburg was not the city of gold after all. Moreover, the place was so risky, and crime was all over the place, and the people were terrible and were not interested in opening their doors to foreigners.<sup>72</sup>

The narrative of disillusionment articulated in this excerpt invokes sympathy and expresses one basic element of the "tragic sense of life," which is "the permanence and the mystery of human suffering"<sup>73</sup> characterized by irremediable misfortunes. The participant's state of joblessness and the increasing feeling of rejection by South African nationals illustrate the experiences of most Cameroonian asylum-seekers and refugees "confronted with a restrictive immigration regime and high level of xenophobia."<sup>74</sup> Despite the challenges that confronted forced migrants in Johannesburg at that time, this respondent does not despair

or abandon life but continues to fuel a strong desire for success and self-determination.

His heroic actions during the struggle for survival culminate in a seemingly kinder phase as his life begins to take shape after years in Johannesburg. The end of painful personal experiences opens a new phase in his life after more than six years in the city:

I think my life today is better than it was a few years back. I have a good job today and driving a good car. I am also living in my own house with my family. I think I have achieved a lot and I want to believe the days of suffering are over.<sup>75</sup>

In this vignette, the ending of this participant's testimony represents a narrative of hope and resilience, evident in the reversal of his experiences during his early days in Johannesburg. The quotation illuminates the multiple contours of Cameroonian lives in Johannesburg and how the city has become a "palimpsest in which new patterns of investment, belonging and mobility ... over social fragmentation and new patterns of migration."<sup>76</sup>

In describing tragic and heroic moments in their lives, these Cameroonians have offered snapshots of autobiographical memory whereby the narrators have astutely and self-consciously fashioned their personal lives. They have constructed their subjective diasporic experiences against the backdrop of broader socio-political issues in Cameroon and in South Africa. This means that "autobiographical memory episodes play strong directive roles in people's lives in several different ways such as anchors of personal values, as originating events for chosen life directions and turning points that redirect one's life path."<sup>77</sup>

Like many Cameroonian stories of exile, the interviewees' testimonies began with the construction of their personal backgrounds, before delving into constructing their political identities and culminating in their experiences at home and in Johannesburg. One of the participants testifies,

I am a teacher and deputy principal of a private high school and a student as well ... As you know I come from the notorious town of Bamenda, precisely Awing in the North West province ... a very lovely city, quite cosmopolitan, welcoming, and a peace-loving people. But ... it is a notorious city when it comes to politics. It is the hard core of the opposition and the city that has given the ruling party the toughest of times. I think you know the place; it is the birthplace of the SDF<sup>78</sup> and multi-party politics in Cameroon. My parents are strong supporters of the SDF and so are my other siblings. I grew up believing in what my parents believed in.<sup>79</sup>

In this narrative, the characteristics of an autobiographical memory begin to emerge as the respondent constructs

her personal life, privileging her family and ethnic origin. Her political identity is formulated against the background of her family's political history and the fact that she is from Bamenda, a city considered by many Cameroonians as the most rebellious and the stronghold of the main opposition to the ruling party.<sup>80</sup> Here, the participant's memory of family is used to illuminate the relationship between her family values and her political life. She became an ardent supporter of the Social Democratic Front partly because of his parents' affiliations to the party, seemingly continuing her family political history. In Cameroonian applications for asylum, the city of Bamenda and the Social Democratic Front feature prominently in the narrators' memories because of their symbolic role in the struggle for political emancipation in Cameroon. The merits of their stories depend on the way they have associated themselves with these spaces. Their autobiographical memories are therefore "modified and refined to maintain and protect the self."<sup>81</sup>

In this light, Participant 3 uses her family background as a preamble to her political career and frames her story around this preamble. After narrating her family background, her testimony delves into a representation of her own illustrious political history:

I had been very active in our political domain back home since the launch of the SDF. I was a member of the SDF; in fact I was the secretary of my ward, member of the Amnesty International Group, and also a strong activist in the Southern Cameroon National Council (SCNC).<sup>82</sup>

In attempting to narrate a captivating political story, this participant reconstructs her political life and the significance of her persona within the political setting in Cameroon. By positioning her memory within the realms of the SDF and SCNC, she becomes an iconic figure in two oppositional but important movements in Cameroon's political history: the struggle for multiparty politics, represented by the SDF, and the struggle for an anglophone identity, represented by the SCNC.<sup>83</sup> Because of the way she positions herself in these political movements, her narrative emerges as a form of "self-fashioning," captured through the repetitive use of the personal pronoun *I* and the self-construction of an icon in a context as dangerous as Cameroon. The participant's political consciousness and the representation of herself as an important political symbol is one of many strategies used by Cameroonian asylum-seekers to justify claims that their lives were actually in danger and they had to flee the country.

The imagined pivotal roles played by Cameroonian asylum-seekers in the political struggle in Cameroon, supposedly positioning them as prime targets of the ruling party, justify their fears of political persecution. In these cases, this

autobiographical memory "is a marker of credibility"<sup>84</sup> in that it is a typically self-styled narrative of a forced migrant's carefully selected experiences of flight and exilic conditions in Johannesburg. Another participant's experience of flight is not as crippling as that of other Cameroonian exiles:

I can tell you safely and soundly that I was lucky to have a brother with great connections. Through one top military officer, I was smuggled through Douala International Airport and I flew straight to South Africa without a break ... I really did not go through the fleeing trauma like most of my brothers who had to flee through different war-torn countries like DRC, Rwanda, and so on. I had a really smooth trip and that was how I got to Johannesburg.<sup>85</sup>

Although this respondent describes his journey from Cameroon to South Africa as comfortable, his early experiences in Johannesburg were similar to those of other participants. Again, the central features of autobiography memory are brought to the fore as the respondent captures and reconstructs his initial illusory impressions of Johannesburg and juxtaposes these impressions with his early experiences in the city:

I was completely overwhelmed by the infrastructure of the city. It is quite a magnificent place that gave me a different perspective about home. But after living in the city for a couple of days, I discovered that the people were not as beautiful as the city itself. I thought a beautiful city without a welcoming population meant absolutely nothing. We were not welcomed here as you know; we were styled *makwere-kwere*, rejected, and insulted. In fact the people were not friendly at all ... It was a strange place then, and you had to live life by the day not knowing what was going to happen to you the next moment.<sup>86</sup>

The participant's memory is a reconstruction of his personal experiences in Johannesburg and his perceptions of the city, narrating difficulties as symptomatic of wider social and economic problems affecting forced migrants.<sup>87</sup> This autobiographical memory represents the displaced self, caught in the web of social evils of post-apartheid Johannesburg, and emphasizes how the narrator courageously managed to survive. Furthermore, by constructing his personal life along the axis of broader social realities of Johannesburg, Participant 5's memory is the re-storying of multiple personal versions of the city of Johannesburg common to other Cameroonian testimonies.<sup>88</sup>

In the foregoing sections, autobiographical memories are constructed against the backdrop of personal interpretations of political events both at home and in exile. The inclusion of key political events has a powerful bearing on

the representation and invention of the self in the stories, as well as on the legitimacy of claims for asylum.<sup>89</sup> Firstly, the narrators continually construct themselves as either victims or heroes in landmark political events at home, and secondly, in plotting the realities of their lives, their “autobiographical memories involve, at the outset, a discourse of witness: accounts of happening in which one participated.”<sup>90</sup> One participant states,

The reason why I call it an “unholy alliance” is because francophones think they own Cameroon and want to dominate the whole nation. That is why you hear of the struggle for an anglophone identity and the emergence of pressure groups such as CAM<sup>91</sup> and SCNC fighting for an anglophone identity. Secondly, it is also a cultural issue because there is a big gap between anglophone and francophone cultures, making it difficult for the two to cohabit.<sup>92</sup>

In this episode, political significance assumes centre stage as the narrator attempts to assess and evaluate the relationship between anglophone and francophone asylum-seekers. The participant claims to be an activist in the SCNC movement and thus remembers this political struggle with the air of a connoisseur. The primacy of this testimony is in the significant shift from the narrator’s recreation of the self to an account of the political feud between anglophone and francophone Cameroonians. In this case, broader political discourse takes precedence over individual life story. By framing his memory around the knowledge of politics, the narrator attempts to provide a strong “definition and expression of self and in the experience of personhood.”<sup>93</sup> However, this interpretation is still linked to the narrator’s political identity because of his activism in the SCNC struggle. Furthermore, because of his anglophone identity, he continues to be a victim of francophone domination in Cameroonian associations in Johannesburg.<sup>94</sup>

### Conclusion

An analysis of Cameroonian memories of displacement as moments of pain, fear, sorrow, and distress has shown how respondents in this study have located the self within the political history of Cameroon and South Africa. The analysis was shaped by participants’ experiences of flight re-storied to be “perceived to be more believable and credible.”<sup>95</sup> Examining the twenty participants’ stories, we argue that Cameroonian memories focus primarily on retrieving deeply emotional experiences of homelessness and exile and the possibilities of overcoming these challenges. The plots of their stories are constructed against the backdrop of specific events, as the narrators represent themselves as victims in a tragic story at one level and at another level as self-made

heroes. Using the principles of memory construction, autobiographical memory, and the politics of storytelling as conceptual lenses, this article has attempted to examine how personal memories of displacement are constructed, distorted, and/or fashioned to render them credible and believable. The article concentrated on the strategies that Cameroonian asylum-seekers use to reinvent themselves in public spheres and political discourses. Here, the article has shown how memories of forced displacement represent “human reality, reality as it is for beings, who live in situations or contexts, and who are self-creating in that context.”<sup>96</sup>

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# Sri Lankan Tamil Refugees in India: Conceptual Framework of Repatriation Success

MIRIAM GEORGE, ANITA VAILLANCOURT, AND S. IRUDAYA RAJAN

## **Abstract**

*Repatriation to Sri Lanka has become a primary challenge to Sri Lankan Tamil refugees in Indian refugee camps, and a matter of significant public discussion in India and Sri Lanka. Anxiety about repatriation among Sri Lankan Tamil refugees and lack of initiation from the Sri Lankan government threatens the development of a coherent repatriation strategy. This article proposes a conceptual framework of repatriation success for Sri Lankan Tamil refugees, which the Sri Lankan government, non-governmental agencies, and Sri Lankan Tamil refugees may use to develop a concrete strategy for repatriation. Based upon the study results of two of the authors' repatriation studies, this article identifies and describes the four key concepts of the repatriation framework: livelihood development, language and culture awareness, social relationships, and equal citizenship within a nation.*

## **Résumé**

*Le rapatriement vers le Sri Lanka constitue l'un des défis principaux que doivent affronter les réfugiés tamouls d'origine sri lankaise vivant dans les camps de réfugiés en Inde, et un sujet important de débats publics en Inde ainsi qu'au Sri Lanka. L'inquiétude envers le rapatriement parmi les réfugiés tamouls d'origine sri lankaise et l'absence de démarches de la part du gouvernement sri lankais compromettent le développement d'une stratégie cohérente de rapatriement. L'objectif principal de cet article est de proposer un cadre conceptuel pour un rapatriement réussi à l'égard des*

*réfugiés tamouls d'origine sri lankaise que le gouvernement sri lankais, les agences non gouvernementales et les réfugiés dont il est question pourraient utiliser afin de développer une stratégie concrète pour le rapatriement. Fondé sur les résultats provenant des études de recherche sur le rapatriement effectuées par deux des auteurs, l'article identifie et décrit les quatre concepts clés du cadre de rapatriement: le développement des moyens de subsistance, une prise de conscience linguistique et culturelle, les liens sociaux et l'égalité de la citoyenneté dans le contexte national.*

## **Introduction**

Since Sri Lanka's independence from Britain in 1948, the Sinhalese and Tamil ethnic groups have had a conflictual relationship over control of northern Sri Lanka.<sup>1</sup> The conflict between majority Sinhalese and minority Tamils in Sri Lanka resulted in three waves of Tamil refugee migration in 1984, 1999, and 2006.<sup>2</sup> India has the highest number of Sri Lankan Tamils outside of Sri Lanka because India is geographically close to Sri Lanka.<sup>3</sup> Of the 123 Sri Lankan Tamil refugee camps in India, 115 are in the Indian state of Tamil Nadu because there is a linguistic and ethnic kinship between Sri Lankan Tamils and Indian Tamils.<sup>4</sup> For example, the main language of the state of Tamil Nadu is Tamil, which is also the primary language of Sri Lankan Tamils.<sup>5</sup> The Tamil Nadu state government provides support and resources for the welfare of Sri Lankan Tamil refugees living in refugee camps.<sup>6</sup> However, the Indian government has refused to give refugee status, permanent resident status, or citizenship to Sri Lankan Tamil refugees, including

refugee children who were born in India, primarily because the Indian government expected Tamil refugees to repatriate to Sri Lanka when the civil war ended.<sup>7</sup> The civil war ended in November 2009 and—according to the Ministry of Prison Reforms, Rehabilitation, Resettlement, and Hindu Religious Affairs in Sri Lanka—only 4,691 persons repatriated to Sri Lanka between 2011 and early 2016.<sup>8</sup> Although India has recently signed several international treaties pertaining to the rights and protections of its citizens, Sander son argues that they provide only some protections for refugees in India.<sup>9</sup> Regardless, India has not signed either the 1951 United Nations Refugee Convention or its 1967 Protocol, which has 140 signatories, an overwhelming majority of the world's nations. There has never been evidence of a forced repatriation from India, but not signing the Refugee Convention and Protocol is a blot on India's record.<sup>10</sup> Additionally, Sri Lanka, although working with the United Nations High Commissioner for Refugees (UNHCR) to some extent, has refused to sign the 1951 United Nations Refugee Convention.<sup>11</sup> As such, typical thought and interpretation of the law regarding the rights and responsibility of individuals' states of origin<sup>12</sup> and host states is only very loosely applicable to the situation facing Tamil refugees in India. This has limited the assistance role of lead agencies such as the UNHCR, which led to restricted ad hoc protection and ambivalent international obligations to provide a successful repatriation program. Integration into local Indian society may be a durable solution for Tamil refugees,<sup>13</sup> but the current situation of "refugee warehousing"<sup>14</sup> in combination with India's ambiguous stance on international refugee issues are barriers in that process.<sup>15</sup> Although resettlement into a third country may be an option for some Tamils, this too is complicated by pre-migration socio-economic status, social connections, and in some cases, safety in a third country.<sup>16</sup>

In light of the current situation, two of the authors conducted separate research on Sri Lankan Tamil refugees' repatriation and livelihood plans, and the results of these studies provide the basis for the development of a repatriation program as a durable solution for this population. This article does not emphasize the idea that "all refugees want to go home" or that "the best place for refugees is home."<sup>17</sup> In fact, many factors could contribute to a Tamil's desire to stay in India, including the individual's understanding of India as home and perceived greater educational and livelihood opportunities.<sup>18</sup> Instead, this article proposes a conceptual framework for the successful repatriation of Sri Lankan Tamil refugees based on the results of two research studies, which might be beneficial for the Sri Lankan government and non-governmental agencies designing

repatriation programs for Sri Lankan Tamil refugees who want to return home.

### ***Repatriation and Sri Lankan Tamil Refugees***

Voluntary repatriation, which is often considered the optimal solution to refugees' problems,<sup>19</sup> recognizes the right of the individual to safety and security and upholds the dignity of the individual's freedom of choice. Human rights and refugee laws and the agencies working under those laws are subject to promoting voluntary repatriation without any indication that host country or country of origin subscribes to those values.<sup>20</sup> Allen stated that voluntary repatriation is the cheapest option without manipulating international assistance funds; therefore, repatriation is also a pragmatic response, overlooking the possibility of refugee integration into their exile country or a third country settlement as proposed by UNHCR, which is ethically ambiguous.<sup>21</sup> Regardless, the voluntary nature of a refugee's decision to repatriate depends largely on the success of the repatriation program. A common expectation is that refugees will choose to repatriate once the reason for their departure has been resolved,<sup>22</sup> without examining the infrastructures available to repatriates when they return to their homeland. Warner pointed out that voluntary repatriation indicates a return to a home and community with which refugees were associated and embraced before their flight into exile.<sup>23</sup> As a corollary to these perceptions, institutions dealing with refugees tend to depict repatriation as a "homecoming" to a former life and a familiar cultural environment, as a straightforward way of restoring pre-displacement life in familiar settings.<sup>24</sup> However, this assumption does not account for the myriad challenges that refugees often face during repatriation, as evidenced by the experiences of the many refugees who have returned to Sri Lanka from Indian camps.<sup>25</sup> Despite all the attempts to return to Sri Lanka, considerable numbers in India are still reluctant to return, even when the reasons for their flight have abated. The Sri Lankan Tamil refugees are reluctant to return because they are uncertain about having a home, adequate transportation, Tamil-based education system, or health care facilities in the Tamil majority areas.<sup>26</sup> Like any other repatriation process, the repatriation of Sri Lankan Tamil refugees is a complex and multi-level (individual/family/community) endeavour. However, the concept of repatriation for Sri Lankan Tamil refugees must be contextualized to their community needs because no single, generally accepted definition of repatriation can encapsulate the unique context of each refugee population. Within the efforts of the Sri Lankan government and agencies working with Sri Lankan Tamil refugees in Indian refugee camps, the lack of a concrete

and transparent repatriation program for Sri Lankan Tamil refugees remains a significant gap.<sup>27</sup> In order to develop a repatriation program, the Sri Lankan government and non-governmental agencies need a foundational framework to guide their endeavours.

A review of the literature identified a multitude of issues that prevent migrants from repatriating, including the “complexity of repatriation process, demographic characteristics of migrants, duration of stay in a host country, social connection with home country, reintegration in the home country, and social, economic and political support from home country.”<sup>28</sup> Most of the literature offers insight on migrant populations generally without discussion of the context that shapes the experiences of specific refugee populations. However, the authors examined the results of two of their studies of the Sri Lankan Tamil refugee situation, which offer foundational concepts for discussion of Sri Lankan Tamil refugee repatriation. The third author and a colleague conducted a primary case study analysis, and secondary data analysis of “district-wide refugee population data” (2005–10) from the Department of Rehabilitation of Tamil Nadu (DRTN) to assess support resources for Sri Lankan refugees in India, rehabilitation mechanisms, and livelihood options in Sri Lanka.<sup>29</sup> Researchers collected the primary data through twelve case study analyses during 2010. Secondary data collected from DRTN’s field survey, comprising 100 sample households, was also conducted in 2010. Both primary and secondary data collection were carried out in the Puzhal refugee camp in the Thiruvallur district, and Thenpallipattu refugee camp in Thiruvannamalia district in Tamil Nadu. These camps were selected for the field survey because they account for 13 per cent of the total refugee population in the state.<sup>30</sup> Both camps have been in existence for over two decades, have similar household characteristics, and have fewer security issues than other camps.<sup>31</sup> The data included demographic characteristics, family characteristics, possession of identity documents for repatriation, ability and willingness to access and utilize social services, availability of employment outside camp, and children’s education and social networks in India. Among the concerns that Sri Lankan Tamil refugees have about repatriation are education, employment, and accessibility of social and family support services. Data analysis indicated that if Sri Lanka cannot provide infrastructure and livelihood options for Tamil repatriates, integrating Tamil refugees into local Indian society could be a durable solution for their future, especially for those who married Indian citizens and wish to remain in India.<sup>32</sup>

The first author and colleagues conducted a qualitative research study with Sri Lankan Tamil refugees who were willing to discuss their repatriation plan.<sup>33</sup> Researchers used

in-depth, semi-structured interviews to generate data in order to understand readiness for repatriation to Sri Lanka and challenges related to repatriation, and to conceptualize strategies to promote successful repatriation. In 2013, researchers in this study selected fifteen refugees from the Gummidipoondi, Erode, Thiruchirappilli, and Thirunelveli refugee camps in the state of Tamil Nadu, India. Participants came to India during the 1984, 1990, or 2006 migration waves and comprised a sample of 60 per cent males and 40 per cent females with an average age of thirty years of age. All participants were living with families,<sup>34</sup> and all interviews were conducted in Tamil and lasted forty-five minutes. The interview guide focused on six general areas: awareness about repatriation to Sri Lanka, community support for repatriation, concerns regarding repatriation, community leadership to address repatriation concerns, resources to support repatriation to Sri Lanka, and strategies to address challenges to repatriation. Questions within each area were open-ended and designed to elicit a broad range of views and opinions from participants. Interview transcripts and field notes were analyzed by the research team after each interview. The researchers found that Sri Lankan Tamil refugees were concerned about Sri Lanka’s lack of a concrete repatriation plan. Tamil refugees also identified primary challenges of repatriation: lack of livelihood options and infrastructure development, lack of interventions to address intergenerational conflict, lack of knowledge of the Sinhalese language, and challenges associated with restoring trust between the Sri Lankan government and Tamils.<sup>35</sup>

A deeper exploration of these results allowed the authors to identify key themes with operational definitions in order to propose a conceptual model of repatriation success for Sri Lankan Tamil refugees. Further analysis of these key themes within the proposed conceptual framework could also assist the Sri Lankan government and non-governmental agencies in developing a coherent repatriation strategy.

### ***Proposed Conceptual Framework of Repatriation Success for Sri Lankan Tamil Refugees***

Voluntary repatriation to country of origin can be considered re-establishment of conditions before displacement, not only for the host country, but also for the refugees themselves who feel that it is an end of the refugee cycle.<sup>36</sup> However, a well-developed repatriation strategy should move away from the idea of one-way movements and solutions.<sup>37</sup> If repatriation programs are not focused on unique refugee population needs, the return may be more traumatic than the experience of flight and exile itself.<sup>38</sup> Bradley discusses the need for a more in-depth examination of the conditions of repatriates and revival of repatriation programs.<sup>39</sup> She argues that repatriation programs need to focus on land

restitution, suggesting that they must promote repatriates' position in society by placing them on an equal footing with their non-displaced counterparts in order to contribute peace and stability and ensure sustainability of repatriates.<sup>40</sup>

The absence of models specific to repatriation success hinders understanding of Tamil refugee repatriation and effective interventions to address these challenges. On the basis of two research results, the authors of this study propose a conceptual framework of repatriation success that is central to the key themes for Sri Lankan Tamil refugees: livelihood development, cultural and linguistic awareness, social relationships, and a nation with equal citizenship. Subthemes will be discussed under each section.

*Livelihood Development*

Although repatriation involves social, cultural, political, and personal adjustment, establishing a new economic basis often becomes important and challenging.<sup>41</sup> Although there are few studies on the integration of returnees to their country of origin, the literature suggests considerable variation in levels of economic adjustments amongst repatriates. Tamil refugees identified lack of livelihood options such as housing, education, health, and employment as the major challenges they may face in Sri Lanka.<sup>42</sup> Tamil refugees have a limited but comfortable life in Indian refugee camps. Approximately 150,000 Sri Lankan refugees officially reside in the Indian state of Tamil Nadu.<sup>43</sup> Refugees who live inside the refugee camps receive monthly financial support, free access to medical services, free public education for refugee children until twelfth grade, and access to a specific number of seats allocated to refugee children in Tamil Nadu universities.<sup>44</sup> Compared to these supports available to refugees living in Indian camps, Tamil repatriates in Sri Lanka receive minimal support from the Sri Lankan government. Repatriates' ability to transfer their livelihood assets and skills acquired during exile or to practise their pre-exile profession when returning to their homeland can be a positive factor in repatriation. When no or limited livelihood resources are available or transferable, repatriates are likely to face economic hardships upon return.<sup>45</sup> Farming and fishing would be the main sources of employment income for Tamils who repatriate to Sri Lanka, but after the civil war, Sri Lanka has limited infrastructures such as machines, seeds, or money for these industries, which means that Tamil repatriates may need more options than currently available for a sustainable livelihood.<sup>46</sup> One Tamil refugee explained, "People from Vavunia [a region of Sri Lanka] are most familiar with farming. They need necessary infrastructure to start farming; seeds, tractors, money, it will take one year to settle farming. So, living has to be supported by government."<sup>47</sup>



Figure 1. Conceptual framework of repatriation success for Sri Lankan Tamil refugees

Repatriation packages offered by the Sri Lankan government to Tamil refugees are inadequate for developing sustained economic activities among Tamil repatriates. Participants claimed that the resources available to Tamil refugees from the Sri Lankan government and the United Nations High Commissioner for Refugees is a combined 10,000 rupees (approximately US\$160.00 or €130.00) in the form of a one-time payment, as well as a six-month supply of clothing and food.<sup>48</sup> In contrast, resources needed to develop livelihood for Tamils in Sri Lanka include housing, farmland, temporary income until farming is resumed, and farming machinery.<sup>49</sup> Sri Lankan Tamil refugees have also reported that the Sri Lankan government acquired most of the refugee houses and land during the civil war, with no apparent intention of returning the land and houses to their previous owners.<sup>50</sup> Because Tamil refugees no longer have property in Sri Lanka, many Tamil refugees, especially those from the older generation, have concerns about building a new life after repatriation. One Tamil refugee explained, "No house or anything there. We have to go there empty-handed. We have jobs here. We made some money. When we reach there, we have to find a job. What kind of job I am going to get? There are no factories, no farms, no place to sleep."<sup>51</sup>

The younger generation also worries about their future in Sri Lanka since their Indian-based education is not accepted in Sri Lanka. For example, "It is not easy for children to

get into Sri Lankan education system, because, first, they have to learn Sinhalese,<sup>52</sup> which makes children of repatriates fall behind in Sri Lankan schools.<sup>53</sup> Studies done by Huber and Nowotny discussed the importance of accepting repatriates' education from their host country to continue their education or find employment in their country of origin after repatriation.<sup>54</sup> Borjas and Brasberg also identified that the least-trained individuals will be the first to return to their homeland, because they believe they do not need much training to get jobs in their country of origin.<sup>55</sup> This study also identified that repatriates who have an economic advantage and know that they can live below their means in their home country also chose to repatriate.<sup>56</sup> Similar to employment and education challenges, the Sri Lankan civil war destroyed many health-care facilities. Areas like Jaffna and Killinochchi, the Tamil majority areas, still lack facilities to provide care for Tamil families. Therefore, when the Sri Lankan government provides repatriation resources, it is important to prioritize rebuilding medical clinics to provide treatment for Tamil families.<sup>57</sup>

The lack of livelihood options in employment, housing, education, and health represent significant barriers for repatriation to Sri Lanka. Unless Sri Lanka plans to expand livelihood options, these repatriation challenges will persist, creating further conflict for economic benefits between Sinhalese, the majority population, and Tamils, the minority population, in Sri Lanka. For these reasons, it is imperative to include the category "livelihood development" in the proposed conceptual framework of repatriation success. The proposed framework intends to encourage the Sri Lankan government to develop programs to support Tamil repatriates in securing sustainable livelihoods in Sri Lanka.

#### *Cultural and Linguistic Awareness*

Culture and language awareness could facilitate social relationships, which will ease repatriation struggles of migrants.<sup>58</sup> Improved social relationships between Tamils and Sinhalese will facilitate the reintegration of Tamils into Sri Lankan society through employment, education, housing, and health-care services. The ability to speak in the primary *language* of a community is crucial to repatriation.<sup>59</sup> Most Sri Lankan Tamil refugees do not speak Sinhalese, which is the primary language of the Sri Lankan Sinhalese community and one of the official languages of Sri Lanka.<sup>60</sup> While both Tamil and Sinhalese are official languages of Sri Lanka, the Sinhalese community primarily speaks in Sinhalese. The lack of proficiency in Sinhalese constitutes a significant language barrier, which makes repatriation to Sri Lanka impossible for some Tamil refugees.<sup>61</sup> The Sri Lankan government made both Sinhalese and Tamil official languages of the country in order to enable Sri Lankan

Tamils to apply for administrative, educational, and other sector services in the country. However, Sri Lankan Tamils' apprehension is that the north and east of Sri Lanka where the majority of refugees would return have few administrative, educational, and others infrastructures necessary to find employment. Moreover, many members of the younger generation of Tamil refugees consider themselves culturally and linguistically Indian, thus they perceive repatriation as a departure from their adopted culture.<sup>62</sup> Members of the older generation chose to repatriate for the aforementioned reasons, but members of the younger generation often prefer to remain in the host country where they feel most socially connected.<sup>63</sup> However, the Indian government refused to grant Indian citizenship to Sri Lankan Tamil refugees. Although Tamil refugees are upset about the decision to withhold citizenship, they acknowledge the intense support that India has provided to Tamil refugees during their time of crisis. On the other hand, the lack of linguistic and cultural knowledge about Sri Lanka among younger Tamil refugees has resulted in a distant relationship with Sri Lanka: "If I speak Tamil, I will get a job in India, but if I speak Tamil, I won't get a job in Sri Lanka. Even if we learn Sinhalese, we still won't get a job in Sri Lanka because Sri Lanka is still suspicious of Tamils."<sup>64</sup>

Tamil refugees believe in sharing their culture with members of the Sinhalese community, because they believe that cross-cultural interaction promotes mutual understanding and contributes meaningfully to the integrated Sri Lankan community.<sup>65</sup> However, Sri Lankan governmental policies imply that members of the Sri Lankan government, the majority of whom are Sinhalese, would prefer that the Tamil community practise their cultural traditions privately, rather than sharing them with the Sinhalese community.<sup>66</sup> Therefore, in order to promote successful integration of repatriated Tamils, government policies must demonstrate respect for the unique cultural contributions that both the Sinhalese and Tamil communities offer to the cultural landscape of Sri Lanka. Consequently, the proposed conceptual framework of repatriation success for Sri Lankan Tamil refugees highlights the imperative to communicate in Tamil along with Sinhalese to encourage social cohesion between Tamils and Sinhalese in Sri Lanka.

#### *Social Relationships*

Djajic found that family relationships and connection with the homeland are highly influential for those considering repatriation, although generational differences are also apparent.<sup>67</sup> Repatriation involves developing and sustaining social relationships within the Tamil community, social connections between Tamils and Sinhalese, and a feeling of safety and stability in Sri Lanka.<sup>68</sup> To develop a sense of

belonging to Sri Lanka, Tamils first must form *social relations within their own community*. Hathaway notes that repatriation is likely to be unsuccessful without the presence of social connections in the homeland, contributing to indefinite lengths of “refuge warehousing.”<sup>69</sup> Homans proposed that “the more frequently persons interact with one another, the stronger their sentiments of friendships for one another are apt to be.”<sup>70</sup> In their research, Wellman and Wortley assert that kin appear to be primary sources of support, while residential proximity proved essential in supporting transactions involving material aid.<sup>71</sup> Many refugees value living in close proximity to their family because it enables them to share cultural practices and maintain familiar patterns of relationships.<sup>72</sup> For example, because it is traditionally the responsibility of male children to care for the elders in Sri Lankan families, many male refugees plan to return to Sri Lanka in order to fulfil their obligation to the family. As one male refugee explained, “I am the oldest of nine siblings. All my brothers and sisters are living in Sri Lanka. So it’s my duty to go back.”<sup>73</sup> As other scholarly works have noted, repatriates became linked to local labour markets through their specific networks of interpersonal and organizational ties.<sup>74</sup> They forged their own “social world.”<sup>75</sup> Most obtained their current position through “strong ties,”<sup>76</sup> such as their relatives or long-time family friends. Members of the younger generation of Tamil refugees emphasize their lack of social connection with people in Sri Lanka, even fellow Tamils: “I don’t want to go; my life is here; my friends are here; I have distant family there, but, I have no connection with them.”<sup>77</sup>

Another disconnection within Tamil refugee populations includes the fact that Tamil refugees continue to discriminate against Tamils who fought for the Liberation Tigers of Tamil Eelam (LTTE), a self-declared Tamil independence group.<sup>78</sup> Tamils are suspicious of former members of LTTE, which makes it difficult for them individuals to find employment or get married. Negative relationships within the same ethnic group can negatively affect the emotional well-being of individual community members, indicating the need for improved social connections within the Sri Lankan Tamil community as part of a successful repatriation plan.<sup>79</sup>

In addition to addressing tensions between Tamils, successful repatriation will also require improved *social connections between Tamils and Sinhalese*, resolving the social exclusion that Tamil refugees experience upon returning to Sri Lanka. A social connection may be conceptualized as the social process that ultimately links one with his or her social network members.<sup>80</sup> As mentioned by Willems, social connections and relationships between Tamils and Sinhalese could support the refugees.<sup>81</sup> The fact that the majority Sinhalese perceive Tamil refugees negatively also

influences the decision-making of Tamils considering repatriation to Sri Lanka. Sri Lankan Tamil refugees have experienced positive outcomes as a result of their social connection with the Indian community, despite differences in culture and country of origin.<sup>82</sup> One refugee commented, “My cousin who repatriated to Sri Lanka told me that Sinhalese don’t like us, they don’t talk to us or give employment in any of their stores. If we work together we can do business together, but they don’t trust us. They don’t want to be our friends.”<sup>83</sup> This statement suggests that Tamil refugees would greatly value the recognition and support of Sinhalese. Williams discovered that social networks are channels par excellence through which refugees are able to rebuild their livelihoods in a new and unfamiliar environment, and they provide help to refugees.<sup>84</sup> Therefore, the discouraging dearth of Sinhalese support for Tamils is a concern for refugees considering repatriation. In order to ensure successful repatriation, increased positive social relationships must occur between the Tamil repatriates and the Sinhalese community in Sri Lanka.

The theme of *safety and stability* highlights another important factor for facilitating social connection and local integration of Tamil refugees. Information about safety and security may also influence decisions about repatriation. Bradley argued that political agendas have taken priority over human security.<sup>85</sup> Many Tamil refugees have reported hearing about serious violations of safety and security, especially against women, in Sri Lanka.<sup>86</sup> In the context of information, social connections and social relations are the most trusted sources of information. They are perceived to provide refugees with the most reliable and current information.<sup>87</sup>

The victimization of refugee women has significant implications for repatriation. Tamil refugees have indicated that if they did not feel physically safe and stable in Sri Lanka, they would feel unable to integrate with the Sri Lankan community.<sup>88</sup> According to one Tamil refugee, “[There is] no security there [in Sri Lanka]. Lots of assault cases against women; no security to support the safety of women.”<sup>89</sup> The Sri Lankan civil war started in response to violations of basic safety, so current experiences of insecurity could contribute to a decreased quality of life for Tamils in Sri Lanka and lead to additional violence.<sup>90</sup> Further, lack of safety at the time of advocating for the voluntary return of refugees to their countries of origin can be disputed by human rights and refugee law. While this is not directly applicable to India or Sri Lanka, since neither signed the 1951 United Nations Refugee Convention, the principles relating to the ethical dilemma of refoulement must inform a conceptual framework for Tamil repatriation to Sri Lanka.<sup>91</sup> Therefore, the Sri Lankan government must develop strict policies and programs specifically

to address safety and security in Sri Lanka, which will in turn promote increased integration of Tamil refugees. For example, housing can promote social activities, safety, security, and stability for Tamil repatriates in Sri Lanka. Having a home in a Sri Lankan community can increase overall physical and emotional well-being of refugees.<sup>92</sup> Hence, the proposed framework of repatriation success accentuates building social connections with local residents and neighbours to help Tamil refugees feel safely settled in Sri Lanka, as this will provide a range of connections and a sense of belonging, which are important for well-being.

#### *A Nation with Equal Citizenship*

Tamil refugees are apprehensive about securing *equal citizenship* upon repatriation to Sri Lanka. Their concern reflects the different understanding of equal citizenship among Tamils and Sinhalese. Most influential are the actions of the home country government; policies and resources to support repatriation represents the most significant factor affecting refugees' decision to repatriate.<sup>93</sup> In the current political context it seems important to encourage dialogue and exchange of opinions between Sinhalese and Tamils, which alone can make for good will on both sides.<sup>94</sup> After thirty years of war and violence, it is important that new conversations take place which help to build support for the Tamil refugee repatriation.<sup>95</sup> Overzealous nationalism of either the Sinhala or the Tamil kind is clearly not the way to do this, especially when neither thrives on intolerance and prejudicial hatred. And today, when Sri Lankans as a whole must engage with loss and death on a massive scale, and with the memory of terror, by the state and the militants, a politics based on old certainties will not help the healing or create the context for something fresh and unexpectedly life-affirming to emerge.

In principle, the protection of repatriated citizens is a task for the government in the country of origin.<sup>96</sup> However, when refugees go back to fragile post-conflict states, governments normally have very little capacity to provide adequate support for repatriates to restore viable subsistence.<sup>97</sup> For any voluntary repatriation program to be successful in Sri Lanka, the Sri Lankan government must recognize Tamils as citizens in equal standing with Sinhalese and acknowledge the Tamil language and culture as equal in importance to the Sinhalese language and culture. Tamil refugees do not want to return to Sri Lanka to become second-class citizens.<sup>98</sup> A Tamil recalls his heritage in Sri Lanka with pride: "Sri Lanka is my home country; that's where I was born and brought up. That's where my parents were born and brought up."<sup>99</sup> Tamils want respect from the Sri Lankan government. A number of Tamil refugees also pointed out that the establishment of equal rights may have an impact on the way

people view them; where there are no equal rights, there is less respect.

Most importantly, *inclusivity* and *responsible citizenship* must be an ongoing part of designing and developing repatriation programs. Proactive human rights legal work that seeks to protect the inclusivity of both Tamils and Sinhalese is imperative for Sri Lanka's development. Ponni states that younger generations are tired of prejudice, hatred, and war and would like a different politics where it is possible to talk across differences of race, religion, and language.<sup>100</sup> It is important to build bridges through community engagement to secure support for a fair and just resolution for Tamil repatriation. While proposing recognition of state accountability for past wrongs, Bradley's work emphasized each state's responsibility to build a constructive relationship between repatriates and the state through responsible citizenship.<sup>101</sup> Repatriation programs where Sri Lankan Tamil refugees can take up roles in developing projects that arise from their own community needs, will be a positive example of responsible citizenship. Responsible citizenship is the building block of equality and long-term stability. This approach would make them not merely refugees but rather citizens with rights.<sup>102</sup> States should engage with the repatriate community to develop repatriation programs that utilize their leadership skills and unique cultural and traditional practices. For example, Tamil refugees feel violated when the Sri Lankan government makes decisions regarding Tamil repatriation without engaging with the Tamil refugee community. One Tamil refugee explains,

My younger brother is studying in a college here [in India]. When we go back to Sri Lanka, we don't know if he will get a job there because he doesn't speak Sinhalese, and he doesn't know anything about Sri Lanka. My older brother moved there [to Sri Lanka]. But he wants to come back here [to India]. He is an engineer. Sri Lankan companies didn't give him any jobs because he can't speak fluent Sinhalese. The Sri Lankan government didn't give him a job with any repatriation development projects for Tamils either, which is somewhere he could work because we all speak Tamil. They are deliberately trying to put us in poverty.<sup>103</sup>

There are widespread, negative examples of the failure of the Sri Lankan government to support access to services for Tamil refugees. It is generally acknowledged in policy and practice that connecting refugees to relevant services is a major task in supporting repatriation.<sup>104</sup> Accordingly, the proposed conceptual framework of repatriation success for Tamil refugees emphasizes the *restoration of trust* between Sri Lanka and citizens in the hope that increased trust will lead to full and equal engagement of both Tamils and Sinhalese in Sri Lanka. When Sinhalese and Tamils are able

to trust and understand each other, their true perceptions of each other, and the importance of connecting with each other, they will become interdependent. In an interdependent society, the transformation of one can lead to the transformation of all. If Sinhalese and Tamils work together, they might gain respect for each other, affirming their mutual need for each other. This integration could become the catalyst for the kind of change that radically transforms the nation of Sri Lanka.

#### *Verification of Proposed Framework*

When proposing a framework or a program for Sri Lankan Tamil refugees, one must seek the support, guidance, and suggestions of Tamil refugees. The authors sought consultations with Tamil refugee elders, academics, researchers, policymakers, and local-level practitioners. Representatives from the Organization for Eelam Refugee Rehabilitation and Sri Lankan Tamil refugee elders from Trichy and Gummidipoondi refugee camps assessed the meaningfulness and utility of the framework, confirming that the key concepts of the framework reflected the salient features of Sri Lankan Tamil refugee repatriation. The authors also presented the framework in two conferences (local and international) with policymakers and practitioners from government, academic, and social services. When finalizing the framework of repatriation success, the authors incorporated feedback on the relevance of the concepts from the seminar and conferences to contextualize the repatriation framework to Sri Lankan Tamil refugees.

#### **Conclusion**

This article proposed a conceptual framework of repatriation success for Sri Lankan Tamil refugees. Elements of the framework were identified from the findings of two specific scientific studies conducted with Sri Lankan Tamil refugees in Indian refugee camps. Key concepts that emerged through this process were then verified by Sri Lankan Tamil refugee elders, academics, practitioners, and policymakers. The conceptual framework of repatriation success specifies sub-concepts under the key concepts that shaped conceptualization of successful repatriation.

The identification of each key concept raises significant questions regarding repatriation. First, interdependence of these themes (livelihood, cultural and linguistic knowledge, social connection, and nationhood) should be highlighted. For example, the authors' literature analysis identified lack of livelihood options as the most commonly reported repatriation challenge.<sup>105</sup> Stable housing can help refugees establish continuous relationships with their neighbours and other local residents. However, the inability to communicate in Sinhalese can hinder the ability to learn cultural

knowledge from neighbours, contributing to a lack of social connection among refugees. Second, the conceptual framework of repatriation success encourages social relationships between the Tamil and Sinhalese communities, while also promoting their unique cultural identities and languages. Third, a nation with equal rights for both the Tamil and Sinhalese communities promotes equal citizenship and social cohesion, rather than assimilation to a single mainstream culture and potential ongoing exclusion of an ethnic minority.<sup>106</sup> These engagements should be fully integrated into the repatriation framework. Any conceptual framework related to repatriation can incite debate, but it can also provide a structural foundation for thoughtful conversation about how best to accomplish the goals of repatriation.

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# A Context of Risk: Uncovering the Lived Experiences of Chin Refugee Women Negotiating a Livelihood in Delhi

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## Abstract

*In India, the livelihood spaces that refugee women from Chin State, Burma, have carved for themselves in their country of first asylum remain relatively unexplored. This article focuses on Chin refugee women's pursuit of livelihood in Delhi in 2012–13. The concept of "livelihood" is a starting point to better understand the women's work experiences and explore the associated risks affecting their well-being. Emerging findings indicate that pervasive sexual harassment and discrimination, inside and outside of work contexts and a constant sense of livelihood insecurity severely affect the health and well-being of these women and contribute to diminished hopes for a future in Delhi.*

## Résumé

*En Inde, les contextes que les femmes réfugiées originaires de l'État Chin, en Birmanie, se sont façonnés afin d'assurer des moyens de subsistance dans leur pays de premier asile demeurent relativement peu étudiés. Cet article est axé sur la quête de moyens de subsistance de la part des femmes réfugiées chin à Delhi en 2012-13. La conceptualisation des «moyens de subsistance» représente un point de départ pour mieux comprendre les expériences de ces femmes concernant le travail, et explorer les risques impliqués qui influent sur leur bien-être. Des données récentes indiquent que l'omniprésence du harcèlement sexuel et de la discrimination, inhérente ainsi qu'extérieure aux divers*

*contextes de travail, associée à un sentiment constant de précarité, entrave gravement à la santé et au bien-être de ces femmes, et contribue à des attentes réduites concernant leur avenir à Delhi.*

## Introduction

Risk permeates all facets of the refugee experience. An individual's decision to flee and seek asylum in another country is informed by risk and uncertainty, while being a risk in itself.<sup>1</sup> Refugees flee out of a well-founded fear of being persecuted and the hope that threats and peril will diminish upon arrival in countries of first asylum; however, this may not be the case, as new risks are frequently confronted when durable solutions are sought. For the majority of refugees who have fled to neighbouring countries, a durable solution, such as resettlement to a third country, is never found. As a result, they can either "integrate" into the local host community or repatriate back to their home country. There are 14.4 million refugees of concern to the United Nations High Commissioner for Refugees,<sup>2</sup> and fewer than 1 per cent will be resettled. This means that, for many refugees, quasi-integration into countries of first asylum will be the only answer.

Refugees from Chin State, Burma, are among the nearly 65.3 million forcibly displaced people worldwide.<sup>3</sup> The spaces that Chin refugee women have carved for their livelihoods in India—their country of first asylum—have been relatively unexplored. This article adds an important dimension

to current knowledge by uncovering the rich, lived experiences of the Chin women who engage in or pursue a livelihood specifically in Delhi. Despite the great hardships Chin refugees have faced before and after displacement, they are often ignored in the global media.

This article discusses select findings from a qualitative research project that examined Chin women's well-being and survival in India; we report on emerging findings from Phase 1, which included twenty-eight in-depth interviews with Chin refugee women in Delhi. The primary focus will be Chin women's experiences and their perceptions of the risks they face engaging in or pursuing a livelihood in their country of first asylum.

### ***The Research Context***

Participants originally came from Chin State, a mountainous region of northwestern Burma. Chin State is an agrarian society with an estimated population of 500,000.<sup>4</sup> Since the 1962 military coup, which resulted in the overthrow of the democratic system and the introduction of military rule, ethnic groups from Burma have faced human rights abuses. The Chin face discrimination that is due not only to their ethnicity, but also their religious identity. They are predominantly Christian in a country where the majority is Buddhist. According to the Chin Refugee Committee,<sup>5</sup> previous military rule resulted in widespread atrocities in Chin State which "led to extrajudicial killings, arbitrary arrest and imprisonment, torture, rape, forced relocation, forced labour, religious persecution, and other violations of basic human rights." Women and girls, especially, lived in fear of rape and other forms of sexual violence as the military used "rape systematically as a means of control, torture and repression."<sup>6</sup> These crimes were often committed with impunity, as military personnel were rarely prosecuted and crimes were covered up.<sup>7</sup>

This milieu of violence forced many Chin people to flee to neighbouring India, mainly in the eastern states of Manipur and Mizoram, with hopes of a better life. Despite the recent election of a semi-civilian government in Burma, and a ceasefire declared between the government and armed Chin groups, the militarization of Chin State continues. It is estimated that 75,000–100,000 Chin are living in Manipur and Mizoram,<sup>8</sup> with an additional 8,000 in Delhi.<sup>9</sup>

Importantly, India has not ratified the 1951 Convention relating to the Status of Refugees. While refugees in India are not recognized under national legislation, the Indian government has an informal agreement with the United Nations Development Programme (UNDP) to maintain an office in Delhi to register asylum-seekers and provide limited services to refugees living there. Many Chin make the long, expensive trip to Delhi, as it is the only place in India

where they can apply for registration. The hope of being resettled to a third country is also a pull factor<sup>10</sup> that brings refugees to this urban area.

In 2012, the Indian government announced that it would allow registered refugees to apply for long-stay visas, with accompanying work rights.<sup>11</sup> However, it remains unclear how many long-term visas have actually been granted to Chin refugees. Nevertheless, Chin refugees are still bound to the informal employment sector and work primarily in factories, domestic service, or small-goods sales on the streets. Refugees from Chin State are further disadvantaged because many have limited education and come from agrarian backgrounds, so their skills are not easily transferable to the urban context of Delhi.<sup>12</sup> They are increasingly at risk of exploitation and discrimination by employers, with refugee women at a heightened risk of sexual and gender-based violence (SGBV).<sup>13</sup> In fact, there have been widespread reports of SGBV towards Burmese refugee women (at work and in public spaces), which often goes unpunished.<sup>14</sup>

The situation of Chin refugees in India is unique, as they are physically, culturally, and linguistically distinct from the host population. This "otherness" and classification as "refugees" puts them at risk of abuse and harassment from local people. Additionally "their refugee status means they are doubly-disempowered, for they lack the protection of the state, the opportunities for free movement, and the surplus income to escape situations of violence."<sup>15</sup>

After direct consultation with key informants and refugee women themselves, it became clear that a participatory method of inquiry would be beneficial to explore the topic of livelihood and risk. Indeed, a lack of livelihood creates barriers to meeting several basic needs including health care, education, safe accommodation, and an overall dignified quality of life.

### ***The Conceptual Frameworks of "Livelihood" and "Risk"***

#### *Livelihood*

Understanding the influence and effects of livelihood opportunities is essential, as the concept is foundational and used as a platform to explore the complex, fluid, and often dangerous living situations of participants in this study. The bulk of the literature in this area is policy driven, particularly when focused on refugees. In these instances, a livelihood has a functional definition (e.g., a job, the need for food, shelter, etc.). Indeed, the idea of a livelihood is much more than "just a job." According to Gaillard et al.,<sup>16</sup> "Livelihoods rarely refer to a single activity. It includes complex, contextual, diverse and dynamic strategies developed by households to meet their needs." While a livelihood may include money, it also "encompasses in-kind income, social

institutions (kin, family, and village), gender relations, and property rights required to support and to sustain a given standard of living.”<sup>17</sup>

Moreover, access to a livelihood is a right for all people, as stated in article 23(1) of the Universal Declaration of Human Rights:<sup>18</sup> “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.” This right is expanded upon in article 25(1): “Everyone has the right to a standard of living adequate for the health and well-being of himself [*sic*] and of his [*sic*] family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

The many facets of a livelihood help one achieve a standard of living that is ultimately safe, sustainable, and secure to fulfil other rights with dignity.<sup>19</sup> At the meso-level, livelihood also includes “access to, and benefits derived from, social and public services provided by the state such as education, health services, roads, and water supplies.”<sup>20</sup> Therefore, a livelihood is not limited to material wealth, but is also holistic and all-encompassing.

Providing a conceptual framework from which to understand “livelihood” in this article is fundamental, as livelihood experiences are used to delve deeper into participants’ overall perceptions of their living situations. More importantly, livelihoods may also be a contributing factor to the risks (or alternatively, a mitigating factor) that refugee women frequently face in countries of first asylum. A “people-centred” approach to livelihoods was appropriate to this research, as it places the reality of Chin women participants at the centre of the analysis, while also considering the relationships between local context and the additional elements of gender, well-being, and structural inequalities experienced in the pursuit of a livelihood.

### *Risk*

While the prevalence of risks is recognized in migration studies, “there is little explicit theorization of the role of risk ... it is either simply acknowledged or assumed to be implicit in [the act of migrating].”<sup>21</sup> In fact, there is very limited research on how individuals themselves conceptualize risk more generally in “the broad range of phenomena that have been labeled ‘risks.’”<sup>22</sup> Arguably, the lack of conceptualization in studies on migration is astounding, particularly in relation to refugees, as the entire refugee experience is perilous and full of life-threatening dangers.

Indeed, the literature review reveals that risk is assumed to be entrenched in the refugee experience. However, there is no specific exploration of how the *concept* of risk and

different risk contexts are experienced and perceived in the lives of asylum-seekers and refugees. People encounter risk at all stages of their lives, as risk is “fluid and dynamic over time and space.”<sup>23</sup> This personal knowledge of risk “tends to be highly contextual, localized and individualized and reflexively aware of diversity and change ... membership of cultural and social networks and groups is important in the construction and meaning of risk logics.”<sup>24</sup> Understanding the context and specific sociocultural factors is imperative to unpacking how Chin refugee women assign meaning to the risks they encounter while pursuing a livelihood in Delhi. Therefore, this project is influenced by a social construction of risk, which views risk as something that “is not a static, objective phenomenon, but is constantly constructed and negotiated as part of the network of social interaction and the formation of meaning.”<sup>25</sup> Through phenomenological accounts of risk as provided by the participants in this study, “the ‘lived experience,’ or how individuals experience their world as an interpretive reality” is best understood.<sup>26</sup>

### *Literature Review*

Refugees typically leave behind “life-sustaining resources” such as social support networks (like neighbours, friends, and relatives), support services, land, and communities.<sup>27</sup> For some, “a lack of access to basic needs compounds risk and vulnerability,”<sup>28</sup> and their reaction to such risks or threats is largely dependent on choices available to them. In many urban refugee settings, the choice of options, such as leaving the country or relying on social networks, is limited,<sup>29</sup> and other obstacles such as discrimination or lack of citizenship rights can occur. Without citizenship, those who are displaced may become susceptible to exploitation or abuse from local people who take advantage of their indeterminate status as asylum-seekers.<sup>30</sup>

The livelihood environment becomes increasingly dangerous when a country is not signatory to the Refugee Convention or Protocol.<sup>31</sup> Where human rights are not respected and a legal framework to protect refugees is not in place, refugees may find that sustaining a livelihood is difficult and dangerous. Many might depend on remittances from family or friends abroad if such networks exist.<sup>32</sup> They may struggle “due to an absence of civil, social and economic rights including freedom of movement and residence, freedom of speech and assembly, fair trial, property rights, the right to engage in wage labour.”<sup>33</sup> As workers in the informal employment sector, they may be underpaid and exploited by their employers.

The “gendered nature of risk” is important when looking at the identifiable dangers women encounter<sup>34</sup> as they pursue livelihoods. Risk analysts argue that men and women perceive risk differently.<sup>35</sup> Yet the majority of risk-related

and risk-theory research tends to ignore the gendered nature of risk perception and focuses mainly on “abstract universal and gender neutral subjects.”<sup>36</sup> Livelihood experiences of men and women in both rural and urban areas are diverse and dynamic; however, for women specifically, experiences involve “transformative struggles through which they work to empower themselves by reshaping their identities, lives and relationships within households and communities.”<sup>37</sup> While there is a plethora of literature on livelihood activities, particularly in rural areas, what is missing is rich data on “the role played by gender and generation in influencing differential access and ability to command resources on the part of individual household members.”<sup>38</sup> It is still assumed that context directly affects women’s choices (and limitations) in the way they secure a livelihood, highlighting the distinct and personal approach to livelihood. However, a cross-cutting theme that highlights agency is that women are also “actively making decisions regarding how best to meet their own needs and those of their families.”<sup>39</sup>

Research on the topic of refugee women’s livelihoods and risk in urban areas is lacking, and “there is a poor understanding of, and relatively few studies on, how the safety of urban refugee women can be compromised by going out to work.”<sup>40</sup> For refugee women, SGBV is heightened during conflict and displacement, particularly when work rights are lacking.<sup>41</sup> Consequently, refugees are forced to find a job that “presents the risk of exploitation and serious protection problems ... [Women in particular] are susceptible to the dangers of working in the streets without protection against theft, rape, sexual abuse, exploitation or unhealthy physical environments.”<sup>42</sup> This lack of economic opportunity may also result in high-risk activities such as “survival sex.”<sup>43</sup>

Importantly, women with children often “carry a double burden of reproductive and productive duties” as they balance paid work with childrearing obligations.<sup>44</sup> Some refugee women may take on the primary role of provider and wage earner and carry the responsibility to provide for their family.<sup>45</sup> In displacement contexts, they might be playing a more prominent role in the workforce if the men are “absent, disabled or unwilling to do the lower status and lower paid jobs that are available.”<sup>46</sup> As such, men and women experience the livelihood environments, and the risks and strategies involved, differently, and this is why the research was undertaken solely with women.

### **Methodology**

The researcher (first author) conducted twenty-eight in-depth interviews with Chin refugee women in Vikaspuri, in the western part of Delhi, in 2012 and 2013. Participants were recruited using a snowball sampling technique. Interviews took place at the home of a Chin refugee woman who ran

a well-regarded women’s rights organisation. The identity of the organization and the woman have deliberately been kept anonymous to protect them from harassment. The participants felt secure travelling to this location, as it did not attract unwanted attention from local people; the location was comfortable and familiar for both participants and researcher. During the interviews, a translator was present who was fluent in two Burmese dialects and English.

The interviews were semi-structured, commencing with the collection of basic demographic information such as age, marital status, how long they had lived in Delhi, and number of family members. Participants then provided information on employment opportunities in Chin State and then in Delhi, highlighting associated risks and the daily struggles experienced. The emergent area of livelihood risk usually led to a broader discussion of risk for refugee women in Delhi more generally. Finally, participants discussed the role of social support and coping mechanisms used when facing hardship. While the interviews were semi-structured, they remained sufficiently open-ended for participants to provide greater detail on different aspects of their lives (for example, health or housing problems) if needed.

Constructivist grounded theory, which is an inductive and emergent process, was used in this research project. A grounded methodological approach uses “systematic inductive guidelines for collecting and analyzing data to build middle-range theoretical frameworks that explain the collective data.”<sup>47</sup> This analytical method was chosen because, as Stern notes, grounded theory is particularly relevant in “investigations of relatively uncharted water.”<sup>48</sup> This approach was deemed most appropriate, as little is known about the context of risk in relation to the livelihoods of Chin refugee women in Delhi. Constructivist grounded theory is also useful in “understanding and explaining human experience as it is lived.”<sup>49</sup> The experiences of Chin women are necessarily subjective and contextually defined, which is exactly what this project sought to uncover.

Data collection and analysis were carried out simultaneously, with the approach shifting as the study progressed. Transcription and coding began immediately after the in-depth interviews were completed. Comparative methods were used throughout the analysis, along with memo-writing and theoretical sampling. Through constant comparative analysis, “grounded theorists compare data with data, data with codes, codes with codes, codes with categories, and their finished analyses with relevant theoretical and research literatures.”<sup>50</sup>

Participants have experienced trauma, along with severe hardships. As such, careful consideration of an ethical research process was paramount throughout the project. The study received approval from the Human Research

Ethics Committee (HREC) of the University of New South Wales (HREC Approval HC12280), Australia. A strict code of ethics was adhered to, which ensured that participants were treated with dignity and respect. Additionally, a counseling referral service was identified in Delhi in the event that participants became distressed during or as a result of the interviews.

**Preliminary Findings**

Participants were aged between eighteen and fifty-five. Marital status highlights several widows, who of necessity become sole earners in their household. Four main employment areas were identified by the Chin women: waitresses at Indian wedding parties; domestic staff in households of Korean families; company (i.e., factory) workers; and, self-employed or “other.” All four employment areas are in the informal sector, which means they are unregulated, with salary paid cash in hand. In addition, work was irregular and many women reported changing jobs to best survive. For instance, the majority of participants have worked in two to three of the listed occupations and were therefore able to share insights from more than one job. Participants’ demographic characteristics are summarized in table 1.

Participants disclosed that all employment areas involved some personal risk. However, any problems or complaints experienced by Chin women were typically not addressed, or even reported to employers, because the women were fearful that such actions could result in negative repercussions to themselves and their family. Consequently, many participants reported feeling they had no choice but to accept and endure any job offered.

The following discussion provides a summary of women’s reported experiences of the four emergent employment areas and participants’ perceptions of the risks involved when negotiating these occupations. This section offers a discussion of the overall themes emerging from the coding and analysis of the textual data. This stage of analysis, or “focused coding,” occurred early in the grounded research process and, as such, the results presented here are more abstract but will contribute significantly to the final conclusions of this ongoing study.

**Findings**

*Indian Wedding Parties*

The “wedding season” in India typically runs from September to January. Many participants felt that waitressing at wedding parties was the most dangerous occupation for refugee women in Delhi. However, this job paid quite well compared to other alternatives. For instance, a woman could receive up to Rs400–500 (US\$6–8) per party, whereas one day of work at a company would earn only Rs125–180

**Table 1.** Participants’ demographic features

Number of interviews	28
Age range	18–55
Average number of years living in Delhi	3.3
Marital status	
Single	6
Married	10
Widow	10
Unknown	2
Employment	
Wedding party	4
Company	11
Korean house	4
Self-employed	4
Other	5
Sole income earner in the household	12

(US\$2–2.90).<sup>51</sup> Reported risks included being propositioned for sex and being sexually harassed and groped:

There [wedding party] is not safe at all. Some of the local men are very bad, all the time. It is very dangerous for us. They touch our face, they touch our bottoms and they pull at our dresses. They say bad things to us, and I have seen them grope my friends. It’s not safe. I don’t have enough strength to work at the wedding party anymore and also I am scared to work there. (W5)

The grooms, the guests, some of them get drunk and for the girls it’s not safe that late at night. And they call to us, “How much?”... they want something sexual. (W7)

Most women took this job only if they were more desperate for money than usual, perhaps as the result of frequent illness in their household or if they were sole income earners. Many spoke of the humiliation involved with this work:

If a man touches me at the wedding party, the other guests laugh at me. They laugh at me and I feel very shy and upset, but I have no choice but to work there. There are other jobs around here, but the pay is much less. So, if they phone me, I have to work for the survival of my family. I have no choice. (W3)

When women were sexually harassed, they could not complain, because employers were not present or remained indifferent:

When we are harassed or they ask something sexual, we just ignore the men and tell them we are not like that. We just keep

doing our job because there is no other option. Most of the men usually go away. (W2)

However, a few of the women would fight back when provoked:

When the men grab our bodies, some of them I slap, like this [*motions with her hand*], sometime from my mouth I shout for them to go away. (W3)

When the men ask, "How much?" we reply, "We come for work, we are not like that." (W7)

Most women<sup>52</sup> found out about wedding party jobs through friends or a "recruiter." For example, a Burmese man working for an Indian employer served as the "contact" to recruit women to work at weddings. The women were specifically told to wear short skirts and revealing clothing. The job typically started around 6 p.m. (but sometimes earlier) and ended around 2 or 3 a.m. Depending on the location, the women were picked up by a rented bus and taken to the venue, then also taken home. Some women reported that this time of night could be dangerous because sometimes they were locked out of their homes by landlords; the women waited on the street until 6 a.m. or went to a friend's house if possible. The risks associated with this job were great, but often there was no alternative and the women had to stay on. This was the case for one woman who, along with her husband, was supporting two children and a disabled brother:

I am searching for another job at the company also, but till today I can't find a job. I have no choice. If there is a wedding party, then I will work again. (W7)

#### *Domestic Staff at Korean Households*

A number of Korean families in the Delhi outskirts and Noida (southeast of New Delhi) employed Chin refugee women as housekeepers. Participants claimed that Korean families preferred to hire the Chin because of perceived commonalities in appearance. Many Korean expatriates were working for Korean technological companies, or setting up Korean restaurants or guesthouses.

The job of housekeeper included cooking, cleaning, and minding children in the households. These jobs were typically arranged through word-of-mouth from friends. Single, unaccompanied women preferred jobs at Korean households because they were provided with room and board:

I don't have very close family here or relatives, so when I work in a Korean house I get more than I would get at a different job. Also, the Korean family gives me food and shelter. (W2)

They could live with friends and find a different job but did not want to be dependent on people who were not family members, as every family, in their words, had their own problems:

Sometimes we help each other, but as you know, everyone, every household is facing these problems in finances, so sometimes you can't get help ... or we don't trust each other. (W13)

In the Korean house we get a room, a separate room and our own life. (W2)

Sexual harassment occurred at Korean households, not usually by the employer, but by other employees of the house (e.g., the driver or security person). Two women recounted how they had to barricade themselves in their room because another employee was trying to get in "and harass us." One woman mentioned that an Indian worker propositioned her for sex at her house. The women always kept their doors shut and told the men to go away. Another woman experienced sexual harassment from the family driver (who was Indian); the man tried to touch her and say "something about sex." She complained to her employer, but the employer only scolded her.

If I face these kinds of problem again [sexual harassment] I will be looking for another job. It's a cycle. I have worked at so many Korean houses and at every house I have been harassed. (W2)

While harassment is common, it is often ignored:

We just ignore them and keep doing our job because there is no other option. (W2)

The women reported that Korean employers did not usually harass them; however, they offered little to no protection if other workers sexually harassed the women. Working hours were often set from 6 a.m. until 6 p.m., but the women were on call twenty-four hours a day and could be summoned at any time. The employer was usually a female head of household. If she got angry or upset with a Chin woman employee, she would withhold food, as reported by all women who worked in Korean households. Despite the risks faced in such workplaces, many women felt that they were safer and had marginally better conditions than Indian wedding parties.

#### *Company Work*

Company jobs involved the manufacture of a variety of goods (such as clothing or toys). Participants reported that the companies were often located in one room with poor

ventilation and lighting, and hours of employment were very long. Despite the severe risks involved, a *few* women felt that company jobs were a safer option when compared to the alternatives.

Because work hours are long, some women noted that their children had to stay home alone after school (if they were enrolled) while they were at work. One woman locked her children in their room because the neighbourhood was not safe and she feared for them when they ventured outside alone. As one widow who worked at a company described her experience working in Delhi,

My children are at a church-run school from 8 a.m. to 11 a.m. After that they come home alone. They are six, nine, and twelve years old. I finish work at 6 p.m. After the school day they come home on their own and they stay on their own at the house ... I don't have time to take care of them and look after them. It's very difficult [*starts to cry*]. As a mother, I can't see the future. For my children, there is no future at all to see if we stay here in Delhi. Still, we can't do anything ... We can't leave, we can't get resettlement, so ... it is very difficult to stay in Delhi. (W28)

According to another woman, also a widow, sexual risks were prevalent in companies:

It's not safe; it's not safe to work there, but if we don't work there we don't have anything to eat ... it's very difficult to find other jobs at other companies because I am forty-four years. One of my co-workers, a local man, asked me to sleep with him and he would give me Rs500 ... I was very angry and I said to him, "Do you think I'm a prostitute?" I was angry. Sometimes if a woman is beautiful, they ask for Rs1000 or more [for sex]. The girls are not safe. I have stayed here in Delhi since 2008 and I have heard lots of stories about this [girls being propositioned for sex]. Some women used to talk about their daughters who are experiencing harassment from the company. I have heard lots of stories like that. The refugee women, girls face lots of harassment and abuse in their working place. Some girls, the pretty or smart ones, they are asked how much [for sex]. (W25)

At some companies, local people were often paid more than refugee women, even though they were doing the same job. The women were also harassed and verbally abused by other local workers. They could not complain to employers, as they did not speak Hindi:

They [local people] look down on us because we are refugees and we are different from them. Our skin is different. If we are working, the co-workers, the local people, tell us what to do. Tell us to do our work. We are working, we are doing our work, but still they tell us what to do. (W28)

Despite the risks, a few participants preferred this type of job, but only when they had a good employer. According to them, a good employer would employ them again when they had to leave as the result of illness, or stood up for them if they were harassed. While rare within this context, two participants spoke of having come across decent employers.

#### *Self-employed and "Other"*

The women who identified as self-employed or "other" mainly sold small goods on the streets of Delhi, provided basic services to neighbours, such as doing laundry, or worked myriad other jobs. Participants described self-employment as desirable, but this type of work also had its share of risks.

Working outside of recognized employment contexts was dangerous. For example, selling goods on the street rendered women vulnerable, as local men would often deliberately target women, groping them in public or making inappropriate sexual remarks. However, this behaviour was not limited to women who worked on the street. *Every* woman in this study reported this as a common, sometimes daily occurrence in public spaces.

Those who classified their work as "other" worked myriad jobs because they continued to be harassed in the employment contexts described above. One thirty-three-year-old single woman spoke of the hardships she faced while working in Delhi:

Thinking about my past, I'm not so happy. One time I was walking home from work and there was a man on a bike coming toward me. He was following me. I was just walking and then he came and turned around to me. He touched my breasts twice. And I was crying, crying, and I just try to follow the bike, to chase him, but the bike is at full speed and he got away. I was crying, crying ... I have also had my purse stolen twice. Both times on payday (and on the bus). Perhaps this was planned? I used to have one boss who I thought I could trust, but he turned out to be bad. He tried to take advantage of me when he gave me a lift home. So there are many problems for refugees. Women cannot eat good food, so we don't have much energy. Our minds, everything is weak, weakened. Always depressing. (W20)

Another participant mentioned being robbed on payday, which brought up the question of whether this was an organized scheme rather than random misadventure.

Earnings for those who were self-employed were very low (much like the other occupations) and sometimes the women's children had to work to make ends meet. One participant who sold cigarettes and pickles in her neighbourhood, told of her thirteen-year-old son who worked part-time because her husband was too sick to work:

My son goes to school when we can afford it, but when we are facing a severe crisis, he has to work. He sometimes works two to three days a week for up to twelve hours a day. He works in the District Centre selling tea. We are scared we can't pay the house rent, so that's why, at the time when we face that severe financial problem, my son has to work too. (W10)

A common theme was that work in this context was infrequent, which meant that they were trapped and obligated to put up with abusive and dangerous situations. This is why many of the women had aspirations to run their own income-generating activities, where they could work from home or with other Chin women because, as one woman said with an ironic laugh, "The only safe job [in Delhi] is doing housework at home!"

### **Discussion**

As De Haan argues, "Livelihood activities are not neutral. They engender processes of inclusion and exclusion and power is part of that."<sup>53</sup> This is indeed exemplified in the reported experiences of participating Chin refugee women in Delhi. While there were economic opportunities for these women that should have mitigated select risks. However, these livelihood opportunities also involved considerable personal risk, primarily sexual harassment and other forms of SGBV. Participants then faced additional obstacles when trying to sustain economic livelihood opportunities, such as not speaking the local language and constant experiences of discrimination. The women reported encountering SGBV and sexual harassment primarily by local Indian men. Moreover, Chin women were easily targeted because "they looked different" from the local people, and because of their gender and refugee status.

Participants could not engage in work in the formal employment sector, which "limits their control over their lives and livelihoods."<sup>54</sup> It became evident that engaging in and maintaining in the informal sector exposed the women to serious dangers. For example, a young woman could easily find a job in a Korean household, but her freedom of movement was restricted. She may experience harassment from local employees and her wages and provision of food depended on the mood or demeanour of her employer. The Chin refugee women had no bargaining power in these situations because they were "outsiders." As one participant said,

They look down on us because we are refugees and we are different from them ... our skin is different. (W28)

They experienced "unfavourable inclusion":<sup>55</sup> Chin refugee women were not being excluded from pursuing a livelihood; they were included, but under severely unfavourable

and unsustainable conditions. These unfavourable conditions were not limited to the employment context; in fact, the women and their families were "unfavourably included" in education, housing, and health. These conditions left them feeling disempowered. As one widow with two children said,

It's not safe here. It's not safe to work here ... but we can't go home to Burma and we can't go to other countries. We are stuck here in Delhi. (W25)

The women felt that they had no choice but to put up with adverse and dangerous conditions because work options were so limited. In Delhi, personal agency was compromised by the influence of factors such as gender, which inhibited their capacity to pursue safe livelihoods and self-reliance. According to the participants, free choice when negotiating a livelihood simply did not exist; they kept reiterating that they had no choices available to them in Delhi. In the majority of cases, they had to take what was offered because they were so desperate for any income. Many women had skills from their previous lives in Burma that they would have liked to use, but the opportunities were just not available:

I feel sad and depressed. I am just a housemaid. In Myanmar I am a student of the college. In India I am just a housemaid. (W4)

This lack of choice, combined with a living context where harassment and abuse were handed out without consequence, created a dangerous environment where they were allowed to pursue work, but inevitably, risk was embedded in it. This is not to say that they did not exhibit any personal agency or resilience. Some of their decisions were made independently and were strategic, but they were often choosing the least damaging option from a number of poor opportunities.

According to Chan and Rigakos,<sup>56</sup> the nature of risk is different for women and is inherently gendered. The present discussion suggests that the risks encountered by participants in the livelihood context were overwhelmingly about sexual violations of their bodies. This is consistent with earlier research undertaken with Burmese refugee women in Delhi.<sup>57</sup> In this current project, participants' knowledge of risk was highly localized and influenced by gender and was unique to these Chin refugee women. In their minds, the actual risk (SGBV) was tangible but could be understood and explained only subjectively. The results indicate that risk perception, while subjective, is also influenced by sociocultural constructs. The participants' meanings of risk were "constructed" through cultural or social practice: (1) through direct, personal experiences in Delhi and through interactions with the local people, and (2) through discourse and knowledge creation with other Chin refugee women.

Additionally, to fully understand how participants themselves identified these risks (and responded to them), consideration must be given to the influence of gender, refugee status, Chin ethnicity, and their overall experiences (past and present) in the asylum cycle. To many participants, the risk of SGBV highlighted the power imbalance between them and local men who preyed on them, not only because of their gender, but because they were aware of their vulnerable status as refugees. They could exploit and take advantage of these women because they knew they could get away without fear of punishment.

Frequent SGBV had broken the will of many participants. Other issues such as rape and survival sex were also prominent in the data (forthcoming). Many participants reported that these experiences were detrimental to the mental health (and in some instances, the will to live), with depression and a sense of hopelessness a common theme in all interviews:

“I want my freedom to stay and work on my own. We people have different interests and skills, but we can’t use these interests. We can’t do anything, so we are stuck here and we are depressed and our young children ... I can’t imagine how the future will be for them. (W25)

Sometimes I feel like dying or something ... but if I die, who will take care of my children? So I have lots of depression and sometimes I feel like I’m nothing to my children. I feel something like that. (W14)

The findings outlined here also open up a wider discussion on the concept of livelihood. In Delhi, a livelihood involved much more than the mere materialistic notion of finding and maintaining paid work; while inclusive of basic needs, it also encompassed the participants’ identity and sense of worth, and connectedness to community and family. Pursuing and engaging in a livelihood was interconnected with other facets of their lives. For example, when they were not working, some participants had to choose between using their meagre resources to send a child to school or pay rent. In more severe cases, it was choosing between food and rent. Even when participants were employed, the repercussions of these unsafe livelihoods could be felt, primarily in relation to the women’s mental health.

The findings also suggest that the concept of livelihood should include an optimal achievement of rights and personal well-being underpinned by a safe work environment and reduced vulnerability. This approach is aligned with the conceptual thinking and work of earlier researchers.<sup>58</sup> The Chin women indicated that they had yet to achieve an adequate standard of living or quality of life in Delhi. Additionally, because of the inequalities they experienced,

an adequate standard of living could not be met within this context. Participants were excluded from accessing basic resources and safe livelihoods and were increasingly vulnerable to risk and discrimination due to intersecting factors such as gender and their status as “outsiders.”

### Conclusion

The emergent findings outlined here can be used to guide future economic initiatives for refugee women in Delhi, to include built-in strategies and mechanisms to mitigate risk. Greater insights into these women’s experiences of livelihood risks can lead to increased awareness, support, and advocacy for Chin refugees living in India. Chin refugees have fled persecution, torture, and sexual violence from the Burmese military junta in the hope of finding a safe and accommodating environment in Delhi; however, their reality seems to suggest the opposite. They face severe discrimination, pervasive SGBV, and lack of safe jobs and housing. Clearly, this lack of safe livelihoods, and an all-encompassing context of risk, will continue to hinder any goal of self-reliance. Chin women continue to be marginalized and their voices are being silenced. While their strength is something to admire, their perpetual suffering is devastating.

The refugees are hopeless. We are hopeless; we are stuck here in Delhi. (W12)

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# Fleeing Domestic Violence from a “Safe” Country?: Refugee Determination for Mexican Asylum-Seekers in Canada

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## Abstract

*This article presents a mixed-methods study of domestic violence-related claims for Mexican asylum-seekers in Canada. Although refugee claims that indicate domestic violence are slightly more likely to be approved, the majority of Mexicans seeking protection from domestic violence are denied because they are unable to demonstrate the lack of state protection. Our findings illustrate that Immigration and Refugee Board members' assessment of a claimant's credibility, internal flight alternatives, and the availability of state protection pivot on their perception of Mexico as a “democratic” or “safe” nation. We discuss how cursory attention to the social context of gendered violence in Mexico leaves Mexicans with few legal options for humanitarian migration.*

## Résumé

*Cet article présente une étude à méthodologie mixte des demandes d'asile au Canada reliées à la violence conjugale de la part des Mexicains. Bien que les demandes faisant mention de violence conjugale ont plus de chances d'être accordées, la plupart des Mexicains réclamant une protection de la violence conjugale sont jugés non-admissibles en raison de leur incapacité de démontrer un manque de protection de la part de l'état. Nos recherches démontrent que l'évaluation de la part des membres de la Commission de l'immigration et du statut de réfugié concernant la crédibilité des demandeurs, la*

*possibilité de refuge intérieur et la disponibilité de protection de la part de l'état dépend de leur perception du Mexique en tant que pays « démocratique » ou « sûr ». Nous abordons une discussion sur l'attention insuffisante portée au contexte social de la violence sexospécifique au Mexique qui laisse peu d'options légales aux Mexicains en ce qui concerne la migration pour raisons humanitaires.*

## Introduction

**T**his article examines how domestic violence configures into refugee determination for Mexican asylum-seekers in Canada prior to Mexico's official designation as a “safe country of origin.” Domestic violence falls under the Immigration and Refugee Board of Canada's (IRB) guidelines for “Women refugee claimants fearing gender-related persecution” (herein referred to as the “Gender Guidelines”). Since the Gender Guidelines were first introduced in 1993, there has been a positive trend towards recognizing gender-related persecution in Canada's refugee process.<sup>1</sup> However, legal scholars note limitations within the United Nations framework for determining refugee status for people fleeing gender-related persecution.<sup>2</sup>

Foremost, Arbel and colleagues<sup>3</sup> caution that many women are never seen in the Canadian refugee determination process, because they cannot leave their home country or do not have the means to apply. Increased border controls across North America construct forced migrants as “illegal,” further exposing migrant women to structural and

interpersonal violence.<sup>4</sup> This is particularly true for Central Americans, who are subject to detention and removal by both the Mexican and U.S. governments.<sup>5</sup>

In this article, we present a case study of refugee claims submitted by Mexican nationals that indicate domestic violence as one reason for seeking protection in Canada. To set the groundwork for our study, we review trends in humanitarian migration from Mexico to Canada. We then discuss the concept of “safe” country in Canadian refugee determination. To contextualize the IRB’s assessment of Mexican refugee claims, we reviewed academic and grey literature on violence against women in Mexico, where domestic violence, rape, and femicide are systematically ignored or dismissed.<sup>6</sup> After discussing our research methods, we present an empirical analysis of IRB’s assessment rates for Mexican refugee claimants, and key themes that emerged from our analysis of negative decisions written by the IRB members.<sup>7</sup> Our findings illustrate that the availability of state protection from domestic violence pivots on the construction of Mexico as a “safe” nation, despite evidence of escalating violent crimes and impunity across Mexico.

### ***Legal Context of Violence against Women in Mexico***

Estados Unidos Mexicanos (United Mexican States) is a democratic republic made up of thirty-one states and a federal district, Mexico City, the nation’s capital and the largest city in the western hemisphere with 21.2 million residents. Escalating levels of violence across Mexico have had a direct impact on women’s safety.<sup>8</sup> The majority of adult women are victims of some kind of violence from the hands of their spouse, partner, or former partner.<sup>9</sup> Mexico is ranked sixteenth in the world for female homicides.<sup>10</sup> These findings, alongside international pressure, encouraged Mexican elected officials to develop legislation in line with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In 2007, the General Law on Women’s Access to a Life Free of Violence (herein referred to as the General Law) became Mexico’s primary legal framework for addressing violence against women.

The General Law directs federal, state, and municipal governments to respond to, prevent, punish, and eradicate violence against women.<sup>11</sup> Implementation of the General Law thus varies widely relative to regional and local political interests, and coordination among states and municipal governments.<sup>12</sup>

### ***Context of Humanitarian Migration from Mexico to Canada***

Although humanitarian migration from Mexico to Canada is a relatively new phenomenon, in the past two decades

Canada recognized the largest number of Mexican asylum-seekers in the world. According to the UNHCR,<sup>13</sup> 172,926 Mexicans applied for asylum between 2000 and 2014. The majority of Mexican asylum-seekers (73%) submit their claims in the United States. Canada, however, approves the largest share of Mexican refugee claims. Between 2000 and 2014, Canada recognized 7,777 Mexican refugees (70% of the worldwide total) while the United States recognized only 3,287 (29.6%). During this same period, only 46 Mexicans were recognized as refugees by other countries (see tables 1 and 2).

There are notable differences between asylum claim processes in the United States and Canada. People who submit a claim within Canada are referred to as “refugee claimants” and have access to basic health care and social assistance, and are authorized to work while they await a decision. In 2014, Canada processed 13,500 new claims and approved 9,869 refugee claimants from previous years at an approval rate of 49%.<sup>14</sup> Canada also offers permanent residence on humanitarian and compassionate grounds to a small number of people who can demonstrate that removal from Canada would represent a violation of their rights.

In the United States, refugees may submit an asylum claim within one year of their last entry either proactively (i.e., before being detained by immigration authorities) or defensively (i.e., submitted after being placed in removal proceedings in Immigration Court). The United States has high evidentiary requirements but little support for asylum-seekers to navigate the complex legal system (e.g., asylum-seekers are not eligible to work until their claim has been approved). U.S. rates of approving Mexican asylum claims dropped from 23% to 9% between 2008 and 2013.<sup>15</sup> The United States also offers Temporary Protected Status (TPS) to some refugees from Central America (e.g., Honduras, Nicaragua), which allows them to work and reside legally in the United States for a short period. Mexican nationals are not eligible for TPS at this time.

In 2009, Canada introduced a visa requirement for Mexico to block the entry of asylum-seekers whom the Canadian minister of citizenship and immigration denounced as “bogus refugees.”<sup>16</sup> Mexico was later added to a list of Designated Countries of Origin in 2012, as another policy instrument to deter humanitarian migration from “safe countries.” The Conservative Canadian government’s revision of refugee law in 2012 restricted access to public benefits, institutionalized forced detention for refugees whose entry into Canada was deemed “irregular” (i.e., they were trafficked), and reduced access to health care (although health care was restored in April 2016).<sup>17</sup> The efficiency principles of this reform were aimed specifically at refugee claimants who originate in a “safe country of origin” who now have a

**Table 1.** Recognized Mexican refugee claims, 2000–2014

Year	Canada	USA	Other
2000	322	84	2
2001	237	75	0
2002	290	68	0
2003	597	94	0
2004	665	104	0
2005	697	89	0
2006	931	109	0
2007	378	113	0
2008	606	161	0
2009	516	212	4
2010	653	164	6
2011	1,042	337	5
2012	568	560	10
2013	182	430	13
2014	93	687	6
Totals	7,777	3,487	46
Percentage	70%	29.6%	0.4%

Source: UNHCR Statistical Online Population Database.  
 Note: Countries in the “Other” category included Australia, Italy, Switzerland, United Kingdom, Panama, Belgium, Cayman Islands, Luxembourg, Trinidad and Tobago.

shorter period to submit their refugee application and have fewer rights for appeal. Refugee claimants fleeing domestic violence, who often need more time to collect supporting documents, are particularly disadvantaged by restrictions on their procedural rights.

**Designating “Safe” Countries in Canadian Refugee Law**

A “safe third country” provision was first introduced into Canadian law in 1987, when Bill C-55 was tabled during an emergency session of Parliament to address the arrival of two “boatloads”<sup>18</sup> of South Asian refugees on the Atlantic coast. Bill C-55 created the Immigration and Refugee Board (IRB) as a measure to streamline refugee determination. This bill also introduced a “safe third country” provision to allow Canada to return claimants who had sojourned in another country. The practice of deflecting responsibility for asylum-seekers had been established in Western Europe through the Dublin Regulation, signed in 1990 by twelve countries in Western Europe. Bill C-55 went into effect in 1989. The “safe third country” measure, however, was not

**Table 2.** Mexican asylum/refugee claims filed 2000–2014

Year	Canada	USA	Other
2000	1,310	9,145	11
2001	1,669	21,484	3
2002	2,397	23,748	8
2003	2,576	11,660	7
2004	2,918	1,763	16
2005	3,541	1,581	10
2006	4,948	1,673	20
2007	7,028	2,551	33
2008	8,069	2,713	24
2009	9,296	2,295	74
2010	1,299	3,879	106
2011	763	8,304	95
2012	382	11,067	123
2013	110	10,077	105
2014	65	13,987	64
Total	46,355	125,927	699
Percentage	26.8%	72.8%	0.04%

Source: UNHCR Statistical Online Population Database.  
 Note: There are 38 countries in the “Other” category in Western Europe, Central America and the Caribbean, and Australia. No country in the “Other” category received more than 20 applications in a given year. Most countries received from 1–2 applications in a given year.

enforced because there were complicated logistics of returning refugee claimants to a previous country of sojourn.<sup>19</sup>

The concept of a “safe country” reappeared in the Canada-U.S. Safe Third Country Agreement (STCA) after the events of 11 September 2001.<sup>20</sup> The STCA allows Canada to turn away asylum-seekers at the U.S.-Canadian border (i.e., land border crossings, airports, and train stations), under the presumption that they can submit a refugee claim in the United States, unless they qualify for an exception to the Agreement (e.g., people who have family in Canada, unaccompanied minors, people who hold a valid work or study permit in Canada, people who hold a valid travel document or may be issued a travel document upon entry to Canada). After the introduction of the STCA, the number of refugee claims filed at the border fell 50% and remain low, with 3,790 filed in 2012.<sup>21</sup>

The list of DCO countries introduced into Canadian law in 2012 draws upon a different notion of a “safe” country by presuming that legal institutions where the asylum-seeker originated have the capacity to ensure justice. Asylum-seekers from “safe countries of origin” bear the onus of proving that institutions within their home country failed to protect them.

The combination of visa restrictions, the STCA, and designating Mexico as a “safe country of origin” contribute to a marked decrease in the number of in-land refugee applications that were submitted by Mexicans in Canada since 2012.<sup>22</sup> While new refugee claims peaked at 9,296 in 2009 (for principal claimants and their dependants), this number plummeted to 1,299 in 2010 following the new visa requirement; only 65 new claims were filed in 2014<sup>23</sup> (see table 2). The number of new asylum claims filed during this same year in the United States grew by 4,000 and continued to rise to 13,987 new refugee claims filed in the United States in 2014.

### ***Gender and Domestic Violence in Canadian Refugee Policy***

When the Gender Guidelines were first introduced, feminist legal scholars commended them as a positive direction for women’s rights, while calling attention to the limits of refugee determination. Mawani<sup>24</sup> forecasted many of the hurdles that women seeking protection due to gender-related persecution would face, including (1) that persecution against women often takes place in intimate relations where the state plays an indirect role; (2) that evidentiary requirements presume women have access to male-dominated legal systems; and (3) the assumption that women have the same mobility as men, when relocating alone or with their children.

Refugee determination reifies Canada as a democratic nation that has the power to determine which nations are incapable of ensuring protection from gender-related persecution. Macklin<sup>25</sup> has argued that Western feminists have a penchant to rally against the misogyny and sexism in the Third World while lauding the success of the women’s movement in the West. In viewing itself as a “refugee receiving state,” assessment of gender persecution by the Canadian IRB pivots around what Macklin calls “cultural chauvinism ... to distinguish between those states which are ‘unwilling or unable’ to protect women from domestic violence (non-democracies, current refugee producers), and those states whose justice systems are simply ‘imperfect’ and cannot be held accountable for an inability to protect each individual woman from each individual criminal assailant (democracies and general respecters of human rights).”<sup>26</sup> Attention to violence against women in refugee determination thus has the potential to minimize the prevalence of violence in North American society towards maintaining the binary of “refugee-producing” versus “refugee-receiving” states.

Razack<sup>27</sup> similarly argues that Canadian refugee hearings perpetuate racist constructions of culture while dismissing the complicity of the Canadian state in failing to protect women from gender-based violence.<sup>28</sup> The refugee hearing

requires claimants to construct gender persecution as a cultural problem. Claimants are more successful when they present cases of violence that are viewed as “non-Western, inferior, and unusually barbaric towards women.”<sup>29</sup> When the form of persecution is constructed as a type of “cultural practice” (i.e., female genital mutilation), the state’s complicity in failing to protect women is more readily assumed.

In Arbel’s<sup>30</sup> review of IRB decisions on gender-related persecution, “cultural practices” that warrant refugee protection (e.g., genital cutting or forced sterilization) were framed as a “violation of rights regarding persecutory practices.” In contrast, women who reported domestic violence had to demonstrate that the state failed to protect them as the result of its “persecutory culture.” Arbel further noted that adjudicators look favourably on countries that make “good-faith efforts to take the problem of violence against women seriously by enacting legislation, training specialized police units, providing legal-aid services, or establishing shelters or other forms of recourse or support.”<sup>31</sup> The presence of legislation that criminalizes violence against women signals to adjudicators that this is a democratic nation and this nation is trying to offer protection. The combined effect increases the burden on the claimants who experience forms of violence that do not fit the cultural script of “barbaric,” to prove that their state’s legal system failed to protect them.

The effectiveness of the Gender Guidelines is difficult to measure because refugee hearings are closed to the public. Positive decisions are not routinely written, and only a fraction of negative decisions are publicly available. This contributes to the “unknowability” of how gender influences adjudicators’ decision making.<sup>32</sup>

Sean Rehaag<sup>33</sup> has also documented alarming variance in rates of approval by individual IRB members. In 2006, approval rates ranged from 100% for 1 adjudicator to as low as 6.7% for another, for comparable cases. Rehaag also reports that rates of approval vary slightly with the gender identity of the adjudicator; between 2004 and 2008, male adjudicators approved 51.5% of claims in their caseload as opposed to 48.6% that were approved by female identified adjudicators. Adjudicators who had prior experience with women’s rights—all of whom were women—were more likely to approve claims for refugees who sought protection from gender-related persecution.<sup>34</sup>

Building on previous scholarly attention to Canada’s Gender Guidelines, our research examines where domestic violence appears in refugee determinations for claimants from a specific country and how IRB members characterize the country of origin’s capacity to protect women from gender-related persecution, in their written decisions.

### **Methodology**

Our research design included qualitative and quantitative research methods to explore how public texts construct domestic violence for Mexican women seeking refuge in Canada. We draw upon feminist and critical theories of “language as a social practice”<sup>35</sup> to analyze how ideologies are enacted, sustained, and challenged in different contexts.<sup>36</sup> We theorize discourse as a “site of struggle,” a system of representation for social action, a source and expression of power, and site where subjectivities are constructed, contested and resisted.<sup>37</sup> In particular, we examine how public documents (i.e. IRB reports, IRB written decisions) construct domestic violence for refugee claimants, what types of knowledge are referenced in official documents, and what linguistic markers (e.g. speech acts, rhetoric) do IRB adjudicators use in their written decisions.

Our sources of data include: (1) IRB statistics on principal applicants of refugee claims submitted by Mexican nationals between 2007 and 2012; (2) IRB data for Mexican refugee claims that included domestic violence when the claim was submitted; and (3) written decisions by IRB adjudicators for claims related to domestic violence that are published online by the Canadian Legal Information Institute (CanLII).<sup>38</sup> To better understand the IRB’s assessment of Mexico as a “safe” country, we reviewed reports on “country conditions” for Mexico that are maintained by the IRB.

#### *IRB Data for Mexican Refugee Claimants, 2007–2012*

We examined refugee claim data from the IRB that were retrieved by Sean Rehaag through an Access to Information Request and made available to the public through the Canadian Council for Refugees website.<sup>39</sup> These data include the outcomes for decisions on principal applicants only, thus do not include accompanying partners or dependent children.

#### *IRB Data for Mexicans Who Sought Protection from Domestic Violence*

Through a formal Access to Information Request, we reviewed IRB claim data for Mexicans who sought protection from domestic violence between 2008 and 2012. The IRB provided the number and gender of claims that reported domestic violence as the basis for their claim at the time of initially filing the claim (i.e., through the Personal Information form or Basis of Claim form). The IRB stipulated that they maintain these records for case management only. IRB staff do not update the “claim type” categories during the claim review, nor does the IRB maintain records for claims where domestic violence was a relevant factor in the final decision.

#### *IRB Determinations for Mexicans Seeking Protection from Domestic Violence*

We conducted a discourse analysis of 76 IRB written decisions for claimants from Mexico (75 female; 1 male), between 2007 and 2012 that are available through the CanLII and LexisNexis/Quicklaw databases (see table 3). The CanLII database publishes a portion of decisions that are released by the Federal Court of Canada, the majority of which are negative decisions that have been submitted for appeal to the Federal Court. We drew a sample from 2007 to 2012 using the search terms *female* and *Mexico*, followed by a range of terms including *domestic violence*, *violence against women*, and *sexual assault*. We also ran a separate search using only the terms *Mexico* and *partner abuse*. For this analysis, we did not track the outcome of the judicial review, but rather focused on the content of the initial negative decision.

#### *IRB “National Documentation Package” for Mexico*

We conducted a content analysis of the National Documentation Package for Mexico, which IRB board members regularly cite in their written decisions. We focussed on documents that the IRB maintained between 2005 and 2012, which address domestic violence and other forms of violence against women in Mexico.

#### *Grey and Academic Literature on Violence against Women in Mexico*

We conducted a review of Spanish- and English-language academic and grey literature on country conditions and violence against women in Mexico. This included analysis of over 30 documents retrieved from governmental bodies including the Mexican National Institute of Women, the National Commission to Prevent and Eradicate Violence against Women, the National Institute of Statistics and Geography, and the National Commission of Human Rights. The majority of the reports we reviewed evaluate implementation of the General Law in specific areas of Mexico, the incidence and prevalence of violence against women, and the services available to victims. We also reviewed reports published by non-governmental organizations such as Human Rights Watch and Amnesty International that provide detailed information regarding the situation of gender-based violence in Mexico. Academic scholarship by Castro and Riquer, Frias, and Olivera<sup>40</sup> provided structural analysis of impunity for violent crimes against women in Mexican society.

**Table 3.** Summary of IRB written decisions for Mexican claimants, 2007–2012

	2007	2008	2009	2010	2011	2012	Total	%
Number of claims reviewed	18	19	12	13	6	8	76	
Reasons for denial								
Credibility	6	5	4	5	5	4	29	38
Internal flight alternative	9	14	7	5	5	2	42	55
State protection	8	11	8	10	4	7	48	63
Combination of 2 or more	5	9	6	5	6	4	35	46
Type of violence								
Physical abuse	14	17	11	10	6	5	63	83
Verbally threatened	8	12	5	8	4	3	40	53
Emotional abuse	2	1	3	2	2	2	12	16
Kidnapped or attempt to kidnap	1	1	0	0	0	0	2	3
Sexual abuse	4	6	4	5	2	3	24	24
Abuse (no further description)	3	1	0	2	0	1	7	9
Reports of seeking help								
Did seek police/state protection	11	14	8	9	4	7	53	70
Did seek to relocate	8	8	5	7	2	4	34	45

Source: We retrieved this sample of IRB written decisions through the CANLII and LexisNexis/Quicklaw databases.

In our analysis of written decisions, we consider the ramifications of how IRB members characterize claimants' accounts of domestic violence. We also explore how representations of Mexico are mobilized to support IRB members' decisions to dismiss or deny protection.

## Findings

### *Assessing the National Documentation Package for Mexico*

The IRB's National Documentation Package for Mexico includes reports on narco-related violence, human rights violations, and general impunity in the criminal justice system. Several documents briefly refer to the General Law and identify women's shelters and support systems that have been established to support women seeking safety from gender-related violence. The weakness in the General Law is noted in limited resources and safety for women's shelters. One IRB report documented that shelters in Mexico, unlike Canada, "do not receive police protection, and attacks against staff and facilities have been reported."<sup>41</sup> The National Institute for Women in Mexico also identified a need for additional shelters, particularly in Mexico City where there are only 4 shelters for a population of over 21 million.

The documentation package, however, does not fully address the political conditions that influence implementation of the General Law. We noted minimal attention to government and independent reports that address the lack of coordination among government bodies as well as the high levels of insecurity in many regions of Mexico, both of which significantly undermine the protection these laws are purported to offer. For example, the IRB documents

only refer to the implementation of the General Law in the state of Sonora and state protection available to victims of domestic violence in Mexico City, Jalisco, and Veracruz.

The limited scope of the National Documentation Package is evident in cases of female homicide (or femicide), which first drew international attention in 1993 following the expansion of *maquiladoras* (factories) along the Mexico-U.S. border. The United Nations and grassroots activists have documented numerous cases where young women who disappear and are sexually tortured and murdered, their bodies often found in public spaces across Mexico.<sup>42</sup> While 30 out of the 32 Mexican states have criminalized femicide, the majority of cases go without formal investigation at the federal and local levels. Impunity for violent crimes extends to non-gender-related homicides, with less than 10% of homicides leading to convictions, including the widely reported mass killing of 43 male students from the Ayotiznapa Rural Teachers' College in Guerrero.<sup>43</sup>

### *Summary of Refugee Claims from Mexico*

According to IRB administrative data, Canada issued 16,028 decisions for Mexican asylum-seekers between 2007 and 2012. Decisions peaked at 3,389 in 2011, then dropped to 1,660 in 2012. On average 10% of the decisions were positive; 55% were negative; 29% were reported as withdrawn or

**Table 4.** IRB decisions: Principal applicants from Mexico, 2007–2012

Year	Total	Gender		Positive		Negative		Withdrawn or abandoned	
		Male	Female	Male	Female	Male	Female	Male	Female
2007	2,150	1,488 69%	662 31%	88 5.9%	96 14.5%	793 53%	322 49%	604 41%	243 37%
2008	1,958	1,323 68%	633 32%	125 9.4%	131 21%	1,198 91%	502 79%	N/A	N/A
2009	3,497	2,429 69%	1,066 30%	109 4.5%	108 10%	1,178 48%	515 48%	1132 47%	438 41%
2010	3,374	2,342 69%	1,032 31%	145 6.2%	141 14%	1,300 56%	502 49%	894 38%	387 38%
2011	3,389	2,384 70%	1,005 30%	224 9.4%	209 21%	1,663 70%	622 62%	495 21%	172 17%
2012	1,660	1,161 70%	499 30%	129 11%	134 27%	862 74%	295 59%	167 14%	70 14%
Total	16,028	11,127	4,897	820	819	6,994	2,758	3,292	1,310
%	—	66%	29%	7.4%	16.7%	63%	56%	30%	27%

Source: IRB claim data published by Sean Rehaag (2008, 2013).

Note: “Gender” includes total number of male and female principal applicants per year along with the percentage of males and females relative to the total. The values reported for decisions that were “positive,” “negative,” or “withdrawn/abandoned” include the total male and female principal applicants in each category, along with percentage for each gender (i.e., in 2007, 4% of male applicants and 4.5% of female applicants received a positive decision).

abandoned; and 1% were closed for administrative reasons. On average 31% of Mexican principal applicants were female. Female principal applicants have a slightly higher approval rate of 16%. In 2009, the IRB reported that 257 claims were gender-related; this information was not available for other years in our date range (see table 4).

Between 2008 and 2012, the IRB received 595 claims from Mexican nationals that included domestic violence as a basis of the initial claim; the majority (95%) were filed by women (see table 5). Among female claimants from Mexico, 14% indicated domestic violence in their original claim. On average, 26% of domestic-violence-related claims received a positive decision, which is a higher rate of approval than Mexican refugee claims overall, but significantly lower than the 48.7% approval rate that Arbel<sup>44</sup> reported in her review of all IRB decisions for principal applicants who reported domestic violence, from 2008 to 2012.

There are limitations, however, to the IRB administrative data. The IRB does not record which applicants are transgender or if the claimant feared domestic violence from a same-sex spouse or partner. Because the IRB does not track forms of persecution that arise after the initial application, it is possible that persecution other than “domestic violence” contributed to a claim’s outcome or that some claimants disclosed

persecution related to domestic violence after filing the initial claim. In addition, because a limited number of negative decisions are publicly available, it is difficult to assess how often “domestic violence” contributes to a refugee claim’s outcome. Finally, our research did not address the disparity in individual IRB members’ rates of approving applications.

### **Analysis of Domestic Violence in Negative IRB Decisions**

#### *Summary of the Negative Decisions*

In our analysis of 76 written decisions, 8 did not mention gender or the Gender Guidelines anywhere in the decision. Of the 68 decisions that did reference the Gender Guidelines, more than two-thirds used the following statement and made no other reference to the Gender Guidelines: “In arriving at its decision, the panel considered all of the evidence in the context of the Chairperson’s Gender Guidelines and the panel accepts that the circumstances which give rise to women’s fear of persecution are often unique to women” (IRB decision TA8-05504).<sup>45</sup> In the absence of any discussion of how the Guidelines were applied to a specific case, this statement represents a perfunctory “speech act”; it signals compliance with the Guidelines without having to

**Table 5.** IRB decisions: Domestic violence as a basis of the initial claim for principal applicants, 2008–2012

Year	Total claims	DV-related claims	Male	Female	Positive	Negative	Other	Dependants
2008	1,958	94	6	88	21	51	22	74
2009*	3,497	366	19	347	89	199	78	238
2010	3,374	73	1	72	21	38	14	36
2011	3,389	45	0	45	16	24	5	23
2012	1660	17	2	15	5	4	8	6
Total	13,878	595	28	567*	152	316	127	377
% of total		4.3%	0.2%	4.1%				
% of female				14%*				
% DV claims			5%	95%	26%	53%	21%	

Source: Immigration and Refugee Board (IRB) data, obtained through a request for information.

\* In 2009, the IRB reported that 7% of all claims were gender-related. From 2008 to 2012, 14% of female principal applicants indicated domestic violence as a basis of their initial claim. 95% of all claims that indicated domestic violence were submitted by female applicants, with an approval rate of 26%.

demonstrate if or how the IRB adjudicators considered what circumstances are “unique to women” in their decision.

Among the decisions that provided some indication that the Gender Guidelines were discussed (18 out of 76), we identified three themes: (1) the influence of domestic violence on ability to demonstrate credibility and trustworthiness; (2) how the cycle of violence may include repeated attempts to leave and return to an abusive relationship; and (3) the potential for the hearing to increase women’s psychological trauma. The one decision in our sample that involved a lesbian-identified woman included acknowledgement of intersections of male violence against women and homophobia.

Of the decisions in our sample, 63 were initially denied because the claimant did not seek state protection in Mexico or lacked evidence of seeking help (i.e., filing a police report, going to a women’s shelter) (see table 3). Over one-third of the cases were denied for “credibility” for lack of evidence or discrepancies between the claimant’s testimony and written application. More than half of the claims were denied because the board members assessed there was an “internal flight alternative.”

Within the IRB member’s representation of the original claim and hearing, the majority of the claimants (83%) reported having suffered physical violence from their husband, boyfriend, or father of their child/ren. The severity of the violence varied from being slapped or hit, to having broken bones, miscarriages, and having to seek medical care. In half the cases, the claimant reported being verbally threatened, including three women who claimed that their spouse/partner threatened their lives; 16% reported suffering emotional abuse; and nearly one-third were sexually

abused. Two women reported being kidnapped or averted an attempted kidnapping that was orchestrated by their spouse/partner.

More than two-thirds (70%) stated that they reported their abuser to the police or other governmental organization and were turned away or had no response after filing a report. Of the women in this sample, five sought police protection for domestic violence while in Canada; this resulted in one claimant’s spouse being deported by the Canadian Border Services Agency.

*Challenges to Credibility as a Gendered Performance*

According to the Gender Guidelines, the evaluation of the credibility of the claimant’s evidence must consider “the social, cultural, religious and economic context in which the claimant finds herself” and whether the state is “willing or able to provide protection.” In our analysis of IRB decisions, however, we noted that applicant’s “credibility” was often refuted by affidavits from “legal experts.”

In the following excerpt, an IRB member refers to a legal opinion on the General Law as evidence that the claimant’s testimony is not credible. The claimant testified that she had made several attempts to report her husband’s abuse in different jurisdictions, but that each time she met with an official she was told to report the abuse to a different office. In the decision, the IRB member referred to an affidavit submitted by a Mexican lawyer, which is one of the documents assembled by IRB staff in the National Documentation Package. This affidavit offers a legal opinion on procedures in Mexican law for responding to domestic violence complaints across jurisdictions within Mexico. On the

basis of the lawyer's affidavit, the IRB member concluded, "This document therefore shows that it is *possible* to file a complaint with a state jurisdiction; the complaint *would be* transferred, as applicable, to another state jurisdiction ... In conclusion, the panel does not believe that the lawyers told the principal claimant that she could not lodge a complaint ... This undermines the credibility of the claimant concerning this aspect of her testimony" (IRB decision MA8-09643, 6-7; emphasis added).

The IRB member's use of an "expert" legal opinion illustrates what Mawani<sup>46</sup> cautioned: that male authorities who are part of a system that continues to deny the severity of violence against women as a social problem are given more weight than a woman's personal testimony of her actions to seek safety and protection. The applicant's testimony was dismissed as not "possible" in the face of a legal opinion from a Mexican lawyer that was assembled a priori by IRB staff. The privileging of an "expert's" interpretation of the law's intent represents a form of authoritative male knowledge that is used to dismiss the claimant's testimony of seeking legal advice as not "possible."

Challenges to claimants' credibility also pivoted around perceptions of how victims of abuse are *supposed* to behave. In the following excerpt, a claimant sought protection from spousal harassment, battery, rape, verbal threats, and threats with a firearm. Throughout the testimony, the panel asked if the claimant, who lived in Mexico City, had sought help from police or an organization that supports victims of domestic violence. The claimant explained that she did not seek help because of a previous bad experience with the police (which led to her spouse retaining custody of their child) and because she no longer trusted authorities. In one instance, the claimant reported that she felt too ashamed to seek help after being raped by her spouse's friend. The panel responded: "While the panel understands that the claimant could have felt some shame in the alleged circumstances, it cannot accept these explanations; she could have at least tried to seek some protection after so many events of alleged violence" (IRB decision MA9-00629, 4).

In this decision, the IRB member presumes how victims are supposed to behave in the face of extreme cruelty. The presumption that a claimant "should at least try to seek some protection" in order for her testimony to be credible dismisses the harm caused by losing custody after reporting violence to the police or the stigma associated with marital and gang rape. Nowhere in this decision does the adjudicator reference the social and cultural attitudes that perpetuate shame for victims of sexual violence or the consequences that victims of sexual assault face when engaging the criminal justice system.<sup>47</sup>

#### *States Are Presumed Capable of Protecting Their Citizens*

In the written decisions, IRB members repeatedly stated that failure of local police does not equate to the lack of state protection. Rather, the IRB adjudicators clarified that "no state can guarantee perfect protection; only adequate protection."<sup>48</sup> In one decision, the IRB member wrote, "Having canvassed the country conditions documents, the Panel finds that Mexico is in effective control of its territory and has in place a functioning security force to uphold the laws and constitution of the country" (IRB decision TA9-14562, 15). IRB members expected claimants to seek protection from the police or from organizations that address violence against women as a prerequisite for refugee protection. One IRB member wrote, "The simple assertion that corruption exists is insufficient to conclude that the state is incapable of protecting its citizens" (IRB decision MA9-00629, 5).

These statements demonstrate how Mexico is constructed as a "safe country of origin" prior to its appearance on the DCO list. As stated earlier, we found the national documentation package discussed implementation of the General Law in only 1 of 30 states, while failing to include recent reports on the poor coordination, police corruption, and impunity for violence across Mexico. IRB members interpret Mexican law on violence against women at face value, rather than interrogating implementation of the law.

The IRB decisions also minimize the role of the local police in upholding the General Law in Mexico. The General Law positions local police as the first level of intervention. They represent the state's capacity to protect women's rights, but also determine future state action. In cases of femicide, local police must initiate a report before a "gender alert" can be issued by the state in which the femicide took place. Thus, failure of the local police to report femicide represents a fundamental breakdown in state protection.

#### *Internal Flight Alternative*

For a case to be successful on Internal Flight Alternative grounds, the claimant "must demonstrate that a real risk to their life or a risk of cruel and unusual punishment exists throughout their country" (IRB decision TB1-08945, 6). In nearly half (45%) of the IRB cases we reviewed, the claimant stated that she relocated to a different state within Mexico; many of them were eventually found by their abusive partner and further persecuted or threatened.

IRB members, however, rejected the majority of claims in our sample on the basis of Internal Flight Alternative grounds, concluding that cities like Mexico City and Monterrey have "a large thriving population with civic services to assist inhabitants with their social and security needs ... the Panel is of the view the claimant can easily blend into the mass of people in either city" (IRB decision TBO-03720,

12). One board member argued that he “does not believe that, in this country with 113 million residents—more than three times Canada’s population—the persecutor would have the means and the desire to search for the claimant if she decided to live in one of the IFAs [Internal Flight Alternatives]” (IRB decision MA9-10361, 11). This type of rhetoric disregards research on domestic violence that consistently shows elevated risks for victimization, if not lethal violence, when women are leaving or have left an abusive relationship.<sup>49</sup>

Throughout the IRB decisions, we identified contradictions within board members’ reasoning for denying a claim in the belief that Mexico is a functioning state capable of providing the necessary assistance to abused women. As it is noted, “Admittedly, the documentation shows that there is corruption in Mexico, that seeking protection is not always easy, and that violence against women is often a problem. However, over the years, mechanisms to assist women victims of spousal abuse have developed in Mexico, specifically in Mexico City and in Puebla in the state of Puebla, areas that have been identified as safe for the principal claimant and her children” (IRB decision MA7-09351, 7).

Despite acknowledging some limitations in the Mexican state, IRB members assert that “mechanisms” to assist women (ostensibly laws and the availability of women’s shelters) render Mexico City “safe” for women and their children. Evidence of growing insecurity, including rising female homicide rates in Mexico City, are ignored. Ismail<sup>50</sup> raises similar concerns regarding refugee determination for Pakistani women in the United Kingdom, where refugee claims are often denied on the presumption that women have options for internal relocation, despite the dangerous circumstances that prevent women from relocating within their own country. In this sense, Canadian IRB members collude with the Mexican government to minimize the state of violence and insecurity that has been documented by local and international human rights organizations. The Internal Flight Alternative requirement deflects Canada’s humanitarian responsibilities and upholds Mexico’s incapacity to address systematic violence against women as “adequate.”

### Conclusion

Our research illustrates how Canadian refugee adjudicators construct Mexico as a “safe country of origin” for women seeking protection from domestic violence. Throughout the written decisions that we reviewed, IRB adjudicators refer to Mexico as a “democratic nation”; a nation that is “in control of its territory”; with “mechanisms” (i.e., laws and women’s shelters) to offer assistance to victims of domestic violence. Within Mexico, the passage of anti-violence-against-women laws are important steps towards acknowledging women’s

rights as human rights. Reports from non-governmental organizations and international watchdogs like Amnesty International, however, have documented shortcomings in how the law is implemented. Legal instruments to protect women fall dramatically short when considering the high rates of impunity in Mexico for violent crimes, including rape, domestic violence, and femicide. The IRB decisions, however, downplay the context of increased levels of violence and associated impunity. The representation of Mexico as “safe” has direct implications for refugee claimants who, as a result, face a higher burden of proof that the state failed to protect them.

Considering Macklin’s<sup>51</sup> earlier attention to the dichotomy of refugee-producing vs. refugee-accepting countries, we illustrate the consequences of political discourse that frames Mexico as capable of offering protection for domestic violence. The “higher burden” of proof for Mexican refugee claimants reproduces victim-blaming attitudes that minimize the structural barriers and institutional misogyny that deter women from seeking state protection from domestic violence in Mexico—a phenomenon that similarly contributes to low rates of reporting domestic violence or sexual assault crimes in Canada. We also noted that while gender has become incorporated or “mainstreamed” in refugee determination, the majority of published IRB decisions in our sample paid little attention to the context of impunity for violent crimes against women in Mexico. When IRB members did reference the legal context in Mexico, they regularly privileged the authoritative knowledge of legal documents, rather than evidence of the law in practice. IRB members’ representation of Mexico as a functioning democracy in control of its territory thus operates as a rhetorical rather than empirically supported assertion. The poor implementation of laws that criminalize violence against women and limited support services reinforces a distinction between juridical rights (what is stated in law) and “notions of protection.”<sup>52</sup> As such, we caution the appearance of anti-violence-against-women laws as an adequate benchmark for determining protection from gender-based violence.

Although it is the primary source of refugee protection for Mexican asylum-seekers worldwide, Canada’s restrictions on humanitarian migration (e.g., the Safe Third Country Agreement, visa restrictions, the list of Designated Countries of Origin) significantly reduce the legal options for Mexicans to find refuge. Furthermore, Canadian IRB members’ emphasis on Mexico’s stature as a “democratic nation” reinforces global hierarchies of what constitutes a “well-founded fear of violence.” By placing Mexico on a “safe” country list, Canada in effect affirms that everyday violence against women is unworthy of international intervention. This indirectly reinforces Canada’s tolerance for high rates

of domestic violence and sexual assault within its own borders, especially for indigenous women, trans people, and women with disabilities, where only a fraction of cases are reported to law enforcement or lead to criminal conviction. Because the prevalence of violence against women as a “legitimate” or normalized part of everyday life persists in many regions of the world, refugee determination under the UN convention remains an unfulfilled space to advocate for safety from domestic violence as a human right.

#### NOTES

- 1 Efrat Arbel, “Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases,” *McGill Law Journal* 58 (2013): 729–71.
- 2 Efrat Arbel and Alletta Brenner, *Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion* (Boston, MA: Harvard Immigration and Refugee Law Clinical Program, 2013); Audrey Macklin, “Refugee Women and the Imperative of Categories,” *Human Rights Quarterly* 17, no. 2 (1995): 213–77; and Sherene H. Razack, “Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race and Gender,” *Canadian Journal of Women & Law* 8 (1995): 46–88.
- 3 *Ibid.*
- 4 Rupaleem Bhuyan, Bethany Osborne, and Janet Flor Juanico Cruz, “‘Once you arrive, *se te sala todo*’ (everything is salted): Latina Migrants’ Struggle for ‘Dignity and a Right to Life’ in Canada,” *Journal of Immigrant and Refugee Studies* (2016), <http://dx.doi.org/10.1080/15562948.2016.1147630>.
- 5 UNHCR, *2015 Likely to Break Records for Forced Displacement: Study* (Geneva: United Nations High Commissioner for Refugees, 2015). Although El Salvador, Guatemala, and Honduras are considered “postwar,” migration is constant as the result of ongoing violence, natural disasters, and exacerbated poverty. Civil society and non-governmental agencies (e.g., Washington Office on Latin America, Amnesty, Human Rights Watch) have documented the protection-worthy status of many Central American migrants who enter Mexico and the United States, yet there is limited protection through the U.N. Convention for Refugees. Further, implementation of the U.S.-Canada Safe Third Country Agreement and U.S.-supported *Plan Programa Sur* in Mexico has led to increased detention, extortion, and risk for violence for migrants from this region.
- 6 Mexican Commission for the Defense and Promotion of Human Rights, *Femicide and Impunity in Mexico: A Context of Structural and Generalized Violence* (New York: Committee on the Elimination of All Forms of Discrimination against Women, 2012).
- 7 Sean Rehaag, “2012 Refugee Claim Data and IRB Member Recognition Rates,” Canadian Council for Refugees, 2013, <http://ccrweb.ca/en/2012-refugee-claim-data>. In the Canadian system, Immigration and Refugee Board members are politically appointed, thus the selection of IRB members reflects their political connections more than their level of knowledge in immigration law.
- 8 R. Castro and F. Riquer, “Claroscuros En El Conocimiento Sobre La Violencia Contra Las Mujeres,” in *Retratos De La Violencia Contra Las Mujeres En México. Análisis De Resultados De La Encuesta Nacional Sobre La Dinámica De Las Relaciones En Los Hogares*, ed. I. Casique and R. Castro, 9–39 (Mexico: Instituto Nacional de las Mujeres, 2012). See also Melissa Wright, “Necropolitics, Narcopolitics, and Femicide: Gendered Violence on the Mexico-us Border,” *Signs* 36, no. 3 (2011): 707–31, for her analysis of the politics of how violence in Mexico is portrayed by different political interests. NGOs and human rights groups call attention to “escalating forms of violence,” while the Mexican government declares that it is meeting international conventions for the eradication of violence against women.
- 9 Instituto Nacional de Estadística y Geografía, *Encuesta Nacional sobre la Dinámica de las Relaciones en los Hogares (ENDIREH)* (Aguascalientes, Mexico: Instituto Nacional de Estadística y Geografía, 2011).
- 10 Castro and Riquer, “Claroscuros En El Conocimiento.”
- 11 United States of Mexico. Article 1, *The General Law on Women’s Access to a Life Free of Violence*, 2007.
- 12 *Ibid.*
- 13 UNHCR, *Population Statistics* (Geneva: United Nations High Commissioner for Refugees, 2015).
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- 15 Anna J. Calbot, “Problems Faced by Mexican Asylum-seekers in the United States,” *Journal on Migration and Human Security* 2, no. 4 (2014): 361–77.
- 16 Audrey Macklin and Kenneth M. Waldman, “Ottawa’s Bogus Refugee Bill.” *Toronto Star*, 16 February 2012; Paloma E. Villegas, “Assembling a Visa Requirement against the Mexican ‘Wave’: Migrant Illegalization, Policy and Affective ‘Crises’ in Canada,” *Ethnic and Racial Studies* 36, no. 12 (2013): 2200–19; Liette Gilbert, “The Discursive Production of a Mexican Refugee Crisis in Canadian Media and Policy,” *Journal of Ethnic and Migration Studies* 39, no. 5 (2013): 827–43. Canada also introduced a visa requirement for the Czech Republic, to block Roma migrants. Visa restrictions were lifted for the Czech Republic in 2013 in response to pressure from the European Union and for Mexico in 2016 under the Liberal government.
- 17 In July 2015, the Federal Court of Canada ruled that denying refugee claimants the right to appeal their decision violates the *Canadian Charter of Rights and Freedoms*. The Prime Minister Justin Trudeau promised to amend the rule, soon after assuming power in the fall of 2015, but has yet to do so.
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- reaction Canadians display when “boats” carrying refugees land on Canadian shores—from denying the entry of Sikhs on the *Komagata Maru* in 1914; Jewish refugees fleeing the Holocaust; and most recently criminalizing Tamil passengers of the *mv Sun Sea* in 2010 after their ship arrived from Sri Lanka.
- 19 Marie Lacroix, “Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeeness,” *Journal of Refugee Studies* 17, no. 2 (2004): 147–66.
  - 20 Arbel and Brenner, *Bordering on Failure*.
  - 21 Ibid.
  - 22 Steven Chase, “New Fast-Track Rules See Big Drop in Refugee Asylum Claims,” *Globe and Mail*, 21 February 2013.
  - 23 United Nations High Commissioner for Refugees, *Population Statistics*.
  - 24 Nurjehan Mawani, “The Factual and Legal Legitimacy of Addressing Gender Issues,” *Refuge* 13, no. 4 (1993): 7–10.
  - 25 Macklin, “Refugee Women and the Imperative of Categories.”
  - 26 Ibid., 36–7.
  - 27 Sherene H. Razack, “Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race and Gender,” *Canadian Journal of Women & Law* 8 (1995): 46–88.
  - 28 Here Razack calls attention to Western hegemony and the role of Western nations, like Canada, in perpetuating global inequities. She specifically critiques the role of racialized knowledge production, or racialized power in constructing refugee discourse. Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998), 48–50.
  - 29 Ibid., 80.
  - 30 Arbel, “Culture of Rights Protection in Canadian Refugee Law.”
  - 31 Ibid., 756–7.
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  - 34 Sean Rehaag, “Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations,” *Canadian Journal of Women and the Law* 23, no. 2 (2011): 627–60.
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# Telemedicine: Bridging the Gap between Refugee Health and Health Services Accessibility in Hamilton, Ontario

ANTHONY ROBERT SANDRE AND K. BRUCE NEWBOLD

## Abstract

*Refugees face considerable challenges upon seeking asylum in Canada, and accessing health care services remains a prominent issue. Recurrent themes in the literature outlining barriers to health-services accessibility include geographic, economic, and cultural barriers. Drawing on the experiences of service providers in Hamilton, Ontario, we explored the efficacy of telemedicine services in bridging the gap between refugee health and health-services accessibility. Research methodology included structured interviews with clinicians who provide health-care services to refugees, complemented by a scoping literature review. The results of this exploratory study demonstrate the efficacy of telemedicine in encouraging dialogue and policy change in the greater health-care setting, and its potential to increase access to specialist health-care services.*

## Résumé

*Les réfugiés doivent faire face à des défis considérables lors du processus de demande d'asile au Canada, et l'accès aux services de santé demeure un enjeu important. Parmi les préoccupations qui reviennent fréquemment dans la documentation portant sur l'accessibilité aux services de santé sont les obstacles de nature géographique, économique, et culturelle. En nous basant sur l'expérience vécue des fournisseurs de service établis à Hamilton, en Ontario, nous étudions l'efficacité des services de télémédecine à combler l'écart entre les besoins en matière de santé des réfugiés et l'accessibilité aux services de santé. La méthodologie*

*de recherche comportait des entrevues structurées avec le personnel traitant chargé de fournir des services de santé aux réfugiés, accompagnée d'une revue exploratoire de la documentation sur le sujet. Les résultats de cette étude exploratoire ont démontré l'efficacité de la télémédecine à stimuler le dialogue et le changement en matière de politique dans le contexte général des services de santé, ainsi que sa capacité à accroître l'accès aux services de santé spécialisés.*

## Introduction

The social,<sup>1</sup> health,<sup>2</sup> and medical<sup>3</sup> needs of refugee populations are unique. Refugees are more likely to have experienced combat and domestic violence;<sup>4</sup> political instability and political warfare; death of family and friends; and culture shock.<sup>5</sup> The combination of these adverse events before, during, or after migration frequently manifest as physical and mental health issues, predominantly post-traumatic stress disorder, generalized anxiety disorder, and depression.<sup>6</sup>

Several international systematic reviews have outlined general barriers to accessing health-care services across all vulnerable populations, i.e., immigrants, refugees, and asylum-seekers. Carrasco, Gillespie, and Goodluck outline the challenges for immigrants in accessing primary-care services in Canada, where primary care is considered to be the first point of contact with medical services or the health-care system, usually mediated by a family physician.<sup>7</sup> Medical practitioners who were unable to address the needs of immigrants, that is, unwilling to accommodate the

culturally sensitive demands of the patient or unwilling to participate in culturally sensitive training, deterred patients from accessing services.<sup>8</sup> Joshi et al. draw on similar principles in emphasizing the need to provide identical health care to refugees and other members of the general public.<sup>9</sup> The authors call for regular physician-patient communication in the provision of primary-care services in order to improve access to and quality of health-care services.<sup>10</sup> Hadgkiss and Renzaho explored the utilization of health-care services for asylum-seekers in Australia. Six general themes were identified: affordability, including transportation and prescription medication costs; poor health literacy and understanding of the health system; perceived effectiveness and quality of health services; medical mistrust; discrimination and health professionals' attitudes, or witnessed substandard treatment of patients; and linguistic and cultural factors.<sup>11</sup>

Accessibility to health care in Canada is guided by the 1984 Canada Health Act, with the over-arching objective to ensure that all medically necessary services will be provided free of charge, with the implication of unimpeded access to health-care services for all.<sup>12</sup> In considering these principles and the fluidity of the Canadian refugee population, the Government of Canada enacted the Interim Federal Health Program (IFHP).<sup>13</sup> Currently, and following major restructuring in 2012, 2014, and again in 2016, the IFHP provides health coverage to protected persons (resettled refugees), government-assisted refugees, refugee claimants, and other specified groups.<sup>14</sup> The IFHP is a temporary health insurance program for non-Canadian citizens, and six types of coverage are offered on the basis of immigration status of the individual.<sup>15</sup> Recurrent barriers, including a limited number of subsidized health services, call for a solution to health services accessibility between clinician and patient.<sup>16</sup>

Telemedicine or telehealth, which refers to the provision of health-care services using specialized technology,<sup>17</sup> spans consultation,<sup>18</sup> referral, diagnosis, treatment, and follow-up.<sup>19</sup> Notably, over an array of medical specialties, telemedicine has been shown to increase satisfaction for patient and health-care provider;<sup>20</sup> increase services access for vulnerable and distant populations;<sup>21</sup> and improve linguistic and cultural appropriateness of care.<sup>22</sup> Within Ontario, existing and well-known telemedicine services include Telehealth Ontario<sup>23</sup> and the Ontario Telemedicine Network (OTN).<sup>24</sup> Telehealth Ontario provides patients with 24/7 phone access to a registered nurse who may assist in symptom management and/or booking appointments with other health-care providers; all services are free for citizens of Ontario.<sup>25</sup> The OTN was created to link patients in rural and remote settings with health-care providers across the province using two-way videoconferencing.<sup>26</sup> Although telemedicine is

classified as an uninsured service, physicians offering their services through OTN will submit their bills for consultation to the Ontario Health Insurance Program (OHIP).<sup>27</sup> In light of the IFHP and its divide from OHIP, the medical-legal landscape in Canada poses immediate barriers to the care of refugee patients via technology, e.g., Telehealth and OTN.

While several authors have explored the efficacy of telemedicine in addressing the health intricacies of vulnerable and underserved populations, few authors have explicitly focused on its applicability to refugee populations. Herein, we propose telemedicine as a means to bridge the gap between refugee-health and health-services accessibility for refugee populations. The objective of this study is to explore the efficacy of telemedicine for remediating health-services accessibility for refugees, with special attention paid to accessing specialist care. In order to understand the relationship between telemedicine and health-services accessibility for refugee populations, research methodology included structured interviews with clinicians who provide health care to refugees in Hamilton, complemented by a scoping literature review focused on the implementation and delivery of telemedicine services to vulnerable and/or underserved populations. This study will also contribute to the existing literature concerned with barriers to accessing health-care services for refugee populations. The authors hope that this study will serve as a dialogue piece surrounding health inequity for refugees, and will encourage clinicians to implement telemedicine services in their practice.

### Methods

Two research methods were used to explore the efficacy of telemedicine to bridge the gap between refugee health (and its intricacies) and health-services accessibility. Data obtained from structured interviews with health-care professionals who provide health care to refugees in Hamilton were complemented by a scoping literature review.

Qualitative research methods provide an understanding of personal truths, and five physicians and one nurse practitioner were interviewed in 2015 and 2016. Research ethics board clearance was obtained from the Hamilton Integrated Research Ethics Board of McMaster University. Non-probability, purposive sampling of health-care professionals was performed to obtain the study sample. Three family physicians, one internal medicine subspecialist (subspecializations: medical microbiology and infectious diseases), one pediatrician, and one nurse practitioner were interviewed. In an effort to improve the credibility of results, we sampled a unique and interdisciplinary team, including one family physician who was a former refugee. Participants were contacted by electronic mail and were identified using physician referral and/or place of employment. Participants

were fully informed of the research objective, study design, results reporting, confidentiality of information, and the intended use of results. Participants remain anonymous, save professional qualifications. One-on-one interviews were recorded, and each respondent was asked six questions about the implementation and delivery of telemedicine services when serving refugee populations.

Open coding methods were utilized to interpret the collected data, and underlying themes were identified, labelled, and categorized.<sup>28</sup> In order to elucidate an in-depth understanding of the opinions of the health-care providers and their experiences in working with refugees, analysis followed grounded theory. Grounded theory methodology necessitates constant comparison between accounts, i.e., health-care provider perceptions, and through repeated and systematic assessment, the author is able to generate social truths grounded in empirical data.<sup>29</sup>

A scoping literature review was conducted in order to complement interview data and to perform a rapid and encompassing assessment of the current and existing literature within the scope of this research article. In comparison to systematic review counterparts, scoping literature reviews do not include a formal quality assessment of the literature; rather, a methodical presentation of the literature, including categorization and reporting of data using specified search criteria and databases.<sup>30</sup> Arksey and O'Malley state that there are five essential steps of any scoping literature review, including identifying a research question, finding and selecting relevant studies, charting data, and reporting said data methodically.<sup>31</sup> Further, they state that the author may choose to consult relevant stakeholders to provide direct insight onto the literature.<sup>32</sup>

Electronic databases of MEDLINE, Embase, and PubMed were searched in January 2016 for the terms *emigrants and immigrants* OR *refugees* OR *transients and migrants* OR *vulnerable populations* AND *telemedicine*; and one hundred and twenty-six references were obtained. A breadth of search terms were included for two reasons: first, because there was a scarcity of literature focused explicitly on telemedicine and refugee health; and second, while this study is focused on refugee health, the authors believe that most, if not all, core social and health concepts found using these search terms can be applied across vulnerable populations (including refugees). Seventy-four references were obtained after redundancies were eliminated. Next, only peer-reviewed, English articles published since 2000 and accessible by the McMaster University electronic database were included. Any articles focused on the delivery of dental-care services, rather than medical-care services, were eliminated, reducing the number of references to fifty-one. Finally, in order to maintain the integrity of the research objective, any articles

concerning physician migration, incarcerated individuals, or smoking cessation were excluded. Articles were also required to focus on the delivery of a telemedicine service (rather than intervention design). The remaining twenty-seven references were reviewed and determined to satisfy the inclusion criteria. The authors note that any research papers referenced in the introduction section have been included only to explain core concepts. All research papers referenced in subsequent sections are the result of the scoping literature review.

## Results

### Structured Interviews

Stakeholder perceptions obtained during structured interviews revealed three themes concerning the implementation and delivery of telemedicine when serving refugee populations: (1) model of care and understanding of health, (2) perceived benefits, and (3) perceived challenges associated with the implementation of telemedicine services in the health-care setting. Verbatim quotes have been included to demonstrate participant perceptions.

### Model of Care and Understanding of Health

In keeping with the diverse perspectives offered by the participants in this study, all health-care providers were acutely aware of the unique health needs of refugee populations, both upon arrival and while residing in Canada. There was unanimous agreement amongst health-care providers that the current model of care and understanding of health continues to be the greatest barrier faced by refugee patients when attempting to access health-care services. This biomedical model surpasses simple differences in language, a frequently cited barrier, and exacerbates differences in the expectation and understanding of chronicity of disease; differences (or similarities) amongst health-care provider and patient expectations; in-depth understanding of foreign culture; and, of course, frustration in navigating refugee-health legislation.

Language, visualized as the “tip of the iceberg” in the model of care and understanding of health, spans appointments, communicating with health-care professionals, comprehending reading materials, and understanding diagnosis and/or prognosis. Among participants, there was consensus that language, an extension of ethnic diversity, challenges health-care providers and patients alike:

Despite advancement, I believe that language remains the biggest barrier, in terms of making an appointment or having an appointment being made for you, seeking specialist opinions or locating health-care services. The patient may also have difficulty accessing and understanding such information if it is located in a central place, e.g., a website. (Participant 1)

One barrier is language. This can be a challenge if there is or is not an interpreter—this can make [patient care] very challenging. It may be that the language may interfere with referring to the specialist [or performing] investigations as well as a breakdown in communication. (Participant 3)

While language serves as a concrete barrier to patients and health-care providers, this concept is further enveloped in a network of cultural and human understanding, i.e., the model of care and understanding of health offered by the health-care provider. By simply providing the patient with an interpreter, the health-care provider does not break down this barrier; rather, he or she exacerbates it:

In my experience, people spend a lot of time to talk diabetes—but from a framework that the client isn't engaged with. So who cares? They have an interpreter, and they have a diabetes educator, and they're talking diabetes education, and they have the time, but the model doesn't fit in [the patient's] mind, you know, about chronic disease, or about lifestyle management, or about foods that are best, you know, things like that—so the communication still hasn't taken place ... The biggest barrier to providing care to new patients is the biomedical model that we work under; because, perhaps, it's contrary, a bit to what they've experienced in the past ... There, perhaps, might not be an understanding of chronicity of disease, the use of medication, diagnosis, and what we mean ... especially by mental health. People come with huge histories of trauma, but then their symptoms are somatic, and because we are very biomedical, we investigate the symptoms without thinking about it ... And, it's not, perhaps, that person's way of expressing distress. (Participant 4)

Obviously language and the whole cultural piece; people have different expectations of the health-care systems, depending where they're from. (Participant 6)

As a former refugee, the next participant, a family physician, provides an in-depth understanding of the issues a refugee may face when adjusting to a new model of care and understanding of health:

I have, and still do, work with refugees. I was a refugee myself ... So when I became a doctor, of course, my priority was immigrants and refugees ... They are a challenge, the refugees, because their issues are not single. They are not only medical. It's a whole social circumstance. (Participant 5)

Variability in the delivery of health-care services between the origin and settled countries challenges the health-care provider and patient. Certain physicians may be unwilling to work with refugee patients:

There is a certain degree of stigma associated with being a refugee. This makes it hard just to get access to health care, because there is a perception that this is a more difficult population to deal with for a number of different reasons: cultural understanding, language barriers, those types of issues. (Participant 2)

The current model of care and understanding of health also necessitates a mention of the issues surrounding compensation for the health-care provider and frustration when navigating refugee-health legislation. Each participant explicitly voiced this concern. Financial compensation, an extension of health policy, has challenged participants:

There's the financial aspect, a barrier imposed by policy, number one, and the health-care system, number two ... [so] physicians find it difficult to navigate the compensation program for refugees since it is a very complicated system—oftentimes physicians just won't see refugee patients. (Participant 2)

A big component, obviously in the last few years, is IFHP cuts. The actual confusion at the health-care-provider level ... essentially people who used to perhaps figure it out once in awhile are no longer willing to do that. More [refugees] are just turned away because it's too confusing or they are not covered. (Participant 1)

The accessibility of health services extends into exploring solutions to these barriers. While participants did mention telemedicine as a potential solution, respondents also described a non-electronic intervention—a community-based partnered approach. The scope of this concept is twofold: first, the evolution of a specialized facility to serve refugee populations, and second, building a professional relationship with community members who are of a similar religious and/or ethnic background of the patient:

The best way to serve this population is through a community health centre. (Participant 5)

The most success we've had is a community-based partnered approach ... Newcomers are accessing their services for housing, school, employment, and everything else ... and then receiving health care in the same location in collaboration with settlement workers. So them being able to work alongside the [settlement workers] for questions the family may have around school, integration, etc. [As physicians], we work closely with [the settlement workers] to get initial referrals for newcomers—they can direct them to a clinic where they'll be seen regardless of coverage and where we have access to translators. (Participant 1)

From a primary-care point of view, the general response has been the evolution of a specialized primary-care clinic that will

see refugee patients and is aimed to get past the financial burden aspect of it ... there is at least a presumably higher cultural understanding in that clinic and there is language services available for translation. (Participant 2)

For language support, from my perspective, the ideal is to have an in-person translator who knows the family in a professional context. So not a community member that [the patient feels] wouldn't be confidential, which can be tricky in some of the less common languages. (Participant 1)

The advantage of establishing a professional relationship with community members, who can assist the health-care professional in providing a higher standard of care, is demonstrated in the following quotation:

The time is spent with interpreters to talk about, say, post-traumatic stress, but when we're talking from the same framework—and I'm not talking where we have to go figure out what [ethnicity] they are and go change the language—it's more like having more of a human understanding of what the thinking is back and forth. (Participant 4)

#### **Perceived Benefits Associated with Implementation of Telemedicine**

With the exception of telephone translation services, all participants had limited experience with the implementation and facilitation of telemedicine; however, all broadly spoke of the perceived benefits associated with offering such services:

I've seen telehealth work really well when a primary-care provider, such as a nurse, nurse practitioner, or family physician, is with the patient on one side while communicating with a specialist on the other side. (Participant 1)

I did a physician search for doctors who speak Somali, and only one came up in the area, and I already work with him. He's very, very busy, you know. So what if there were ten, twenty, who knows how many in Toronto, that would be willing—particularly if there was compensation—to be able to consult, and then we could just ... manage that way. Yeah, that would be superb. (Participant 4)

I'm thinking, envisioning that ... if I can't find a psychiatrist in Hamilton to do an assessment ... Let's say there was a psychiatrist, Farsi-speaking or Afghani-speaking in Toronto, and willing to do the assessment through telemedicine from my own office, I would set up the patient, have them do the interview, and everything ... That would be a proper assessment, because not everything needs the patient to be physically touched. (Participant 5)

I did call the on-call pediatrician, but it would have been great if they could have seen it. (Participant 6)

Another aspect is getting patients access to specialist care. This works best if the primary-care/primary care clinic, with the patient alongside, can communicate to the specialist or his or her office using telehealth. (Participant 2)

Further, telemedicine increases the human resource capacity (and referral network) available to the health-care provider, who can then provide a higher standard of care to the patient:

There's actually an application for a nurse practitioner to do telemedicine NP for rural, right? ... Usually it's been a physician and now they're bringing nurse practitioners into this model. And it might be part of the solution, I was thinking around all this, to our issues around human resources, because our clients have multiple needs—sometimes, not all the time, some of them are just really, really healthy and adapt and there is no problems at all—but sometimes they have a lot of needs and you have to bring them a lot of specialists, and we do that by bringing them physically on site. But would it also be possible to have more nurses or something, or some other means of accessing specialists, from telemedicine?

I could see it as a way of expanding the human resource or the clinical capacity for not just refugees, but all marginalized populations. (Participant 4)

Finally, visualizing human interaction over an electronic medium allows the clinician to observe physical nuances:

But to be able to catch the nuances of symptoms in one's own language, instead of even through a medically trained interpreter, would just add value and increase the quality of their health care. Wow. Think of that. (Participant 4)

I think just having a face, socially, a face to relate to, to know, breaks down a barrier and just gives a bit more immediacy and intimacy. (Participant 3)

#### **Perceived Challenges Associated with Implementation of Telemedicine**

Study participants raised two central concerns about delivering health care over an electronic medium: financial compensation and sacrificing patient interaction, especially at the primary-care level. There was no disagreement amongst participants. Again, financial compensation is related to navigating a complex billing system:

The problem you would run into again and again is the compensation piece ... This would be an issue unless you were willing to find a network of specialists who are willing to take one call a week, or something like that, and not worry about payment. (Participant 2)

A challenge is billing, because our medical-legal system has not been designed to be in favour of indirect consultation. (Participant 1)

That would be awesome ... if it was possible. If it was possible not only for the refugees but for all of [my patients], I would love to be able to talk to a specialist ... by videoconferencing or something and show them a skin condition and ask them what they think. It takes too much time or the specialist won't like doing that. You have to send them a referral and do it properly. (Participant 5)

Sacrificing patient interaction, perhaps the most deleterious consequence of implementing telemedicine services, was a central concern of study participants. The clinician-patient relationship is unique in that health-care providers rely upon the verbal tone and/or body language of the patient during diagnosis and treatment. Likewise, the patient places his or her general health in the hands of the clinician. In light of this delicate balance, the clinician must be a skilled communicator capable of understanding the complexities of this in-person interaction:

The biggest downfall, potentially, would be that the clients don't engage with that kind of way of communicating with a clinician. (Participant 4)

The other thing is, working with kids, I can't imagine trying to interact with them over telehealth or trying to do a developmental assessment without being able to play with them—I just can't see doing that over telehealth ... I've heard while chatting with other colleagues who also conduct mental health work ... that when they use telephone translation services versus in-person translation, they find that they miss a lot with the telephone because of lack of facial expressions and body language. Many different cultural groups place a lot of meaning in this. (Participant 1)

The biggest downfall, potentially, would be that the clients don't engage with that kind of way of communicating with a clinician. (Participant 4)

### *Scoping Literature Review*

Twenty-seven articles satisfied inclusion criteria and were selected for review, with the literature review complementing interview data and increasing the credibility of the conclusions. Given the nature of a scoping literature review, research findings have been organized into six sorting

categories based on the article title and core content: (1) telemedicine uptake; (2) telepsychiatry; (3) telemonitoring; (4) telephone assistance; (5) telecollaboration; and (6) mobile health services. Only those sections most relevant to the discussion have been elaborated upon; the full data-set is available upon request from the first author.

### **Telemedicine Uptake**

Seven articles focused on telemedicine uptake, that is, usage patterns of a specific telemedicine service or a network of services in a geographic area or within a specific patient database. All articles focused on providing vulnerable and/or marginalized populations with increased access to health-care services.

Remote and at-home health-screening methods surpass issues of socio-economic status, gender,<sup>33</sup> occupation,<sup>34</sup> and geographic location, and have the potential to provide culturally specific services to a target population.<sup>35</sup> Electronic screening methods provide an immediate link between patients and health-care providers and was the focus of five articles.

In highlighting the first study, videoconferencing-based clinics for rural, Native Americans allowed health-care professionals to offer culturally specific mental-health services to this population.<sup>36</sup> Across socio-demographic indicators such as race, ethnicity, socio-economic status, age, and sex, Kontos et al. conclude that young female patients of higher socio-economic status are more likely to utilize ehealth services.<sup>37</sup> Reifels et al. report increased usage of applied psychological services, i.e., an electronic mental health service spanning telephone consultation or web-based cognitive behavioural therapy, despite certain patients preferring face-to-face visits.<sup>38</sup> With a similar conclusion, Gabrielian et al. report that while most patients were satisfied with an in-home messaging service, some participants preferred the in-person rapport.<sup>39</sup> In contrast, and in light of the rapid flow of information between parties, Gagnon et al. conclude that technology will not negatively influence the physician-patient relationship.<sup>40</sup> In either case, concern about straining the physician-patient relationship was raised by interview participants, and the results suggest that this issue may be overcome if the patient is interacting with a specialist physician while in the same room as his or her primary-care provider.<sup>41</sup>

Finally, and perhaps most relevant to this research article, Schulz et al. studied the first 120 consultations provided at a refugee telehealth clinic in Australia. This clinic allows a general practitioner to sit with the patient while video-conferencing with a specialist physician who is in a distant geographic location. However, the authors note that the viability of this clinic is entirely dependent upon

continued Medicare funding provided by the Australian government.<sup>42</sup>

In the seventh article, Hitt et al. assessed the usage of a novel gynecological screening technique, telecolposcopy. As it is not applicable to this research article, a more thorough discussion can be found at the corresponding reference.<sup>43</sup>

### **Telepsychiatry**

Six articles focused on the delivery of psychiatric services over an electronic medium. The focus of four articles was the adaptation of psychiatric services to deliver culturally competent care, that is, providing the patient with a psychiatrist, over an electronic medium, who is of a similar ethnic origin and/or able to speak the native language of the patient. As this was a central concern of interview participants, each article necessitates a brief mention. Yeung et al. discuss the provision of telepsychiatric services for Chinese immigrants in nursing homes. While the service was efficient and improved access to health-care services for the population, the authors note that participants were provided with an initial face-to-face consultation before a subsequent virtual visit.<sup>44</sup> Mucic reports an international telepsychiatric service between Denmark and Sweden for asylum-seekers, refugees, and migrants. Patients report that the lack of physical contact between patient and physician was compensated by cultural similarities.<sup>45</sup> In a similar study, the authors provided a comparable service and, despite increased patient satisfaction, several participants expressed issues of confidentiality of information.<sup>46</sup> Next, a telepsychiatric service for Korean immigrants connected patients to a culturally competent health-care professional.<sup>47</sup> In this study, unexpected technical issues, such as poor audio-visual connection, posed a barrier in care, with the authors reiterating the need for a community-based partnered approach.

Further discussion on two additional studies exploring the efficacy of electronic psychiatric services in areas of conflict<sup>48</sup> and using “avatar therapy”<sup>49</sup> can be found at the corresponding references.

### **Telemonitoring**

Telemonitoring includes the study of diagnostic and self-monitoring equipment and was the focus of two articles. While telemonitoring equipment is usually designed to empower the patient to actively participate in his or her medical treatment, the potential cost of this equipment, at the expense of the health-care provider, poses a serious challenge.<sup>50</sup> Further, Terschüren, Mensing, and Meikel have shown that while patients may be receptive to such equipment, acceptance generally declines with increasing age.<sup>51</sup>

### **Telephone Assistance**

Telephone assistance refers to providing medical support or monitoring for patients over a landline or a mobile phone. Eight articles focused on telephone assistance for vulnerable populations. Telephone counselling has provided emotional support for patients,<sup>52</sup> improved treatment timeline,<sup>53</sup> increased medication adherence,<sup>54</sup> and provided early screening opportunities for pain management.<sup>55</sup>

### **Telecollaboration**

Telecollaboration, or the ability to work with colleagues and patients in various geographic areas, in real time, was the focus of one article.<sup>56</sup>

### **Mobile Health Services**

Mobile health services refer to portable health-care services such as audio-video equipment, mobile health clinics, and mobile monitoring systems. Three articles were found within this sorting category.<sup>57</sup>

### **Discussion and Conclusion**

The objective of this study was twofold: first, to provide the reader with an overview of the barriers to accessing health services for refugees in Hamilton; and second, to explore the efficacy of telemedicine services in remediating such barriers, especially with respect to accessing specialist care. Research results from the interview transcripts and the scoping literature review were congruent with one another, demonstrating robust research methodology.

### *Health Services Accessibility*

During the interview sessions, the clinicians spoke of obstacles facing refugee patients when accessing health services, all of which are supported by the current body of literature. Thus, research results can be used to contribute to the literature concerned with health services accessibility for refugee populations. The results have demonstrated that the current model of care and understanding of health, in the Canadian context, has exacerbated barriers to health services access encountered by refugee patients.

Before and after migration from the country of origin, the refugee patient is forced to interact with international aid workers, government officials, and health-care professionals, among others. From a clinician’s point of view, any communication barriers will be approached using the current model of care and understanding of health, a framework that prevents many refugee patients from seeking adequate care, according to study participants. While this issue may not be unique to refugees, it is likely that the residual trauma from mental and/or physical violence will exacerbate these issues.

The results demonstrated that financial compensation for clinicians in Hamilton (and likely elsewhere in Ontario, given similar funding policies) has deterred some clinicians from serving refugee patients. The current medical-legal landscape in Canada, and particularly the evolving IFHP for refugee patients, has created confusion among health-care providers. The authors suggest that this confusion may project onto the patient. Should a patient wish to make an appointment with a clinician, and if care is denied, the patient may generalize anger and frustration across all health care providers.

#### *Telemedicine Services: Implementation, Utilization and Recommendations*

The results suggest that two elements are required for proper implementation of telemedicine services: a community-based partnered approach, and specialist consultation, including compensation. Results from the interview transcripts and the scoping literature review equally advocated for a community-based partnered approach. Ye et al. call for a community-based partnered approach, which involves local ethnic community centres in designing telepsychiatric services.<sup>58</sup> While a community-based partnered approach was not explicitly discussed in the remaining references, the implicit mention of employing health-care professionals of similar cultural and/or ethnic background similar to that of the patient implies the evolution of such a concept. On the basis of professional experience, interview participants harmoniously advocated for such a solution. It is suggested that the community-based partnered approach will remedy many of the barriers created by the current model of care and understanding of health. Further, the integration of community, in a professional context, addresses any issues a health-care provider may have in connecting with a patient's cultural background.

Specialist consultation is a continued challenge for clinicians serving refugee populations. The lack of ethnically or culturally appropriate specialist physicians in the immediate Hamilton referral network begs attention. For example, telepsychiatric services have been able to connect patients with health-care professionals whose language and cultural background is similar to that of the patient.<sup>59</sup> Such services are especially valuable for patients with a small co-ethnic community. The interview transcripts have shown that clinicians in Hamilton desire a large referral network, including a multitude of specialist physicians who are willing to regularly communicate with the primary-care clinician and the refugee patient. The primary-care clinician serves as a buffer in understanding the medical assessment, interpreting non-verbal cues of the interaction, and bringing an additional expert medical opinion. The concept of telecollaboration, or

the collaboration of health-care professionals over an electronic medium, was highlighted during interview sessions and within the literature. The interview transcripts revealed that clinicians can collaborate quite easily with specialist physicians over an electronic medium. However, issues with IFHP-associated financial compensation has prevented such interaction from becoming routine. To remedy this issue, each participant called for a change in health policy legislation to address compensation for electronic consultations. Schulz et al. have demonstrated the efficacy of a telehealth clinic specific to refugee patients in Australia. The authors note that the unique health needs of this patient database necessitates its own telehealth clinic. Further, in outlining the technical challenges and successes of such a clinic, the authors note that continued support by Australian Medicare is the lifeline for electronic consultation.<sup>60</sup>

The limitations of implementing and delivering telemedicine services are many. Sacrificing face-to-face interaction, the foundation of the clinician-patient relationship, was a recurring concern amongst interview participants and within the literature. However, this limitation applies only if the primary-care clinician is communicating with the patient over an electronic medium. On the other hand, if the primary care clinician is in the immediate vicinity of the patient while communicating with a specialist physician, this restriction no longer applies. The literature also expressed concern about confidentiality and apprehension when utilizing telemedicine services. In highlighting one study, Mucic reports that patients may not feel comfortable sharing personal health information over an electronic medium.<sup>61</sup> Thus, health-care professionals requiring patients to share such information over video-conferencing, etc., should ensure the patient is aware of all confidentiality measures.

Overall, the expected benefits associated with the implementation of telemedicine in the health-care setting include empowering patients to participate in their own continuity of care,<sup>62</sup> increased medication adherence,<sup>63</sup> and offering specialized health-care services across geographic boundaries.<sup>64</sup> Finally, the integration of technology into a community-based partnered approach provides the patient with access to culturally and ethnically sensitive health care services—a factor that is likely to increase patient satisfaction and overall compliance.

To maintain transparency, the limitations of this research study must be addressed. First, a small sample size necessitates a discussion of sampling bias. The subset population who volunteered to participate in this study, given that they frequently work with refugees, may hold opinions that are similar to or different from the remainder of the medical community. Purposive, non-probability sampling of study participants was utilized to minimize sampling bias. While

we targeted a relatively small group of health-care professionals, we continued sampling until a reasonably similar opinion was offered by all health-care professionals. While we cannot explicitly say data saturation was achieved, we believe that, given the already small number of professionals who satisfy inclusion criteria and that many community professionals do not work with refugees, saturation was achieved, although further replication of this work, including expanding the number of interviewees, is needed.

Two future research objectives are recommended. First, a call for further adaptation of the medical-legal landscape concerning the utilization of telemedicine services within and across Canadian provinces.<sup>65</sup> In combination with IFHP-associated confusion, issues of providing health-care services across provincial or national boundaries further exacerbate such matters. The authors of this study recommend that further research must be conducted within this field for several reasons: first, to provide unimpeded and rapid access to primary and specialist health-care services for refugee populations; second, to promote the integration of telemedicine services into such care; and third, to educate health-care professionals on the updated standards of care. We recommend either interviews with services users, to explore patient perceptions of such services, or an intervention study comparing telemedicine services to the current standard of care.

Second, and perhaps most important, the core concepts of a community-based partnered approach must be integrated into routine telemedicine practice, especially when accessing specialist services. At its core, this approach relies upon trust in a health-care professional who is willing to engage in ethnically and culturally appropriate conversations with the patient. This may also be accomplished using a combination of resettlement services and/or a specialized primary care centre tailored to serving refugee populations.

### Glossary

*Telemedicine*: the provision of health care using specialized technology. This may include telephone services, electronic video consultation, remote consultation following image acquisition, etc. Telemedicine is frequently referred to as telehealth.

*Telemedicine uptake*: monitoring usage patterns of a specific telemedicine service or a network of services in a geographic area or within a specific patient database.

*Telepsychiatry*: the provision of psychiatric services over an electronic medium. The inherent personable nature of psychiatry frequently involves electronic video consultation.

*Telemonitoring*: the study of diagnostic and self-monitoring equipment, usually designed to empower patients

to actively participate in their health care. Telemonitoring does not include the study of consumer usage patterns.

*Telephone assistance*: the provision of medical assistance/advice to patients over the telephone.

*Telecollaboration*: the ability to collaborate with colleagues, in real time, over an electronic medium, such as video-conferencing.

*Mobile health services*: portable health-care services such as audio-video equipment, mobile health clinics, and mobile monitoring systems.

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# Interpreters' Self-Perceptions of Their Use of Self When Interpreting in Health and Behavioural Health Settings

NICOLE DUBUS

## Abstract

*This study examines interpreters' self-perception of their use of self when interpreting in health and behavioural health-care settings. Constant comparative analysis was used to analyze the individual, semi-structured interviews of thirty-six interpreters. Interpreters identified specific skills and techniques, that they developed on their own, (1) to create a safe environment for provider and client, and (2) to increase the effectiveness of the intervention. Interpreters are vital members of care teams. Interpreters might be under-utilized if only seen as a language conduit. Embracing interpreters as members of the inter-professional team may hold great promise for addressing challenges in providing culturally effective services.*

## Résumé

*Cette étude se penche sur l'auto-perception des interprètes de leur recours au soi dans l'interprétation en milieux de services de santé et de santé comportementale. Une méthode comparative constante avait été employée pour analyser les 36 entrevues individuelles semi-structurées des interprètes.*

*Les interprètes ont identifié des aptitudes et des méthodes spécifiques qu'ils avaient indépendamment développées afin de (a) créer un environnement rassurant pour le fournisseur ainsi que le client, et (b) accroître l'efficacité de l'intervention. Les interprètes constituent des membres essentiels d'équipes de soins. Ils risquent toutefois d'être sous-utilisés s'ils sont considérés uniquement comme des*

*intermédiaires de langue. Intégrer pleinement les interprètes en tant que membres de l'équipe interprofessionnelle est très prometteur pour aborder les défis reliés à la prestation de services adaptés aux particularités culturelles.*

When there is not a shared language, interpreters are needed. Meeting the health-care needs of newly arrived immigrants and refugees requires competent language services, as these populations are less likely to have economic, language, and cultural resources to help them navigate through systems of care. The United States has one of the largest foreign-born populations, with many of these foreign born arriving with little prior experience with the language or culture. The American Immigration Council<sup>1</sup> reports that in the United States, 70,000–80,000 refugees arrive each year.

Studies have examined the effectiveness of interpreters in health-care settings when the interpreter has been a family member, a staff worker who is asked to leave her or his job station to interpret, and when the interpreter has been professionally trained. Karliner and colleagues<sup>2</sup> found that clients who worked with professional interpreters received better clinical care. But having a professional interpreter present does not ensure better care is received. Butow and colleagues<sup>3</sup> found that providers who work with interpreters respond fewer times to non-verbal cues and are less responsive to clients' emotional state. This speaks to the need for better training of providers in working with interpreters, and better training of professional interpreters on interpreting non-verbal communication. A number of hurdles prevent providers from working with professional interpreters.

Bischoff and Hudelson<sup>4</sup> found that professional interpreters are used less frequently than a client's relative or a bilingual staff member, both of which are perceived to be logistically easier and less expensive to access. Other studies have examined additional factors that impede the effective use of interpreters, including factors such as the availability of interpreting services and difficulty scheduling the interpreter and the client together.

In addition to challenges in working with interpreters, there are hurdles between provider and interpreter. Hsieh<sup>5</sup> has examined the dynamics between provider and interpreter in a number of studies. Her work demonstrated the complexity of this relationship and the importance of developing trust and clear roles between provider and interpreter. Her work also makes a compelling case for deliberately using the interpreter's many possible roles within the visit to the benefit of the client-provider relationship. An interpreter can act as a language conduit, a cultural broker, an advocate, and a support for the client. Brisset, Lanza, and Laforest<sup>6</sup> found in their meta-analysis of the literature that some providers are comfortable having the interpreter use a number of roles within the visit. Several studies such as Kosny et al.<sup>7</sup> examine the provider's experiences working with interpreters. There are few studies, like Hadziabdic and Hjelm<sup>8</sup> that focus on the client's experience of interpretation services, and a small but growing body of literature on the experiences of interpreters. Green, Sperlinger, and Carswell<sup>9</sup> looked at refugees' experiences when they worked as interpreters for fellow refugees.

As more remote methods of interpreting (telephonic, video) become more common, studies have sought to evaluate the effectiveness of each of these methods. Studies such as Locatis<sup>10</sup> show that in-person interpreting is preferred by providers and interpreters more than a remote method, while video is preferred over telephonic. The findings reflect the perception that "much was lost" when not in-person. This suggests that the physical presence of the interpreter with the client and provider is important. Studies have demonstrated that interpreters understand, as Hsieh<sup>11</sup> stated, that they are more "than a robot," and in a different study by Hadziabdic<sup>12</sup> and colleagues, they found that providers feel both burdened and enriched by the quality of the interpretation service. Few studies, though, have examined the interpreter's physical presence as part of the interpreting service. In particular, this study seeks to understand how, if at all, interpreters use themselves as a tool to enhance the interpretation services. As Dewane<sup>13</sup> describes, the use of oneself to enhance service delivery and client trust is most often associated with psychotherapy. The use of self is defined within social work and counselling literature as the "use of personality; use of belief system; use of relational dynamics;

use of anxiety; and use of self-disclosure."<sup>14</sup> For social workers and counsellors, the use of self is an important skill in working with clients. Maclaren<sup>15</sup> and others describe the purpose of using oneself as a method where the therapist consciously uses aspects of her personality, personal experiences, and dynamics within the relationship to create a safe and authentic exchange with the client. As Arnd-Caddigan and Pozzuto discuss,<sup>16</sup> the intent of using parts of oneself within the helping relationship is always to enhance the intervention and deepen the trust with the client.

Studies, such as Doherty, MacIntyre, and Wyne<sup>17</sup> have looked at ways interpreters struggle with the complex dynamics inherent within interpreting sessions. While these studies identify challenges and limitations of interpretation services, they do not explore the interpreter's conscious and deliberate use of self to enhance the service. This study seeks to understand, through the interpreter's perspective, the interpreter's use of self when interpreting in health and behavioural health-care settings. Behavioural health-care in the United States is a service that addresses mental health issues, such as counselling and medication.

### **Method**

The Institutional Review Board of the author's institution has approved all components of this study. To better understand the subjective experiences of the participants, semi-structured interviews were conducted with thirty-six interpreters.

### *Participants and Procedure*

Thirty-six interpreters participated in this study. The data were collected from July 2013 to July 2014. Recruitment was through interpreting agencies. Supervisors from the agencies informed interpreters of the study and were directed to contact the primary investigator of their interest. Because the purpose of the study is to explore the interpreter's use of self, it was important to have interpreters who have had both in-person and telephonic interpreting experience to tease out the importance of physical presence versus other means of using oneself (voice, tone, silences). Participants who have interpreted both in-person and telephonically were included in the study. It was important to have an equal sample of men and women in the study to see if any gender difference would occur in the findings. Once an equal number of men and women participants had been achieved, recruitment ended. Final sample contained thirty-six interpreters. Participants were paid for their time at the same rate they are paid for interpreting. For most participants, this ranged from \$25 to \$60 per hour. Written informed consent was obtained. Confidentiality and anonymity of their responses were described. All interviews were individual, face to face,

lasted forty-five minutes to an hour, and were audio-taped, with consent, for later transcription.

In addition to demographic questions (length of time as interpreter, languages spoken, age, sex), interviews were guided by the following questions: Describe the process when you interpret in-person. Describe the process when you interpret telephonically. What are the differences in interpreting in-person versus telephonically? What are the challenges and strengths of each method? What do you see as your role with the provider? The client? With both? How does the trust of the client affect your ability to effectively interpret? Are there ways that you try to develop trust with the client? With the provider? Does this vary if in-person versus telephonically? Are there ways that your personality affects your work? Do your own beliefs and experiences affect your work? Are there dynamics with three in the room that affect the process? How do you know if you are effective in your role?

Each interview was conducted in English at a private location of the participant's choosing. To maintain confidentiality of the participants, the audiotapes and transcripts were anonymized and coded by number. All data were stored in locked file cabinets and password-protected drives that could be accessed only by the principal investigator.

#### Data Analysis

The qualitative software program Dedoose was used to manage the data. The data were analyzed using grounded theory constant comparative analysis. This process entails four coding phases as described by Charmaz,<sup>18</sup> Glaser<sup>19</sup> in his work, and by Kamy and Poindexter.<sup>20</sup> A second coder (a graduate student experienced in coding) was hired in addition to the principal investigator to independently analyze the data and to generate memos and codes. The initial coding phase involved each rater independently reading the transcripts line by line and generating codes from excerpts of the transcripts. The principal investigator and graduate student compared the excerpts and the code names. If the excerpts and codes varied, the two discussed the rationale and looked for more evidence to substantiate the code or to reject the code. This process continued until an agreed list of codes were identified. This list contained codes such as "interpreter using body language to develop trust with client," "provider looks only at client," "perceived anxiety in client." In the second phase the raters performed selective coding, a process that creates conceptual categories from the codes through a rereading of the transcripts, reviewing the codes, and combining and reorganizing codes when doing so strengthened the theme of the codes. This resulted in fewer codes, but the remaining codes seem to better capture the information; for example, self-taught techniques for

developing trust, self-perception of interpreter as a bridge. In axial coding, the third phase, categories and subcategories were developed to show causal relationships, if any. In the final phase major themes or stories emerged from the categories. The two raters then reviewed the coding process to ensure the validity of the findings. These findings and the coding process were critically peer reviewed by researchers not affiliated with the study to further ensure the findings' validity.

#### Findings

The findings presented in this section are of the stories that emerged from the interpreters. The interpreters described their roles as complex. They saw themselves as interpreters, advocates, cultural brokers, support for the client, cultural navigators, and teachers. They believed the different roles were inevitable in ensuring the effectiveness of the service. They felt rewarded and valued, but also invisible and devalued, and that their satisfaction in the work was determined often by how the provider treated them. Throughout their narratives was the story of interpreters using themselves to enhance the services received by the clients and the effectiveness of the providers.

The interpreters' didn't use the term *use of self* but did describe the components that make up the concept, such as consciously using aspects of their personality, awareness of their belief system and its possible impact on the client, and use of relational dynamics among the three in the room (client, interpreter, and provider). The interpreters used these components of "use of self" to develop trust with the client and provider and to enhance the effectiveness of the services provided. In addition to these components they used their body language, voice, and eye contact to develop trust with the client. For example, one interpreter (female #30) stated,

For me, it starts with when I fetch her in the waiting room. I make sure to talk softly to the client and look at them. I usually sit down next to them and tell them who I am. Then when we get in the room, I set up the chairs for her and me to sit. The whole time I am trying to help her feel safe. I watch for signs of whether she does or doesn't.

And another (male #24) stated,

I make sure I use a familiar greeting. Sometimes it is easy, 'cause they are the usual ones. But sometimes you find out they are from a region and I then try to use that region's greeting. I love when I can do that. It's rare, but fun. I see them feel more relaxed. Like, "It's going to be ok because this interpreter understands me ... where I come from."

Another interpreter (female #11) described developing trust with the client when the provider is present:

Voice is really important. If the provider is stern, and I don't think the client will understand being talked to like that, I soften my voice. Sometimes I reach out and touch the client on the shoulder or arm to let them know I am here with them. With some providers you have to do the little extra to help the client feel comfortable. Some providers are too quick and brisk. They can come off as angry. The client doesn't need that. So I soften it. I also keep my body open, like this [positions her arms along her sides]. I want the client to know I am safe to trust.

Interpreters often balanced themselves in relation to the provider. If the provider seemed "gruff" then the interpreter softened; if the provider made eye contact and was attentive to the client, the interpreter involved herself or himself less (the interpreter matched the provider's tone, assumed the provider would notice when the client appeared anxious and would address it without the interpreter assuring the client). They also used their personality to balance the dynamics in the room and to help the client feel safer, as evident by another interpreter (female #17):

I am really a shy person, an introvert. I think many times this works to my advantage in this work. I think most of the patients are quite like me. Maybe it's a cultural thing. I don't know. But I know they feel safe with me. I'm not going to be loud or small talk when we are waiting for the doctor. We just sit. Sometimes I get someone who seems to need to talk, like they are nervous. I have gotten better at talking with them. I think I can talk enough to help them relax. When I first started [interpreting] I wasn't good at this. But now, well, I'm still quiet, but I can talk to them when they need me to.

An interpreter who described himself (male, #4) as an extrovert said,

I start talking the first I see them. I usually go get them in the waiting room. I start talking, weather, then their home country. Sometimes we have seen each other around town and we talk about restaurants. But the point is, I let them know that I am friendly, that I won't be judging them. There are times where I just get a feeling that my talking might be too much for them. Then I hold myself back [laughs]. Not that easy. But it's for them, right? It's got to be what is best for them.

The provider's approach in working with a client and an interpreter played an important role in how the interpreter used herself or himself in the sessions. If an interpreter had worked with a provider before, she or he knew what

to expect and worked with the client in specific ways. For example (female #22),

I work with this one doctor. I already know that I need to do more in the sessions than interpret when I work with him. I don't mind. I actually like doing more. I wish the doctor didn't seem so dismissive of me though. But, anyway, I know this doctor won't look at either of us much in the room. He stares mainly at the computer when he talks. So make sure I look at the patient. I smile. I sit closer. I'll ask the patient if they understand what the doctor means because I don't think he explains himself well. I think I am the human element in the room.

This interpreter's reference to being "the human element in the room" came up in a number of interviews, but usually as how each felt treated by the provider: "I think he thinks I am a machine just spitting out words. Just use the god-dam Internet if that is all I am" (male, #12). When a provider worked closer with the interpreter, the interpreter worked differently. For example (female #7),

I definitely change who I am based on who's in the room. I work with this one therapist and she is asking me how best to phrase something, or asks about the client's culture, stuff like that. We often have a three-way conversation about something from our country that the therapist doesn't understand. In these sessions I get to be more myself. But other times, I am quiet and try to be invisible ... like a voice for both of them. Those sessions actually make me really tired.

Interpreters, in addition to using different aspects of their personality when interpreting, also understood that their beliefs play a role in the work. One male (#20) described it this way:

You see, we have a different culture than the U.S. Like we don't talk about sex much. But the doctors here talk about sex a lot. I feel uncomfortable. I know that if I am uncomfortable, then the patient will be. So I have had to learn to not be uncomfortable when sex is talked about. Other times, a patient might talk about something back home [in country of origin] and I will have an opinion. I don't say my opinion, of course. But I know it affects me. Sometimes I can feel myself get angry and I don't look at them. I hate that. I don't want it to affect my work, but I think it does. I think it is noticed.

The interpreter from the above quote had strong feelings about the political struggles in his country of origin. At times he had to monitor his anger when a client talked about the struggles. Other interpreters felt that their beliefs helped them to interpret better. They described using

shared cultural experiences as a way to develop trust with the patient, as well as being able to help the provider understand the client:

I tell the doc that we don't think like that in our country. Or I will tell the doc about a home remedy we use. I bring in what I know about the culture when I think it will help them [the provider and patient]. (Male, #12)

The interpreters were aware that their knowledge of the client's culture was helpful to the provider and the client, and they tried to use it carefully. Sometimes, they questioned if every interpreter was able to use their culture well. Some wondered if interpreters projected their own beliefs onto a client. They understood that having the same culture as the client could be helpful but also could complicate the interpreter's role. This seemed to be a nuanced skill that more seasoned interpreters developed over time, as recollected by one interpreter (female, #31):

I remember when I first started out, I thought I knew what the patient felt because I used to live there too. Over time I realized that not everyone has the same experience as me. So I have to keep an open mind, even if we come from the same place. I can't know their experiences. I can make a better guess maybe, but I can't know.

The interpreters' ability to use aspects of themselves occurred both telephonically and in person. While it was difficult for them to convey body language over the phone, they deliberately used their voice, pauses, and culturally familiar phrases to aid in the development of trust.

The interpreters described in many ways that they used parts of their personality to aid in the interpreting, as well as their shared culture, body language, voice tones, and culturally familiar phrases. They discussed the providers' personalities and style in working with an interpreter as contributing to and hindering their ability to develop trust with the client. Developing trust with the provider appeared to be based on interpretation accuracy and the interpreter's ability to adapt to the provider's expectation of the interpreter's role.

### **Discussion**

The term *self* is often used in psychotherapeutic settings to describe how a therapist consciously uses aspects of his or her personality, personal experiences, and dynamics within the relationship to enhance the intervention and deepen the trust with the client. The presence of a third person in the room affects interpersonal dynamics, particularly within a helping relationship. The provider and interpreter are

an inter-professional team present in the room to help the client. Therefore, the interpreter's presence (whether via a telephone or in person) is part of that helping intervention, beyond the interpreting services provided. The interpreter can enhance or impede the provider's work with the client, and with the client's trust and engagement in the sessions. The interpreters in this study understood many of the ways that they use themselves to enhance the sessions. They consciously used parts of themselves to deepen trust, enhance understanding, and make interventions effective. Interestingly, this was true whether the interpreter was in the room or via the telephone. The findings from this study are important because they suggest that interpreters might be under-utilized when used only as a language conduit. Perhaps interpreters should be considered as a member of the inter-professional team in health-care settings. This is a timely redefining of the interpreter's role in health-care settings in the United States. Since the implementation of the Affordable Care Act in the United States in 2014, the health-care industry has been encouraged to develop inter-professional teams in health-care delivery as a means to improve health-care outcomes and decrease health-care costs. As the narratives within this study reveal, interpreters provide valuable interventions in addition to language interpretation. While studies have examined the many roles interpreters can have, this study highlights their importance in the helping relationship. The many roles, and the methods these interpreters have found to execute these roles, are essential components within a team approach to health care where the provider and interpreter work together in the best interests of the client. It may be warranted to draw out the roles of the interpreter, make those roles more pronounced and deliberate, and train interpreters to consciously and skilfully use these roles. In addition, providers could be trained to work with interpreters as team members in the provision of care to clients.

This study examined the experiences of interpreters. The sample was diverse with a wide range of languages spoken. The gender was equally distributed, and interpreters were asked about their in-person interpretation experiences as well as their telephonic experiences. However, the study is just one examination of a topic that is complex and difficult to measure. Would a quantitative study that examined patient outcomes reveal the effectiveness of interpreters consciously using parts of themselves to enhance services? It is possible that a study that examined team approaches versus the use of interpreters as language conduits would yield results that can assess the effectiveness of one approach over another.

Interpreters work throughout the world interpreting in various settings. Especially in the health-care setting, their

presence affects the dynamics in the room with the client. In the United States, as it moves toward inter-professional team approaches in health care, viewing the interpreter as part of the team has important implications for how interpreters are trained and valued. As the United States embarks on new models for health-care delivery, it is a critical time for interpreters' roles to be re-evaluated, and their value as team members be acknowledged.

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# The Stories We Tell about Refugee Claimants: Contested Frames of the Health-Care Access Question in Canada

JESSE BEATSON<sup>1</sup>

## Abstract

A contested issue is the extent to which refugee claimants should have access to health care in Western host countries with publicly subsidized health-care systems. In Canada, for a period of over fifty years, the federal government provided relatively comprehensive health coverage to refugees and refugee claimants through the Interim Federal Health Plan (IFHP). Significant cuts to the IFHP were implemented in June 2012 by the Conservative federal government (2006–15), who justified these cuts through public statements portraying refugee claimants as bringing bogus claims that inundate the refugee determination system. A markedly different narrative was articulated by a pan-Canadian coalition of health providers who characterized refugee claimants as innocent victims done further harm by inhumane health-care cuts. This article presents an analysis of these two positions in terms of frame theory, with a greater emphasis on the health-provider position. This debate can be meaningfully analyzed as a contest between competing frames: bogus and victim. Frame theory suggests that frames by nature simplify and condense, in this case packaging complex realities about refugee claimants into singular images (bogus and victim), aiming to inspire suspicion and compassion respectively. It will be argued that the acceptance of current frames impoverishes the conversation by reinforcing problematic notions about refugee claimants while also obscuring a rights-based argument for why claimants should have substantial access to health care.

## Résumé

L'étendue de l'accès aux services de santé pour les demandeurs du statut de réfugié dans le contexte des pays d'accueil occidentaux munis de régimes de santé financés publiquement constitue un enjeu controversé. Au Canada, pendant plus de 50 ans, c'était le gouvernement fédéral qui fournissait une couverture relativement intégrale de services de santé aux réfugiés ainsi qu'aux demandeurs du statut de réfugié par l'entremise du Programme fédéral de santé intérimaire (PFSI). Des réductions importantes au PFSI ont été effectuées en juin 2012 par le gouvernement fédéral conservateur (2006-15), qui a justifié ces réductions par des déclarations publiques accusant les demandeurs du statut de réfugié d'avoir encombré le système de détermination du statut en présentant des demandes non légitimes. Un récit nettement différent avait été articulé par un regroupement pancanadien de fournisseurs de services de santé qui représentaient les demandeurs du statut de réfugié comme des victimes innocentes dont les réductions inhumaines aux services de soins de santé n'avaient fait qu'aggraver leur situation. Cet article présente une analyse de ces deux positions par l'entremise de la théorie de l'encadrement, en mettant l'accent particulièrement sur la position des fournisseurs de services de santé. Selon la thèse proposée par l'article, il serait profitable d'analyser les arguments émis dans ce débat en tant qu'affrontement entre deux cadres en concurrence, notamment le cadre de la non-légitimité et celui de la victimisation. La théorie de l'encadrement propose que les cadres, de par leur nature, simplifient et

*condensent le sujet dont il est question, dans ce cas les réalités complexes autour des demandeurs du statut de réfugié, en les réduisant à des images uniformes (non-légitimité et victime), avec le but d'inspirer soit la méfiance ou la compassion, respectivement. Le fait d'accepter ces cadres tels qu'ils sont présentés actuellement appauvrit le discours en renforçant des notions problématiques concernant les demandeurs du statut de réfugié, tout en refoulant des arguments fondés sur les droits qui favorisent un accès intégral aux services de santé pour les demandeurs.*

### Introduction

A central question for any publicly subsidized health-care system is the extent to which non-citizens should be granted access. Refugee claimants, by definition, are not yet citizens of the host state, and a continued debate is over what legitimate claims they have on social resources like health-care vis-à-vis citizens. Many scholars assert that refugee claimants should at the very least have access to emergency medical care, what Gibney argues is part of a “moral minimum” owed to precarious migrants.<sup>2</sup> Beyond this baseline of care, opinions vary widely about whether any additional health-care benefits should be provided and under what conditions.

In Canada, the question of to what extent refugees and refugee claimants should have access to health care was contested in a heated and public manner, in the wake of cuts to the Interim Federal Health Program (IFHP). For over fifty years the Canadian government provided relatively comprehensive health insurance coverage to refugees and refugee claimants through the IFHP. When the Conservative federal government (February 2006–November 2015) significantly reduced the scope of this health coverage on 30 June 2012, all refugee claimants lost coverage of medications, and many others lost access to medical services, except for rare instances where health conditions were deemed a risk to public health or safety.<sup>3</sup> On 19 October 2015, the Liberal Party was elected and in April 2016 restored IFHP health coverage to previous levels.

The scope of this article concerns the status of the IFHP under the Conservative government. It was this era in which the IFHP cuts were made, and accordingly, this is when the event of interest for this study took place: a discursive struggle in the media between the Conservative federal government and refugee health-provider advocates. For each of these two parties, their public statements can arguably be distilled into single generalizing labels applied to refugee claimants. These labels centred drastically different features that claimants allegedly exhibit.

This article demonstrates that these labels acted as short-hands for the more complex political positions of the Conservative federal government and doctor advocates, who were each endeavouring to steer a national conversation about what Canada owes to claimants in health coverage. This period of recent Canadian history (2012–16) presents an opportunity, therefore, to study how conflicting ways of representing refugee claimants in the media are linked to differing determinations about their entitlements to health services. In other words, it is a comparison between two different “stories” that have consequences. The consequences of these media portrayals are significant. We see in the United States the way that the portrayal of the “deserving” vs. “undeserving” poor has justified cuts in the social safety net.<sup>4</sup> To this end, this article borrows conceptually and methodologically from frame theory, a type of discourse analysis.<sup>5</sup>

The literature on frame theory is rich and diverse, with intellectual roots stretching back to the 1970s.<sup>6</sup> The frame theory that is relevant here, however, is its recent application to the collective arena, exploring how frames are used strategically to mobilize people around particular political causes and issues. Attention will be paid to the inability of refugee claimants themselves to have participated as equal partners in the national conversation on their access to health care; the responsibilities that should flow from the fact of refugee claimants’ muted political voice to those who speak on their behalf; the main frames that were in play regarding refugee claimant health care and what they highlighted, compared to what they obscured from view; and finally, the tension between the need for frames in an adversarial public dialogue and how even “pro-refugee” framing may have negative ramifications for the claimants who are being characterized.

### Background

It is no wonder that refugee claimants are the subject of discursive activity. While the determination of their legal identities follows the relatively fixed process of immigration and refugee boards, their social identities are in limbo because they are between states of civic belonging; they have fled their country of origin and are not yet members of their host country. Lacking the benefits of citizenship in the host country, their political voices are muted. Simply put, they are not in a favourable position to have their own narratives and perspectives heard. Instead, they are an ideal screen upon which various images, conjured by more powerful and civically entrenched actors, can be projected. As noted by Phillips and Hardy, there are two components of refugee identity: first, *what* a refugee is; and second, *who* is

and who is not a refugee.<sup>7</sup> While the second component is determined largely by the legal and institutional processes of refugee determination, the first is a more open question, influenced largely by the discursive productions of actors who vie to advance their agendas.

Since refugee claimants have limits placed upon their capacity to, as it were, tell their own stories, a lot of power is placed in the hands of those who do this representational work on their behalf. Malkki notes that even when discourses on refugees or refugee claimants attempt to empower and humanize, they inevitably construct a limiting “vision of humanity that repels elements that fail to fit into the logic of its framework.”<sup>8</sup> In other words, discursive constructions of refugees necessarily entail generalizations that deny complexity and the uniqueness of the individual. To advance a side of a public debate, even if it is a “pro-refugee” stance, generalizations will be necessary. Nonetheless, the degree to which the potential harm of these generalizations is outweighed by benefits is an area for critical inquiry and assessment.

A tension presents itself to those who would put themselves in the role of advocates. On the one hand, there is a responsibility to do justice to the complexities of what is essentially other people’s lives, to render into high resolution their diverse experiences and subjectivities. On the other hand, there is a practical necessity to put forward an advocacy message that is clear and concise enough for it to be effectively digestible and able to circulate widely. The concept of a frame is a helpful analytic device for understanding the discursive process that occurs in substituting relatively clean-lined images for necessarily jagged realities. Importantly, frames do not fit the world as it is, and by extension, they are never neutral representations.<sup>9</sup> The subject of a frame is like the elephant from a famous parable. The frames themselves are the blind men who each appraise one facet of the animal: upon comparing notes, they are inevitably going to disagree about what they are describing because each has only one piece of the puzzle.

Frame theory has a rich academic lineage, dating back to the mid-1970s. Goffman, a sociologist, studied institutions and contended that every institution is structured by a frame, a kind of unconscious social script. Goffman defined a frame as a “schemata of interpretation” that enables individuals “to locate, perceive, identify, and label” events and phenomena occurring in the world.<sup>10</sup> Fillmore, a linguist, wrote about frames at around the same time and proposed that every word is defined with respect to a frame. As an example, the word *surgeon* has a series of readily triggered linguistic and conceptual associations, such as *operating room* and *scalpel*, which in turn enrich our understanding of the original word.<sup>11</sup> In both Goffman’s and Fillmore’s

accounts, frames are structures that inform, as well as constrain, the way a thing is talked about and understood. More recently, the concept of frames has been employed in the collective arena, with frame analysis studying how frames might be strategically used in social mobilization. Kligler-Vilenchik and Thorson note that participants and observers in a public discourse may not be able to name the “title” or “category” of a frame.<sup>12</sup> They may still have a sense for how the ideas in a frame cluster together, what have been called “interpretative packages.”<sup>13</sup>

Once seen through the angle of vision provided by a certain frame, its subject can become difficult to perceive and interpret in alternative ways. Indeed, when unchallenged, a frame can become what Bourdieu termed *doxa*, an established way of thinking about something that is presented as self-evident and experienced as the “natural world that is taken for granted.”<sup>14</sup> This persistence of frames to shape thinking has been studied by cognitive linguists such as Lakoff, who posit that frames are not simply abstract entities but have corresponding physical manifestation in neural structures in the brain.<sup>15</sup>

Frames are not equivalent to ideologies, though there are surface similarities. Ideology is defined by Benford and Snow as “pervasive and integrated sets of beliefs and values” that have historical longevity.<sup>16</sup> Frames, by contrast, can be employed as extensions of, or correctives to, existing ideologies. Accordingly, ideology can either constrain or bolster framing processes.<sup>17</sup> Benford and Snow call this “meaning work—the struggle over the production of mobilizing and countermobilizing ideas and meanings,”<sup>18</sup> while Hall terms it “the politics of signification.”<sup>19</sup> I will use the term *frame contest*. Underlying these concepts is the notion that meaning is constructed in a dynamic and evolving process, an ongoing contest of frames and counter-frames. Having a convincing frame or frames will give one a greater chance of shaping how an issue in question is viewed.

### Methods

Teo describes how discourse analysis is particularly well-suited for examining data such as news articles and press releases containing messages that seem, or are portrayed as, neutral but that nonetheless contain ideological content.<sup>20</sup> Academic journal articles, newspaper articles, and press releases published between April 2012 and November 2015 were examined. Given the primary interest of this article on responses to the IFHP cuts, an initial search was performed on PubMed and Medline with the keyword phrase *Canada cuts to refugee health*, with each database yielding 9 results. A similar search was repeated using Google Scholar with a custom range of 2012–15 and with the added exact phrase *refugee health*, yielding 339 results. A Google News search

was performed further targeting articles tagged with *Canadian doctors for refugee care*, yielding 91 results. In addition, the CDRC website was consulted, particularly the sections titled “Further reading/survey”—a collection of CDRC press releases—and “In the news”—a list of newspaper articles related to refugee health advocacy in Canada. All articles related to the IFHP cuts were retrieved and considered for analysis. A subsequent search on Google Scholar used the phrases *refugee bogus*, *refugee victim*, *refugee rights*, and *refugee right to health*.

Analysis followed an iterative, inductive process, as is standard in discourse analytic methods. While reading through the sources, text sequences that characterized and defined refugee claimants, whether positively or negatively, were collected. Thematic recurrences of subject matter were recorded until the predominant character of both Conservative federal government discourse and CDRC discourse emerged. The structural features of these “texts” were not analyzed, as the focus was not on macro-level analysis but instead on identifying primary discourses through the collection of relevant and frequently appearing text sequences. This process allowed for a preliminary mapping out of frames in discourse in relation to the contested issue of refugee health-care coverage.

The government discourse was found to centre on notions of bogus refugees threatening limited health-care resources, while CDRC discourse most often advanced an image of refugee claimants as victims deserving care and consideration. Codes for these bogus and victim frames were then applied manually to sources to isolate and retrieve relevant text sequences for further analysis. This study was exempt from ethics review.

### **Conservative Party of Canada: The Bogus Frame**

The Conservative federal government defended cuts to the IFHP by implying that these measures would protect the immigration system from refugee claimants who are allegedly “bogus” and intent on taking advantage of Canadian generosity. This phrase *bogus refugee* has been a particularly charged and oft-recurring theme in Conservative Party discourse.<sup>21</sup> In a discourse analysis of Canadian media, Bauder found that the term *bogus refugee* appeared most frequently in the weeks before immigration legislation was tabled, suggesting a link between discourse and efforts towards legislative change.<sup>22</sup> Negative rhetoric such as this is mirrored in the popular media and political discourse of other Western countries, where language is often dehumanizing and likens refugees and refugee claimants to swarms of insects or catastrophic floods, signifiers of threat to host societies.<sup>23</sup>

Characterizing refugee claimants as bogus, Conservative Party discourse suggested that claimants are in some sense

fraudulent outsiders whose health status is beyond the pale of communal concern. Jason Kenney, former Conservative Party immigration minister, articulated the cuts to refugee health-care as a measure taken to ensure that “tax dollars are spent wisely” and to “defend the integrity of [the] immigration system” from “bogus claimants.”<sup>24</sup> According to Kenney, there is “no legal, moral, or political obligation to give taxpayer services to bogus asylum-seekers, rejected claimants—people who are effectively illegal migrants.”<sup>25</sup>

With the bogus frame portraying refugee claimants as opportunistic “queue-jumpers” who do not deserve “gold-plated health-care,” a sweeping portrait of suspicion was created.<sup>26</sup> This framing was applied “at every moment from the time when [claimants] decide to depart to the moment when they present themselves for determination.”<sup>27</sup> Although Canadians tend to be generally pro-immigration, they are often more reticent regarding refugee claimants. As Tribe has observed, “Refugees are often resented by the host nation, which may feel less than inclined to put resources into refugee health and they may be attributed marginal or ‘out-group’ status.”<sup>28</sup> Negative attitudes toward refugee claimants were more prevalent following the August 2010 arrival of nearly 500 Tamil refugee claimants on the *MV Sun Sea*, portrayed by the Conservative government as potential terrorists as well as “queue-jumpers.”<sup>29</sup> In a winter 2010 poll, 70 per cent of Canadians indicated that they had doubts about the validity of many refugee claims.<sup>30</sup> More recently, a poll from the Angus Reid Institute found that two in five Canadians wanted Canada to immediately stop taking Syrian refugees.<sup>31</sup>

The stated rationale for the IFHP cuts is misleading, both in its characterization of refugee claimants as bogus and in its suggestion that only these allegedly bogus claimants were affected by IFHP cuts. The notion of bogus refugee claimants elides the fact that many claimants eventually become Canadian citizens and hence cannot possibly have anything but legitimate claims. Canada’s own Immigration and Refugee Boards found that half of the 19,960 claims processed in 2014 met the strict criteria for refugee determination—this includes many claims made from so-called designated countries of origin (DCO), countries like Mexico and Hungary that Conservative government policy categorized as “safe” and thus not refugee-producing.<sup>32</sup>

As noted in a press release by the Canadian Association of Refugee Lawyers (CARL), the refugee definition is technical, and even for those who do not meet these strict criteria it does not necessarily indicate any malicious intentions: “Many claimants come with a genuine fear of harm but may not meet the definition of a refugee. That does not make them frauds or bogus, or abusers of the system. Their search for protection is genuine.”<sup>33</sup> In terms of the suggestion that

only so-called bogus refugees were targeted by the cuts, the federal government's own "Summary of Benefits" webpage stated that cuts affected all refugee claimants while their claims were being processed, not only once their applications have been rejected.<sup>34</sup>

### **Canadian Doctors for Refugee Care: The Victim Frame**

In response to refugee health cuts, a pan-Canadian coalition of health professionals formed called Canadian Doctors for Refugee Care. CDRC advocated for the restoration of IFHP health coverage to prior levels. CDRC and its individual members worked both behind the scenes—enlisting health professional associations and lobbying with political parties—and in public, including occupying the offices of members of Parliament, publically confronting Conservative MPs, and organizing public rallies.<sup>35</sup> Furthermore, along with two other public interest applicants—CARL and the Toronto legal clinic Justice for Children and Youth—CDRC engaged in a legal challenge of IFHP cuts. CDRC's legal application to strike down the IFHP cuts of June 2012 was granted by a Federal Court in July 2014 on the grounds that the health cuts constituted "cruel and unusual treatment."<sup>36</sup>

The aim of much of CDRC's advocacy work seemed to focus on replacing negative, widely circulated notions about refugee claimants with more positive, sympathetic representations. CDRC suggested that the term *bogus* "implies these are people who have made a fraudulent claim," which contradicts the reality that many have already been accepted and many others will be found to have legitimate claims.<sup>37</sup> Contrasting with the Conservative Party's representation of refugee claimants as bogus, CDRC highlighted the vulnerability of claimants in their public statements. Primarily, CDRC focused on an image of claimants as innocent victims. As victims, claimants were justified to be deserving recipients of publicly funded services. Moreover, CDRC placed a strong rhetorical emphasis on depicting Canadians as generous and compassionate. In a 23 October 2012 press release, for instance, CDRC suggested, "Our compassionate instincts as Canadians and the evidence points to the IFHP cuts being bad policy."<sup>38</sup> Hence, CDRC contended that that the health cuts were wrong both because they contradicted empirical evidence and because they violated the humanitarian values of Canadians.

According to CDRC, "The impact of the federal Conservative government's cuts has been devastating," for instance with many pregnant women, sick children, and cancer patients who experienced "unwarranted suffering" until the Federal Court reversed the cuts.<sup>39</sup> Indeed, CDRC described refugee claimants in Canada as "some of the most vulnerable people in the world" and "the most insecure and

defenseless among us," often experiencing "poor mental health" and might be "suicidal or suffering from posttraumatic stress disorder."<sup>40</sup>

CDRC argued that the Conservative government's framing of restricting refugee health care as a public safety issue dehumanized refugee claimants: "The refugee person in this context is no longer valuable as a unique and worthy human being but is considered a 'risk factor' for others."<sup>41</sup> Here CDRC challenged Conservative Party discourse that borrowed the language of public health and contributed to negative and dehumanizing representations of refugee claimants. A CDRC press release of 27 January 2014 states, "This is not the fair and generous Canada that we know."<sup>42</sup>

In highlighting the vulnerability and victimhood of refugees and the compassion of Canadian citizens, this approach of CDRC's can be labelled a victim frame. Van Gorp studied Belgian media sources and demonstrated how coverage described refugee claimants in simplistic binaries as either "innocent victims" or as "intruders."<sup>43</sup> The victim frame was found to be associated with calls for and support of humanitarian policies. The intruder frame, on the other hand, was linked to anti-refugee policy proposals and sentiments.<sup>44</sup>

### **Risks in Employing a Victim Frame to Promote Health-Care Access**

While undeniably successful in many respects, CDRC's advocacy still warrants critical examination. Given a context where certain anti-refugee and anti-migrant discourses are widespread, the characteristics of refugee claimants that are highlighted in constructing more positive representations is a consequential topic worth analyzing. As a group, refugee claimants are often marginalized from mainstream services, and this is linked partly to discourse portraying them as "undeserving" in contrast to "deserving" refugees.<sup>45</sup> The counter-discourse to this binary separation of undeserving from deserving has tended to be couched in a humanitarian ethos. If refugee claimants are pictured uniformly as victims, as they were by CDRC, then it follows that they are all equally deserving.

Kurasawa highlights how an essential part of any humanitarian discourse is to "actively construct objects and sites for intervention" by naming vulnerable and victimized populations.<sup>46</sup> Although assignment of victim status to refugee claimants may have some grounding in clinical realities, it is also connected to a particular framework—what Gottlieb, Filc, and Davidovitch call "medical humanitarianism"—that is not neutral in its assumptions about how best to allocate social resources and on what grounds.<sup>47</sup> Specifically, this framework is grounded in notions of charity, that the needy are broadly deserving of care. As this is a particular

framework, rationalizing the granting of health care to claimants in a way that is not necessarily subscribed to by others who advocate for these same general goals, it will have its own consequences: positive and negative, intended or otherwise.

In assigning victim status to refugee claimants, a link was drawn to other characteristics of “ideal victims,” such as passivity, weakness, helplessness, and neediness.<sup>48</sup> If an individual in question does not fully embody those characteristics, there can be negative consequences; for example, the individual can lose tenuous, socially granted legitimacy and deservingness. One reason for losing this provisional legitimacy, as highlighted by Beiser, is through not repaying a debt of gratitude that some members of a host society may think is owed for the “generosity” refugees and refugee claimants have received.<sup>49</sup> This implicit requirement to repay such a social debt may put significant pressure on claimants and, moreover, may constrain their capacity to assert their rights or contest the conditions of their treatment.

Hardy and Phillips have argued that portraying refugee claimants as victims risks being overly paternalistic and “promotes a stereotypical view of refugees as helpless, defenceless individuals.”<sup>50</sup> Moreover, suggesting that claimants as an entire population are victims can be seen as a form of Othering. Conceptualized by Said in his foundational text *Orientalism*, Othering involves a form of symbolic violence, the forcible creation of identities to fit a certain narrative.<sup>51</sup> Contemporary scholarship by Johnson found that the image most frequently reproduced in photographs of refugee claimants is of individuals who are victimized and racialized.<sup>52</sup> Such images are so common that the subtle Othering contained in them might not be readily perceptible. Similarly, Rajaram raises concerns about images and discourses that reduce refugee claimants to their suffering bodies: “Corporeal, refugees are speechless and consigned to ‘visuality’: to the pictorial representation of suffering and need.”<sup>53</sup> This emphasis on visual depictions of suffering may promote perceptions that refugee claimants are somehow more bodily beings than the host population, lacking in complex consciousness and the capacity for articulating nuanced opinions.

### ***Humanitarianism vs. Human Rights***

A victim frame as applied to health-care access for refugee claimants promotes a certain connection of health coverage as a type of humanitarian assistance. A clear hierarchy differentiates the generous giver from the recipient of charitable support. In contrast with rights discourses, humanitarian logic is “about the exception rather than the rule” and therefore is contrary to an advocacy position promoting the notion of universal rights.<sup>54</sup> Arguments grounded in this

status of the exceptional victim are “situationally specific and are about moral worthiness,” which are contrasted with “universalizing juridical arguments” that apply across all contexts and are about formal entitlements to health rights.<sup>55</sup> Although health advocacy informed by a humanitarian ethos share some “common ends” with rights-based advocacy, as noted by Slim,<sup>56</sup> the difference in the underlying logic—charity versus obligation—has significant implications.<sup>57</sup> Whether or not refugee claimants “deserve” health coverage would be a largely irrelevant question from a perspective informed by rights.

In contrast to a hierarchical advocate–victim relation set up by humanitarian discourse, in rights-grounded advocacy marginalized individuals can theoretically become empowered by becoming their own advocates. This was proven to work to an extent in South Africa, where a campaign for access to medicines for the HIV-infected started in the 1990s and reached its height in the early 2000s. This campaign involved impoverished and infected individuals mobilizing and deploying a legal framework in making their demands.<sup>58</sup> By contrast, advocacy based strictly on humanitarian principles leaves little room for the marginalized to participate as anything other than figures emblematic of victimization.

Within CDRC, there was a strong belief that refugees and refugee claimants have a right to health care.<sup>59</sup> The decision to frame the issue around victimhood and deservingness is likely based, then, on an assessment that this is the most efficient strategy to garner broad support across the political and ideological spectrum. There are other pragmatic reasons perhaps that informed why CDRC did not lead with a rights discourse. Specifically, the victim frame avoids the potentially controversial and polarizing stance of attempting to elevate the status of refugee claimants in Canadian society on a more fundamental and permanent level, an agenda that may not have had enough public buy-in.

### ***Rights-Based Arguments: Challenges and Opportunities***

CDRC’s adoption of a victim frame is not a neutral advocacy stance, and it is important to note that despite the prevalence of this frame in popular media, other alternatives are available. Given that there are several potential problems with the victim frame as a mode of advocacy, why then, as Taylor asks, are rights-based arguments used so infrequently in public discourse about refugee and refugee claimant issues?<sup>60</sup> Rights are the “banner under which struggles against oppression and exclusion have been fought (and sometimes won) over the past century,” and “assertions of right are the strongest tools of the law.”<sup>61</sup> Rousseau and colleagues point to the growing legitimacy of the human

rights framework, which by the mid-1990s was endorsed and utilized by a wide range of international actors.<sup>62</sup>

Dauvergne believes that in the case of asserting health rights claims on the behalf of refugee claimants, rights-based advocacy is often practically ineffective, as it implies a controversial obligation and positive duty for host societies to provide health care to those who are not full members.<sup>63</sup> It is true that while there is broad-based international support in Western countries for civil and political rights, there is ambivalence from these governments on social rights.<sup>64</sup>

An additional challenge with rights discourse in this context is that it may not be as familiar a mode of advocacy for health professionals. Both Castañeda and Willen report that health professionals concerned about health-care access for refugee claimants most commonly frame this in humanitarian terms.<sup>65</sup> Vanthuyne and colleagues conducted a survey with Canadian health professionals where a majority of respondents who believed uninsured patients should receive health care articulated this in terms of moral worthiness or “deservingness,” rather than framing uninsured individuals as “subjects of rights.”<sup>66</sup> A rights discourse is perhaps less intuitive and actually challenges the privileged position that clinicians occupy in society.

Centring advocacy on a “right to health” may also meet challenges from those who assert that there is a lack of concreteness to the concept itself or that consensus acknowledging its full existence is missing. Ruger claims that one would be “hard pressed to find a more controversial or nebulous human right than the ‘right to health.’”<sup>67</sup> Ambiguity around health rights has been attributed to various issues, including what Daniels describes as a lack of a proper philosophical foundation,<sup>68</sup> and also the fact that tax-based health systems like Canada’s did not develop within a legal rights framework but as part of the modern welfare state.<sup>69</sup> Sources of the right to health, however, are not lacking. Contemporary international law, which includes the International Covenant on Economic, Social and Cultural Rights, provides a robust defence of the right to health that is inclusive of refugee claimants. Importantly, the ICESCR specifies a legal obligation on states to “respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services” as well as to abstain from “enforcing discriminatory practices as a State policy.”<sup>70</sup> Seventy states are signatories to the ICESCR, though fewer have ratified it.

Despite some aforementioned challenges, from an advocacy standpoint rights-based arguments have certain advantages. They can help to avoid the Othering of the victim frame, changing the emphasis on access to health care from

charity to obligation and thereby providing a more consistent source of legitimacy to refugee claimants as users of health-care services. Claimants would not have to rely to the same extent on the empathy or compassion of health professionals in order to gain needed care. Biased ideas and preconceptions regarding refugee claimants have been found to be fairly common among health-care professionals.<sup>71</sup> Given the necessary limitations of compassion as a basis for protecting the health of this population, repositioning refugee claimants as rights-holders appears to be a promising avenue. Further, by emphasizing the rights of refugee claimants, the capriciousness of public sentiment would be less likely to lead to new refugee health-care cuts. Host society sympathy for the plight of refugee claimants may fluctuate, and with it today’s victims may be transformed into tomorrow’s threats. Grounding the discourse in a language of rights, a more difficult status to strip away than victimhood, would create some protection for refugee claimants from these inevitable changing tides of popular opinion.

Some limitations of this work should be noted. First, materials analyzed were retrieved in three large databases by using specific keywords and phrases in English only. Perspectives expressed in mainstream French Canadian media, for example, may have been missed if not translated and included in English sources. Second, structural features of these texts were not assessed. Third, this article focuses on only one aspect of advocacy/policy mobilization and, although recognizing that individuals, organizations, and movements can hold and be shaped by conflicting frames, the necessarily reductive approach of frame analysis may have resulted in the exclusion of some perspectives. Frame analysis is only one tool for analysis that intends to contribute toward advocacy. Further study could consider the political opportunities, mobilization, and resources for social movement organizing by refugees.

### Conclusions

The victim frame chosen by CDRC appears to have had efficacy, but it may have unintended effects. This article has asserted that there is a need to keep a critical gaze on discursive framing strategies employed in advocacy, even when these strategies have proven successful. In particular, the achievement of short-term goals must be thoughtfully considered in parallel to longer-term aims of broader political and social change. The potential advantages for refugee advocates of leaving rights out of the discussion should be further studied in addition to further assessment of potential risks in the way refugees and refugee claimants have been portrayed as victims.

What does the relative under-utilization of rights-based arguments say about the status of refugee claimants in Canada,

and more generally, in Western host societies? It sheds light on the position of refugees in host societies as fundamentally unequal. Moreover, it is suggestive of a current ceiling on state commitments to refugees, and also of limited supplies of host population sympathy to the cause of refugee claimant empowerment beyond what can be achieved through charity. There may be a generalized willingness to help and extend services, but only on certain terms. Help is rendered with a certain self-satisfaction and can be withheld on reasonably justifiable grounds because assistance is optional and beyond the bounds dictated by duty.

A more secure foundation for justifying refugee claimants' access to critically needed health services could be built around portraying them as rights-holders, rather than as deserving recipients of well-intentioned charity. In pragmatic terms, however, advocacy based on a victim frame may be the best solution to achieving immediate results to urgent problems such as gaps in health coverage. What is important from an advocacy standpoint is that discourses that are selected be critically evaluated for their weak points as well as benefits, the ways they are potentially hurting as well as helping. Refugee claimants are rarely afforded the opportunity to tell their own stories, and so the stories that are told about them have significant influence in defining their public image, setting the terms of the debate over their level of access to health services.

## NOTES

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- 2 Matthew Gibney, "Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens" (research paper, United Nations Development Programme, Human Development Reports, 2009).
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# “The most brutal immigration regime in the developed world”:<sup>1</sup> International Media Responses to Australia’s Asylum-Seeker Policy

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## Abstract

*Despite intense media coverage of Australia’s asylum-seeker policy, there is minimal attention to structures and processes that influence international media perspectives. This article explores international media responses to Australia’s policy using a mixed-method approach. Our research focused on twenty-five articles from international media outlets surrounding the 2014 “riots” at Manus Island Regional Processing Centre. Three major themes (political relationships, domestic policy and practice, and treatment of asylum-seekers) highlight some key trends in international media representations of this event as an example. We discuss the implications of such findings for the production, representation, and reception of international media stories.*

## Résumé

*Malgré une couverture médiatique intense de la politique australienne concernant les chercheurs d’asile, il y a très peu d’attention portée aux structures et processus qui influencent les perspectives médiatiques internationales. Cet article étudie les réactions de la part des médias internationaux concernant la politique australienne en utilisant une approche à méthodologie mixte. Nos recherches se sont portées sur 25 articles émanant de diffuseurs de médias internationaux autour des « émeutes » de 2014 au*

*Manus Island Regional Processing Centre (centre de traitement régional pour l’immigration de l’île de Manus). Trois thèmes principaux (Relations politiques, Politique interne et pratiques, et Traitement des chercheurs d’asile) mettent en valeur des tendances clés dans la représentation de la part des médias internationaux de cet événement particulier en tant qu’exemple. Nous abordons une discussion des implications de ces recherches pour la production, la représentation et la réception des actualités médiatiques internationales.*

## Introduction

Between 16 and 18 February 2014, a range of Australian media sources, including the Australian Broadcasting Corporation (ABC), the *Sydney Morning Herald*, the Special Broadcasting Services (SBS) and the *Guardian Australia* reported on “riots” that erupted at the Manus Island Regional Processing Centre, an immigration detention centre for processing asylum-seekers in Papua New Guinea, operated on behalf of the Australian government. The reported “riots” resulted in around sixty asylum-seekers being injured and the tragic death of a twenty-three-year-old Iranian asylum-seeker, Reza Berati.<sup>2</sup> The violence that ensued following the news of his death once more pushed the issue of Australia’s mandatory detention policy and the conditions under which asylum-seekers live in offshore processing centres into the international spotlight.

Domestic and international media attention to Australia's policy of mandatory detention of asylum-seekers is not new or unusual. Mountz, for instance, suggests that on the international scene, Australia is perceived as having "endless creative capacity" when it comes to the harshness of its asylum-seeker-policy. For instance, in November 2014, the United Nations Committee against Torture strongly criticized the government's handling of asylum-seekers in offshore detention centres; subsequently, Australia's Human Rights Law Centre stated, "On asylum-seekers, Australia is acting in absolute defiance of international law and is being condemned on the world stage for doing so."<sup>3</sup> This suggests that Australia's ability to meet its international obligations to refugees and to implement humane asylum-seeker policies are constantly under scrutiny.

Prior to the 2014 events on Manus Island, Australia had experienced two decades of mandatory detention and offshore processing.<sup>4</sup> First accounts of what the Australian government would today classify as "unauthorized" boat arrivals commenced around 1976 and continued until 1981, carrying Indochinese asylum-seekers following the aftermath of the Vietnam War. During this time, 2,069 asylum-seekers were met by a mainly sympathetic reception from the Australian public, and as these arrivals were perceived as "genuine," asylum-seekers were granted refugee status relatively quickly.<sup>5</sup> However, between 1989 and 1994, another thirty-six boats carrying 1,688 asylum-seekers arrived, and the previously welcoming Australian public questioned their legitimacy as "jumping the immigration queue." This attitude was fuelled by public and political discourses that saw these new asylum-seekers as a threat to the economy and security of Australia.<sup>6</sup> In 1992, the Keating Government (Australian Labor Party) responded to such public perceptions, with bipartisan support, by introducing mandatory detention for any non-citizen arriving in Australia without a visa.

Deterrence measures increased in September 2001 under the Howard Government (Liberal-National Coalition) through the "Pacific Solution," particularly in reaction to the well-documented "Tampa Affair."<sup>7</sup> Asylum-seekers arriving "unlawfully" were sent to Australian-funded detention facilities on nearby islands, namely in Nauru, Manus Island, and Christmas Island, where they remained indefinitely until their claims were processed. Those recognized as refugees were resettled in Australia or a third country (the preferred option). In 2008, the Pacific Solution was formally ended by the Rudd Government (ALP), which saw the closure of offshore processing centres and the removal of Temporary Protection Visas (TPVs). However, this policy stance was seen as unpopular and was consequently reinstated by the succeeding Gillard Government (ALP), who,

from August 2012, oversaw the reintroduction of offshore processing in Nauru and on Manus Island.<sup>8</sup>

As discussed further in the literature review, the current predominantly negative public perceptions of asylum-seekers in Australia not only have the potential to influence how government policies are designed, but can also be employed by government as a "tool" to legitimate policy changes.<sup>9</sup> Recent research suggests that most perceptions stem from erroneous or misleading beliefs, where asylum-seekers are socially constructed as "illegal" and "non-genuine."<sup>10</sup> More recently, Australian asylum-seeker policy has embraced a focus on border protection,<sup>11</sup> indicating a shift to a militarized and securitized model. In September 2013, following the election of Tony Abbott as prime minister, the coalition government's policy aptly entitled Operation Sovereign Borders<sup>12</sup> was introduced, shaped by constructions of asylum-seekers as the threatening "other."<sup>13</sup> The policy comprises a task force headed by an Australian Defence Force (ADF) general and is granted the ability to "turn back" suspected "illegal" entry vessels (SIEVs) and their passengers to countries of origin (including Sri Lanka and Indonesia).<sup>14</sup> This strategy has caused significant political tension between Indonesia and Australia, as the Indonesian government has yet to agree to either the incursion of the ADF in Indonesian territorial waters or to co-operate with the turning back of the vessels seen to be "illegal."<sup>15</sup>

In addition, Operation Sovereign Borders includes the denial of permanent protection visas to asylum-seekers arriving by boat, the reintroduction of TPVs, and the increased capacity of offshore detention centres. The militarized aspect of the policy has also affected the level of access to details on the "operation," as the previously held weekly media briefings from the Department of Immigration and Border Protection were discontinued in January 2014.<sup>16</sup> The media blackout was justified by establishing Operation Sovereign Borders as a "war" on people smugglers with Prime Minister Tony Abbott stating, "If we were at war, we wouldn't be giving out information that is of use to the enemy just because we might have an idle curiosity about it ourselves."<sup>17</sup> As a result, media access to detention centres, whilst already constrained, has been heavily restricted,<sup>18</sup> and the introduction of the Australian Border Force Act 2015 has compounded the issue, as it makes it a criminal offence for workers to disclose any information about detention centres—those who do, risk facing up to two years' imprisonment.<sup>19</sup>

### ***Representations of Asylum-Seekers in the Media***

Despite the pervasive media commentary on Australia's refugee and asylum policies, there is surprisingly little critical analysis of such commentary, but the growing body of

research on how asylum-seekers are imagined and socially constructed in the Australian media predominantly suggests undue government influence on the reporting of asylum-seekers.<sup>20</sup> In particular, there has been minimal attention to the social and cultural practices and conventions that influence perceptions of Australia's asylum-seeker policy from an *international* media perspective. The aim of this article is to look at trends in media representations in international reporting using the Manus Island "riots" as one key example, to contribute a critical perspective on what drives international media reactions to Australia's asylum-seeker policy. In the context of a small social policy research project at University of New South Wales Australia, we sought to explore the following question: *How is the Australian asylum-seeker policy socially constructed within the production, representation, and reception of four international media organizations?* In this article, *production* refers to institutional procedures for gathering, selecting, writing, and editing news.<sup>21</sup> *Representation* highlights the schematically organized ways to convey information.<sup>22</sup> Finally, *reception* refers to potential interpretations and comprehension of information offered in news stories.<sup>23</sup>

First, our article briefly discusses key debates on public perceptions of asylum-seekers in Australia, particularly domestic media representations of asylum-seekers, and the intertextuality of media and the state. While the focus is on international media, we outline these debates as background to situate the emerging findings on trends in international media representations discussed in the article. We then present our findings based on a sample of twenty-five articles (appendix A) surrounding the Manus Island detention centre "riots" in February 2014; our research focused on the seven months between 1 November 2013 and 1 June 2014. The twenty-five online news articles were drawn from the *Guardian (UK)*, the *New York Times*, the *New York Times International*, and *Al Jazeera*. In addition to their accessibility to a global readership, these publication outlets were chosen to represent a diverse sample, including a mix of news articles, feature articles, and editorial pieces from different countries. Three major themes emerged through our mixed-methods approach of quantitative and textual analysis: (1) political relationships, (2) domestic policy and practice, and (3) treatment of asylum-seekers. These key themes not only bring into question the legality and legitimacy of Australia's policy in the context of diplomatic relationships, particularly with Indonesia (as a "source" country for asylum-seekers in transit), and in the context of international law more broadly, but also highlight some of the policy and practice failures of mandatory detention. We conclude by discussing implications for production, representation, and reception of international media on this topic.

## Literature Review

### *Public Perceptions of Asylum-Seekers in Australia*

Recent research suggests that negative perceptions of asylum-seekers in Australia are seamlessly linked to notions of threat, illegitimacy, and instability in the minds of the public because of the way asylum-seekers are depicted in the media.<sup>24</sup> This concept of threat stems from the Australian government's approach of positioning asylum-seeker arrivals—particularly by boat—against notions of sovereignty, and extending this perceived "threat" into debates on the country's economy, resources, culture, and, importantly, national security.<sup>25</sup> In addition, after the terrorist attacks in New York on 11 September 2001, different media outlets and some politicians have linked asylum-seekers (particularly of Middle Eastern or Muslim backgrounds) arriving by boat to discourses of terrorism and threats to national security.<sup>26</sup> These perceptions have played an important role in creating a social "othering" of asylum-seekers and refugees in Australia,<sup>27</sup> developing a more strident "anti-asylum-seeker" discourse over time.<sup>28</sup> The construction of asylum-seekers as a threatening "other" has contributed significantly to rising public support for harsher policies,<sup>29</sup> as political rhetoric can effectively be used to inflame public perceptions that are already negative.

The apparent proliferation of negative perceptions of asylum-seekers in some media outlets and by politicians from the two main political parties is underpinned by concepts of sovereignty, and in particular the Australian body politic's reconceptualized notions of sovereignty, referring to "exclusion with external forms of influence or involvement in domestic political affairs."<sup>30</sup> This (re)interpretation of sovereignty has shaped the focus on border security in asylum-seeker discourses, and as such, these representations of sovereignty appear important to the Australian government to support their policies and strategies of constructing asylum-seekers as "illegals" to then provide "solutions" to stop boat arrivals.<sup>31</sup> Commencing with a statement in October 2001 by Prime Minister John Howard ("We will decide who comes to this country and the circumstances in which they come")<sup>32</sup> and continuing to this day encased in a militarized guise, sovereignty is now articulated by the current government as the "right to exclude," citing in its defence for this strategy an obligation to protect Australian citizens from terrorism and the deviant "other."<sup>33</sup> Concurrently, media representations of ideas of sovereignty arguably play a key role in supporting, sustaining, and "setting the agenda" for the government's campaign by constructing public opinion rather than merely reflecting it.<sup>34</sup>

### *Domestic Media Representation of Asylum-Seekers*

In Australia, asylum-seeker and refugee advocacy groups increasingly use social media to good effect in their media

campaigns, and there is a growing trend among such groups to counter negative portrayals of asylum-seekers through positive coverage of asylum-seekers' stories. For instance, the material developed by a national online community advocacy group Get-Up, and a volunteer not-for-profit human rights media organization Right Now, suggest the potential for the use such stories to lobby the government for more compassionate responses.<sup>35</sup> In sharp contrast, the literature suggests that traditional domestic media have perpetuated representations of asylum-seekers as deviants, juxtaposed with discourses on national integrity, disease, and otherness.<sup>36</sup> It is unsurprising then that domestic media constructions of asylum-seekers are predominantly negative, with a subtext of implied criminality.<sup>37</sup> As such, the multicultural discourse currently informing government policy is *not* shaped by principles of "social cohesion" and "integration"; rather, and considering the example of how Sudanese migrants are represented in the Australian media, there seems to be a disconnect between the multicultural agenda and "social othering" rhetoric.<sup>38</sup> Dominant media discourses can directly shape how social phenomena, including asylum-seekers arriving by boat to Australia, are interpreted and understood by its audience.<sup>39</sup> As such, the media appear to be complicit in the social construction of a particularly influential reality.<sup>40</sup>

#### *Intertextuality of Media and State*

Several authors suggest that there are two reasons why the Australian government has an apparently asymmetrical power relationship with domestic media and their role in the creation of knowledge surrounding the social construction of asylum-seekers.<sup>41</sup> Firstly, the media understandably rely heavily on government sources for information, often because they have limited options,<sup>42</sup> and by doing so may disallow a space for other stakeholder voices, including asylum-seekers, to be heard. Secondly, the production of media does not occur in a vacuum, and as a result can lead to its construction being influenced by a political rhetoric that can engender public and media perceptions of a threatening "other."<sup>43</sup> This dynamic creates a cycle whereby public perceptions and government policy are based on media and government representations, which in turn suggest that the government has led public opinion and media representations surrounding asylum-seeker policy.<sup>44</sup>

However, this asymmetrical power relation also offers an avenue for change, as the power differentials can shift according to the key events that surround asylum-seekers,<sup>45</sup> suggesting that social categorizations of asylum-seekers are not fixed but malleable.<sup>46</sup> Such shifts in power can occur for a number of reasons, but one major influence is how international events continue to shape dominant ideas about

asylum-seekers. For example, the 2001 terrorist attacks in the United States led to a change in how asylum-seekers were portrayed in the media, as mentioned above. Similarly, the extensive media coverage of the European refugee crisis in 2015–16 triggered shifts in perceptions of asylum-seekers after Germany's acceptance of thousands of mainly Syrian refugees; this changed, however, in a very short time, from being seen as an enormous act of compassion to what is now effectively portrayed by the country's far right as an act of betrayal of the German people.<sup>47</sup> Importantly though, when a *disruption* occurs to the hierarchical flow of information between the government and the media, the latter are capable of seeking other sources of information.<sup>48</sup> For example, this would have happened when the Australian government, in the context of Operation Sovereign Borders, imposed a media "blackout" for the first six months of its implementation, which in effect meant withholding access to official information on its operations from the media and public.<sup>49</sup> Nevertheless, policy shifts can occur only when diverse voices can contest political objectives,<sup>50</sup> which, when paired with external international events, can become catalysts for alternative and more balanced news reporting.

#### ***Design and Method***

The theoretical paradigm of critical realism, which posits that observable reality is socially produced through unobservable generative mechanisms,<sup>51</sup> guided our exploration of the structures and processes that may have influenced international media responses to Australia's asylum-seeker policy during the selected time frame. Such mechanisms include social practices, social agents, and language, which in turn produce social phenomena.<sup>52</sup> A mixed-methods approach is particularly valued with the theoretical framework of critical realism.<sup>53</sup> As such, the media are collectively seen as an institution, a cultural construct imbued with social values and knowledge.<sup>54</sup>

#### *Methods*

Quantitative content analysis combined with textual analysis allowed us to ascertain trends in the ways in which asylum-seekers were depicted in international media reporting and if these changed within the seven-month time frame. In our quantitative analysis, predetermined codes derived from the research aims and question (newspaper source, topic, tone, stakeholders, and politicians) provided a framework to understand how international media responded to Australia's policy and practices, by framing data through restricted analytic criteria relevant to our research question.<sup>55</sup> However, quantitative content analysis can only describe what messages are produced and transmitted by the media, rather than illustrate what *meanings*

are imparted and how these messages may be received and interpreted by audiences.<sup>56</sup> To complement this quantitative approach and further our understanding of trends in international reporting on the “riots” in Manus Island, we used textual analysis to explore questions such as “What gets reported? Where does the issue get reported? What is the location of coverage, how much gets reported, and why does it get reported?”<sup>57</sup> Our main themes, namely political relationships, domestic policy and practice, and treatment of asylum-seekers, were generated in a *concept*-driven way, based on the results summarized in table 2 (quantitative content analysis by topic). The sub-themes were then generated in a *data*-driven way, employing a subsumption strategy of textual analysis.

The coding scheme (table 6) and the sampling procedures outlined below ensured that our methods were transparent.<sup>58</sup> Given the small scale of the research, we acknowledge a limitation, in that representative results cannot be reproduced; however, our main aim was to explore recent representations in international media responses to gain a preliminary idea of trends on this topic. Initial findings on such trends can then inform future larger-scale and longitudinal research in this interdisciplinary area. Furthermore, we were aware that textual analysis cannot be completely objective as codes require interpretation of themes via researchers.<sup>59</sup> This is why we (authors 1, 3, and 4) discussed extensively and agreed on the selected codes before proceeding with our analysis. Assuming that media are socially constructed, we researchers must be familiar with the socio-political contexts in which news reports were produced,<sup>60</sup> and so this was the topic of several in-class discussions prior to the research being undertaken.

*Sampling*

Our media sample included twenty-five news print articles published in English from four international outlets: the broadsheet newspapers of the *Guardian (UK)*, the *New York Times*, the *New York Times International*, and *Al-Jazeera*. While all four are all available online, at the time of the study, we focused on the print editions of these newspapers. As this was not a funded initiative and the work was required to be completed within a short period (one academic semester), we focused on four broadsheet newspapers to gather our data. This provided us with a discrete sample to ensure that our analysis could be completed within the required time. Our aim was not to systematically analyze a large sample of articles, but to look at recent trends in international media reporting of key events around asylum-seeker issues. The articles were sourced through two databases, Proquest Newsstand and Factiva, using the search terms *Australia AND Refugee OR Asylum-seeker*. We limited

our search results to three and a half months before and after the discursive incidents surrounding the death of Reza Berati on Manus Island in February 2014, that is, between 1 November 2013 and 1 June 2014. As this tragic outcome was a notable event putting an international spotlight on Australia’s mandatory detention policy, we chose this as a specific point of reference, and extended the time frame to demonstrate a shift (if any) on media reporting over time. Our initial search returned fifty-three articles; each article was then reviewed to match our content criteria. To answer our research question specifically, each article had to relate to Australian policy and/or practice concerning asylum-seekers and/or refugees or the resulting effects of such a policy and/or practice, reducing our sample from to twenty-five articles.

**Results**

*Quantitative Content Analysis*

Using quantitative content analysis, the sample was organized through five descriptive codes: newspaper source, topic, tone, stakeholders, and politicians. Each code was tabled to detail the results in a quantitative manner (table 1). For ease of reference, articles belonging to the *New York Times* and the *New York Times International* were combined into one category (which we refer to as the *New York Times/International*).

First, articles were sorted by newspaper source: out of the twenty-five newspaper items sampled, all three publications had similar frequency of news articles relating to Australian policy and asylum-seekers. The frequency indicates that the results are not skewed towards a single media organization (see table 1).

Second, articles were differentiated by three topics (see table 2): Australian government policy and practice, asylum-seeker and/or refugees, or both topics combined. All three media organizations based the majority of their articles on Australian government policy and practice. Interestingly, unlike the *New York Times/International* and *Al Jazeera*, the *Guardian* was seen to focus on a single topic of an asylum-seeker event, instead of mixing policy and political perspectives.

Third, the articles were categorized into three “tone” dimensions: negative, neutral, and positive (see table 3).

**Table 1.** Articles by newspaper source

Newspaper	Number of articles	%
<i>Guardian</i>	8	32
<i>New York Times/International</i>	10	40
<i>Al Jazeera</i>	7	27
<b>Total</b>	<b>25</b>	<b>100</b>

**Table 2.** Subject of article by newspaper

Subject	<i>Guardian</i>	<i>New York Times/ International</i>	<i>Al Jazeera</i>	Total
Australian government policy and practice	6	6	4	16
Asylum-seekers and/or refugees	2	—	2	4
Both Australian government policy/practice and asylum-seekers and/or refugees	—	4	1	5
Total	8	10	7	25

**Table 3.** Tone of article by newspaper

Tone	<i>Guardian</i>	<i>New York Times/ International</i>	<i>Al Jazeera</i>	Total
Negative	6	9	3	18
Neutral	2	1	4	7
Positive	—	—	—	—
Total	8	10	7	25

**Table 4.** Stakeholders represented by newspaper

Stakeholders	<i>Guardian</i>	<i>New York Times/ International</i>	<i>Al Jazeera</i>	Total
Politicians	14	11	7	32
Academics and lawyers	1	4	1	6
Advocacy groups	5	2	3	10
Asylum-seekers/refugees	2	2	—	4
Total	22	19	11	52

Articles that were found to use a negative tone used words with negative connotations describing the policy and practices as “brutal,” “hard-line,” “harsh,” “illegal,” “punitive,” and “tantamount to torture” (we recognize here that the media could report on policies using a negative tone if they were perceived as detrimental to asylum-seekers and refugees, while at the same time, still be deemed successful by the government). Positive tones referred to articles that presented a favourable stance on the Australian government’s approach to addressing issues surrounding asylum-seekers through mandatory detention. Neutral articles conveyed neither a positive nor a negative position towards Australian asylum-seeker policy. We chose to analyze the tones of the articles as one way to explore the broader attitudes represented by international media towards Australian policy and practice. Overall, the tone was overwhelmingly identified as negative, and this was consistent before *and* after the events of the Manus Island “riots” in February 2014. Of note, none of the articles were categorized as positive, suggesting

that all three media organizations conveyed similar messages and opinions on Australia’s asylum-seeker policy.

Fourth, stakeholders were identified as a person or specific groups represented in the articles (see table 4). Four groups were identified: politicians, academic and lawyers, advocacy groups, and asylum-seekers/refugees. The total representation of politicians was higher than the other three groups combined, suggesting that articles were politically weighted and the media had relied predominantly on political sources. Asylum-seekers and refugees as a group were identified four times only, highlighting a lack of comments from those most affected by the set of policies. In addition, we noted that the voices most prominent in the representations of Australia’s asylum-seeker policy in international media responses were male politicians. Gender was not a category we included in our initial analysis but was one that emerged from our small sample nevertheless.

Finally, to further explore the dominant representation of politicians, we identified the names of politicians and

**Table 5.** Politicians quoted by newspaper

Politicians	New York Times/ <i>Guardian</i> <i>International</i> <i>Al Jazeera</i>			Total
	<i>Guardian</i>	<i>International</i>	<i>Al Jazeera</i>	
Tony Abbott (prime minister, Australia)	4	4	1	9
Scott Morrison (minister for immigration and border protection, Australia)	3	1	5	9
Sarah Hanson-Young (federal parliamentarian, Australia)	2	—	—	2
Susilo Bambang Yudhoyono (president, Indonesia)	1	—	—	1
Marty Natalegawa (minister for foreign affairs, Indonesia)	1	3	—	4
Julie Bishop (minister for foreign affairs, Australia)	1	—	—	1
Malcolm Fraser (former prime minister, Australia)	1	—	—	1
Richard Marles (shadow minister for immigration and border protection, Australia)	1	—	—	1
Indonesian government officials	—	2	1	3
John Kerry (secretary of state, United States)	—	1	—	1
<b>Total</b>	<b>14</b>	<b>11</b>	<b>7</b>	<b>32</b>

the frequency with which they were represented within our sample (see table 5). Ten different politicians from three countries (Australia, Indonesia, and the United States) were quoted, although this list overwhelmingly involved Australian and Indonesian politicians and government officials, with only one government official from the United States. Half of the quotes came from two politicians in the governing political party of the time, Prime Minister Tony Abbott and Minister for Immigration and Border Protection Scott Morrison. However, political voices from Nauru and Papua New Guinea were non-existent; this is surprising, as firstly, both countries are key stakeholders hosting offshore detention centres, and secondly, local workers from Papua New Guinea were involved in the Manus Island “riot.” From the analysis, Australian political voices dominated the discourse, since Australian politicians were responsible for the policy; nevertheless, the absence of voices from Nauru and Papua New Guinea in our small sample was still striking.

#### Textual Analysis

Informed by the literature review, our subsequent textual analysis identified three additional main themes and thirteen sub-themes:

1. *Political Relationships*: Australian and Indonesian Relations; and Australian Policy and International Law
2. *Domestic Policy and Practice*: Media Blackout; Policy and/or Practice Failure; Militarization; Privatization; Creation of the Deviant Other; and Government-Held Responsibility

3. *Treatment of Asylum-Seekers*: Living Conditions (Offshore); Living Conditions (Onshore); Risk to Physical Safety; Children in Detention; and Mental Health

Each article was coded into one main theme and then counted once or more into the subgroup of the main theme (table 6, appendix B). The media outlets focused on Australia’s political relationships with the Indonesian government, highlighting the changing level of tension and cooperation between the two nations. Additionally, political voices were often referenced in defence and criticism of offshore detention policy. Of note, the category of Treatment of Asylum-seekers (specifically Risk to Physical Safety) was discussed frequently, detailing the harsh and uninhabitable environments of detention centres.

Table 7 (appendix B) shows the results of the three main themes outlined in table 6 but by newspaper source. Key trends in media representations reveal that:

4. The *Guardian* reported the highest frequency of news articles on Domestic Policy and/or Practice in relation to asylum-seekers (fourteen).
5. The majority of articles published in both the *New York Times/International* (eight) and *Al Jazeera* (six) were coded into subgroups under the third category of Treatment of Asylum-Seekers.
6. *Al Jazeera* reported the same number of articles coded into Domestic Policy and/or Practice as the *New York Times/International* (four).
7. Articles in the *New York Times/International* (six) discussed Political Relationships; the *Guardian* (four) and *Al Jazeera* (three) also discussed this topic (albeit to a lesser extent), with a focus on how Australia’s

policy approach affected asylum-seekers, suggesting a concern for the human impact of policies.

The three main themes were then further coded into subgroups (tables 8, 9, and 10, appendix B), and the five highest-coding frequency sub-themes were: Risk to Safety (ten), Indonesian and Australian Relations (seven), Australian Policy and International Law (six), Media Blackout (five), and Creation of the Deviant Other (five). The *Guardian* reported the highest frequency of themes relating to Risk to Safety (six) and Creation of the Deviant Other (three). Further key trends identified were:

8. The *Guardian* was the only newspaper to report on Media Blackout (five, table 9), while the *New York Times/International* focused on Australian–Indonesian political relationships (four, table 8).
9. The focus on Australia’s international law commitments was evenly reported across all three outlets (two articles for each, table 8).
10. When reviewing the *Guardian* and *Al Jazeera* articles in relation to frequencies in subgroups across tables 8, 9, and 10, references to Risk to Physical Safety came up highest for both media organizations (six and three respectively, table 10).

## Discussion

### Production

The journalistic pursuit of objectivity can potentially be lost to structured bias, where demand for credible sources coupled with time pressures of news production can lead to the favouring of established sources.<sup>61</sup> Our results showed a favouring of political sources in the production of news stories in international media, which correlates with previous studies that revealed an asymmetrical power relationship between government and domestic media.<sup>62</sup> Obviously, the media privilege the voices of those responsible for the policy, but this should not automatically mean precluding input from other key stakeholders, so the absence of voices from country representatives who were partners in implementing the policy was particularly striking. It could be argued that the “convenience” of accessing (pre-prepared and readily accessible) political comment had led to an exclusion of other key stakeholders’ voices. Concurrently, international media outlets provided a relatively more inclusive platform for stakeholders, including advocacy groups, academics, lawyers, asylum-seekers, and refugees, who are all then able to contribute to the discursive practice and social constructions of asylum-seekers in Australia through such coverage. This adds to perspectives arguing that while the reporting on asylum-seeker issues was seen to be largely negative, “it is no longer reliant on the stance of the government [but includes] a broader range of perspectives.”<sup>63</sup>

Furthermore, political voices within the international media included not only Australian government representatives, but also Indonesian government officials. However, as noted above, government officials from Papua New Guinea (even though the events took place on Manus Island) and Nauru were not represented. This may also be linked to continued lack of access for journalists to Nauru in particular, an issue that will arguably increase in a regime guided by the Australian Border Force Act 2015. Now that media access to offshore detention centres has been restricted even more, and the legislation makes it a criminal offence for workers to disclose any information about the centres, credible sources of information on key events are even more scant. Our analysis of news content prior to the enactment of the legislation in 2015 suggests that the government already heavily influenced the production of information, and the enactment of the Australian Border Force Act is likely to reinforce rather than disrupt this dynamic.

Of note, government influence on the production (as well as representation and reception) of media can decrease as an outcome of measures such as media blackouts,<sup>64</sup> one of the major sub-themes in our findings. This trend is of critical importance, as measures such as media blackouts in the context of Operation Sovereign Borders could actually result in more personalizing perspectives being presented. As such, forcing media outlets to seek alternate sources of information could counter the government’s efforts to control access to such information, while offering more balanced views on the implementation and impacts of asylum-seeker policies. Another relatively minor finding is the dominance of male voices in our very small sample in the production of asylum-seeker constructs in international media, due to the fact that both Australian government representatives responsible for the issues at the time were (and continue to be) male. Our results showed that only five out of twenty-five stakeholder representatives were women. Further research could investigate whether this gender disparity affects media narratives.

### Representation

Findings from our small purposive sample suggest that international media reporting attempted to present relatively more nuanced representations of Australia’s asylum-seeker policy. Indeed, target audiences of newspapers could affect decision-making on representations of political voices.<sup>65</sup> Additionally, the prominence of two sub-themes—Australian policy and international law, and Australian and Indonesian relations—suggests that our sample of articles from the international media showed interest in exploring shifting notions of sovereignty, particularly in relation to Indonesia as a close neighbour and country of transit

for many asylum-seekers travelling to Australia by boat. If sovereignty is based on the principle of removing external forms of influence in domestic affairs, border security and the right to exclude asylum-seekers is certainly more salient in the Australian context.<sup>66</sup> The trends in our sample of twenty-five articles suggest that media outlets tended to reject this discourse surrounding sovereignty, by focusing on the importance of international co-operation and regulation in two ways: first, by highlighting the violation of Indonesian sovereignty through Australian naval incursion during the implementation of Operation Sovereign Borders, and second, by presenting Australia's policy and practices against international instruments. While it has been argued that growing negative perceptions of asylum-seekers in Australia are informed by social understandings of sovereignty,<sup>67</sup> we argue that if international media outlets continue to present alternative understandings of sovereignty, and by extension, differing representations of asylum-seekers and asylum-seeking, more nuanced representations may be more possible. As such, longitudinal, mixed-methods research would be useful to ascertain the impact of international media responses on shifting public perceptions and attitudes.

#### Reception

Our mixed-methods analysis suggests that the social reality constructed in international media tends to question the legality of the Australian government's actions and establishment of the legitimacy of asylum-seekers. The prominence of the themes Risk to Safety and Creation of the Deviant Other in our small sample highlights the international media's focus on consistent threat to safety that asylum-seekers face in detention, while at the same time, being portrayed as "deviant" in the imagination of Western audiences. Here too, the results show trends whereby more nuanced international media representations in this study have the potential to challenge this "othering" process, but longitudinal research would be useful to determine how positive social constructions by international media can influence domestic media as well as public perceptions of refugees and asylum-seekers.

#### Conclusion

As a democracy with a long immigration history, Australia has gradually become obstinate on asylum-seeker policy; the ethic of *hospitality*, underpinned by principles of fairness, openness, respect, and generosity, has been replaced with a culture of fear and anxiety towards the "other" that feeds moral panic in relation to asylum-seekers.<sup>68</sup> Clearly, the media (domestic and international) can play a more influential role in shifting perceptions about asylum-seekers within Australia. The trends discussed in this article suggest

that international media representations can challenge the view of asylum-seekers as "dangerous criminals" typically conveyed in Australian newspapers. As such, more critical stances on media reporting on migration-related topics, as advocated by the Ethical Journalism Network,<sup>69</sup> are certainly warranted. Through our analysis, we wanted to answer Foucault's call to point out "what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest,"<sup>70</sup> and add a critical outlook to media responses to Australia's asylum-seeker policy.

#### Appendix A: Twenty-Five Selected Articles

- Al Jazeera*. "Asylum-seeker Dies in Papua New Guinea Camp," 18 February 2014.
- . "Australia Admits Indonesia Border Incursion," 17 January 2014.
- . "Australia Asylum-seeker Identities Published," 19 February 2014.
- . "Australia Probes Detention of Child Refugees," 3 February 2014.
- . "Australia Rejects Refugee Cruelty Claims," 13 December 2014.
- . "Australia Resettles 500 Afghan Helpers," 1 June 2014.
- Baird, J. "Snooping Derails Diplomacy." *International New York Times*, 13 December 2013.
- "Breakout at Australia's PNG Detention Centre," *Al Jazeera*, 17 February 2014.
- Carrigan, J. "At Sydney Biennale, Controversy amid the Art." *International New York Times*, 9 April 2014.
- . "Sydney Biennale Draws Attention for More Than Its Wild Creativity." *International New York Times*, 8 April 2014.
- . "Indonesia: Australia to Offer an Apology." *New York Times*, 18 January 2014.
- Cochrane, J. "N.S.A. Spying Scandal Hurts Close Ties between Australia and Indonesia." *New York Times*, 19 November 2013.
- . "Tension Rises between Australia and Indonesia over Migrant Patrols." *New York Times*, 17 January 2014.
- Cumming-Bruce, N. "U.N. Office Criticizes Detention Policies." *New York Times*, 22 February 2014.
- Davidson, H., and O. Laughland. "Papua New Guinea: One Dead and 77 Hurt in Asylum Centre Clashes." *Guardian*, 19 February 2014.
- Farrell, P. "Australian PM Hits Out at Public Broadcaster: ABC 'Takes Everyone's Side but Our Own,' Says Abbott: Demand for Apology over Navy Abuse Claims Rejected." *Guardian*, 29 January 2014.
- Gordon, M. R. "Indonesia Takes Aim at Australia over Spying on Talks." *New York Times*, 18 February 2014.

Hurst, D. "Australian General Rejects Claims Asylum-seekers Were Mistreated." *Guardian*, 10 January 2014.

Laughland, O. "Australia: Plight of Teenage Detainees Shines New Light on Tough Australian Asylum Regime: Human Rights Groups Attack Conditions for Migrants, but Most MPs Support Policy." *Guardian*, 29 January 2014.

———. "Australia: Repatriation Offered to Syrian Asylum-seekers." *Guardian*, 15 March 2014.

Laughland, O., and P. Farrell. "Security Breach Hits Australia Asylum-seekers: Online List Identifies Thousands of Detainees: Fears That Information Could Put Families at Risk." *Guardian*, 20 February 2014.

Saul, B. "Australia's Guantanamo Problem." *International New York Times*, 26 March 2014.

Siegel, M. "Comic Finds New Life, and Punch Lines, in Australia." *New York Times*, 2 November 2013.

———. "Finding Many Laughs in a Move to Australia." *International New York Times*, 2 November 2013.

Taylor, L., and O. Laughland. "Guardian Weekly: Australian Asylum-seekers Must Sign Code of Conduct." *Guardian*, 20 December 2013.

**Appendix B**

**Table 6.** Coding frame: Themes and sub-themes

Theme	Sub-theme	Focus	Example from sampled articles
Political relationships	Australian and Indonesian relations	Political relationships between Australia and Indonesia	"Australia's relationship with Indonesia has been tested in recent months over Australia's policy on asylum-seekers." <sup>1</sup>
	Australian policy and international law	Australia's international law commitments	"The UNHCR inspection of this family camp, which holds 109 children, said the conditions 'raise serious issues about their compatibility with international human rights law.'" <sup>2</sup>
Domestic policy and practice	Media blackout	Media censorship surrounding policy and/or practice concerning asylum-seekers and/or refugees	"Tony Abbott is comfortable refusing the disclosure surrounding asylum-seeker policies." <sup>3</sup>
	Policy and/or practice failure	Failure in policy and/or practice of Australia surrounding asylum-seekers and/or refugees	"The department is likely to have breached Australia's privacy laws, which place limits on the disclosure of information held by government entities." <sup>4</sup>
	Militarization	Use of military and/or navy in Australia's application of policy towards asylum-seekers and/or refugees	"It demanded on Friday that Australia suspend its military-led operation to stop the flow of asylum seekers." <sup>5</sup>
	Privatization	Use of private security firms on offshore detention processing facilities	"A group of exhibiting artists threatened to boycott the event after it emerged that the main sponsor, Transfield Holdings, held a 12 per cent stake in a company providing services to offshore detention centres." <sup>6</sup>
	Creation of the deviant other	Addresses language or actions by the Australian government that portray asylum-seekers and/or refugees as deviant other	"Government see current policy as a necessary deterrent to asylum seekers who 'cheat the system' by arriving by boat." <sup>7</sup>
	Government-held responsibility	Actions the government defines as their responsibility towards asylum-seeker and/or refugee policy	"The Afghans, mainly interpreters and their families were granted refugee visas. This policy reflects Australia's fulfillment of its moral obligation to those who provided invaluable support to Australia's efforts in Afghanistan." <sup>8</sup>

Treatment of asylum-seekers	Living conditions (offshore)	Living conditions of asylum-seekers in offshore detention (including physical surroundings, provisions, and facilities)	"Amnesty International's report that described Papua New Guinea's Manus Island camp as 'excessively cruel and prison-like.' <sup>9</sup>
	Living conditions (onshore)	Living conditions of asylum-seekers in onshore detention (including physical surroundings, provisions, and facilities)	"Meager government payments reduced ... others impose extra obligations on the approximately 33,000 asylum seekers already in Australia, who live on 89% of the standard unemployment benefit rate for which they are now required to do community work, but are not allowed to do paid work." <sup>10</sup>
	Risk to physical safety	Risk to physical safety or physical harm experienced by asylum-seekers and/or refugees during any part of their journey to Australia (includes death of asylum-seekers at sea)	"Gross departure from generally accepted medical standards which have posed significant risk to patients and caused considerable harm." <sup>11</sup>
	Children in detention	Children held in offshore and onshore detention	"In 2009, three children under the age of eight were held with their parents at the Villawood facility." <sup>12</sup>
	Mental health	Mental health of individuals in offshore and onshore detention	"The documents show the two Syrians were suffering severe mental health issues at the time." <sup>13</sup>

Note: See appendix A for full references.

<sup>1</sup> Gordon (2014); <sup>2</sup> Laughland (29 January 2014); <sup>3</sup> Hurst (2013); <sup>4</sup> Laughland and Farrell (2014); <sup>5</sup> *Al-Jazeera* (17 January 2014); <sup>6</sup> Carrigan (8 April 2014); <sup>7</sup> Laughland (29 January 2014); <sup>8</sup> *Al-Jazeera* (1 January 2014); <sup>9</sup> *Al-Jazeera* (13 December 2013); <sup>10</sup> Taylor and Laughland (2013); <sup>11</sup> Laughland (29 January 2014); <sup>12</sup> Saul (2014); <sup>13</sup> Laughland (15 March 2014)

**Table 7.** Themes by newspaper

Themes	<i>Guardian</i>	<i>New York Times/International</i>	<i>Al Jazeera</i>	Total
Political relationships	4	6	3	13
Domestic policy and/or practice	14	4	4	22
Treatment of asylum-seekers	11	8	6	25
Total	29	18	13	60

**Table 8.** International relations by sub-themes and newspaper

Sub-theme	<i>Guardian</i>	<i>New York Times/International</i>	<i>Al Jazeera</i>	Total
Indonesian and Australian relations	2	4	1	7
Australian policy and international law	2	2	2	6
Total	4	6	3	13

**Table 9.** Domestic policy and practice by sub-theme and newspaper

Sub-theme	<i>Guardian</i>	<i>New York Times/International</i>	<i>Al Jazeera</i>	Total
Media blackout	5	–	–	5
Policy and/or practice failure	3	1	–	4
Militarization	2	–	1	3
Privatization	–	2	1	3
Creation of the deviant other	3	1	1	5
Government responsibility	1	–	1	2
Total	14	4	4	22

**Table 10.** Treatment of asylum-seekers by sub-theme and newspaper

Sub-theme	<i>Guardian</i>	<i>New York Times/International</i>	<i>Al Jazeera</i>	Total
Living conditions (offshore)	1	3	1	5
Living conditions (onshore)	1	2	–	3
Risk to physical safety	6	1	3	10
Children in detention	1	1	1	3
Mental health	2	1	1	4
Total	11	8	6	25

**NOTES**

- 1 Oliver Laughland, "Australia: Plight of Teenage Detainees Shines New Light on Tough Australian Asylum Regime," *Guardian*, 14 January 2014. We note the conceptual distinctions between *immigration* and *asylum*, while acknowledging that Australia's asylum-seeker policies come under the Migration Act 1958. We also refer to asylum-seekers mainly throughout the article as people seeking international protection but whose claim for refugee status has not yet been determined. A refugee is someone who has been recognized under the 1951 Convention Relating to the Status of Refugees.
- 2 "Asylum-seeker Dies in Papua New Guinea Camp," *Al Jazeera*, 18 February 2014.
- 3 Alison Mountz, "Shrinking Spaces of Asylum: Vanishing Points Where Geography Is Used to Inhibit and Undermine Access to Asylum," *Australian Journal of Human Rights* 19, no. 3 (2013): 3; Human Rights Law Centre, "Australia Must Take Action to Improve Its Compliance with Convention against Torture and Ill-Treatment, Says UN Committee," 29 November 2014, <http://hrlc.org.au/australia-must-take-action-to-improve-its-compliance-with-convention-against-torture-and-ill-treatment-says-un-committee>.
- 4 Janet Phillips, *A Comparison of Coalition and Labour Government Asylum Policies in Australia since 2001*, Parliament of Australia, 2014, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1314/AsylumPolicies](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/AsylumPolicies).

- 5 Janet Phillips, *Boat Arrivals and Boat "Turnbacks" in Australia since 1976: A Quick Guide to the Statistics*, Parliament of Australia, 2015, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1516/Quick\\_Guides/BoatTurnbacks#\\_Table\\_4:\\_Boat](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/BoatTurnbacks#_Table_4:_Boat).
- 6 Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia since 1976*, Parliament of Australia, 2013, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/BoatArrivals#\\_Toc347230712](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/BoatArrivals#_Toc347230712).
- 7 Ibid.
- 8 Elibritt Karlsen, *Developments in Australian Refugee Law and Policy 2007–2010*, Parliament of Australia, 2010, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/1011/RefugeeLaw](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/RefugeeLaw).
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## Book Reviews

### *Trafficked Children and Youth in the United States: Reimagining Survivors*



Elżbieta M. Goździak

New Brunswick, NJ: Rutgers University Press, 2016, 141 pp.

This book is an important contribution to recent feminist studies critical of the social and political underpinnings of the predominant “anti-trafficking” movement based in the United States. As Goździak so carefully details, the “movement” is a coordinated, networked system of politicians and advocacy centres who work to identify and provide rehabilitative services to youth survivors of human trafficking. This network is far from expertly driven, often reactive to the moral panics that dominate policy forums on human trafficking, forced migration, and labour exploitation. Goździak indicates that she is not interested in debating the definition of “trafficking” itself but in how it is operationalized: how the label of “child trafficking” may or may not “work” for survivors according to U.S. and international law. Goździak complicates the sense that there is any “typical” child victim of trafficking, by interviewing and narrating victims’ own contestations of how and when the “trafficked child” label might be applied to them.

Goździak treats the subject matter with a delicate yet deft touch. She is clearly aware of the stakes at play—how naming and intervention forged at the bureaucratic level can have profound, irreversible impact on the lived realities of the youth in question. This attention renders Goździak’s work remarkable: from the outset she foregrounds the complex narratives of youth who have arrived in the United States under less than ideal circumstances. Through fieldwork at anti-trafficking conferences, as well as in-depth qualitative interviews with 140 youth recipients of anti-trafficking services, Goździak narrates a portrayal of survivorship outside the prevalent imagery of trafficking survivors as hapless young victims. She notes many of the victims in her study take issue with being labelled children: as minors transported to work in the United States, many of the youth were classified as victims of trafficking despite their insistence to caseworkers that they had chosen to migrate of their own accord.

Goździak’s citation practices make clear her political stance on this polarizing issue. She joins a small but ardent group of feminist academics (myself included) who draw from critical race studies, post-colonial studies, and critical political economy to call attention to what they perceive as a wave of neo-conservative measures ostensibly aimed at punishing trafficking while in fact upholding heavily carceral and often racist policies against migration and mobility. This body of scholarship has focused predominantly on two groups in North American and Western European countries as proponents of anti-trafficking policy—evangelical Christians and secular feminists who have found common cause in their “abolitionist” stance against sex trafficking through a categorical disavowal of sex work as a form of labour.

Goździak contributes to this critique by arguing that “child trafficking is operationalized unevenly and perhaps even capriciously” (29) with regards to the levels of assistance actually afforded to victims. Her study focuses attention to a third group of actors, the advocates, service providers, and social workers affiliated with the U.S. Department of Health and Human Services who process individual child-trafficking cases. She takes care to acknowledge her positionality as an ongoing independent consultant for the Office of Refugee Resettlement, a perspective that puts Goździak in the role of both researcher and erstwhile service provider to the youth she interviews.

Goździak describes a disjuncture between service providers’ and researchers’ understandings of kinship networks in both trafficking and anti-trafficking processes: “Policymakers, child advocates, and service providers maintained a studied blindness toward the complicated role family and kin play in facilitating and financing the migration journeys of children and adolescents to the United States” (58). Services for youth labelled as “unaccompanied refugee minors” often discount youth requests for reunification with their families

overseas or within the United States if any family member was suspected to have been involved in the trafficking of that child and therefore a potential criminal. Goździak expresses frustration at how law enforcement and policymakers posit that illegal migration is linked to sophisticated organized crime syndicates; her research, and that of others, shows that the majority of the youth did not perceive their families as traffickers, nor did these families belong to any organized criminal chains. This carceral attitude casts a shadow upon the provision of social services after “rescue”; by labelling victims’ families as “criminals,” police and social-service providers lose victim trust, a profound misstep in victim rehabilitation and integration into wider society.

Goździak further argues that policymakers’ and advocates’ reports of trafficking overwhelmingly portray sexual exploitation, “being chained to a brothel bed,” as the predominant harm to trafficked youth: “Pictures of sexually exploited girls summon more sympathy than descriptions of trafficked men toiling in the fields for a pittance to put tomatoes and lettuce in our salad bowls” (68). As Goździak’s case studies show, while many youth had experienced sexual abuse before or during their migration journeys, most were caught up in other forms of labour exploitation and did not identify as sex-trafficking victims unless prompted by their case managers.

Perhaps the most compelling section is the concluding chapter situating trafficking survivorship in the context of social studies of childhood. The image of a supposedly monolithic “trafficked child” is a fallacy that Goździak ardently challenges. Her critical feminist attention to the cultural, racial, and classed dimensions of how youth from different regions perceive their own agency and resiliency is a crucial argument toward adapting rehabilitative services to more comprehensively serve young people who have been exploited but do not identify as victims or as children.

This book is notable for its accessibility and is written largely without pretence or jargon, despite the ambitious scope. It will serve as a useful, comprehensive introduction for scholars of migration studies, cultural anthropology, and related fields. Goździak’s work is a welcome addition to the critical study of anti-trafficking institutions and services, a nuanced and compassionate portrayal of the complex lived realities of young people who move and migrate, however precariously, in search of better opportunities and futures.

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***Bread from Stones:  
The Middle East and the Making of Modern Humanitarianism***



Keith David Watenpaugh

Oakland, CA: University of California Press, 2015, 272 pp.

**T**his is a very timely and carefully researched contribution to the literature that has emerged to mark the centenary of the First World War. The title alone lays the foundation for its subject matter: the desperation of people (especially children) caught up in war, poverty, deprivation, massacres, death marches, and genocide. The reference to bread and stones is not only attributed to the New Testament, but also can be found in Armenian, Turkish, and Arabic folklore. With this backdrop, Watenpaugh draws the reader into his text by prefacing the two beginnings of his work: first, a humanitarian report by Karan Jeppe, written in Baalbeck, Lebanon, in 1922, after the collapse of efforts to repatriate the vast population of Armenian refugees to their homelands in Anatolia; and second, a friendship with Ann Z. Kerr who introduced Watenpaugh to the work of her father-in-law, Stanley E. Kerr, in *Near East Relief* and his book, *The Lions of Marash* (1975), along with other family archives, letters, photographs, and memoirs.

*Bread from Stones* was written as the modern Middle East descended into a humanitarian disaster that, in the degree of suffering and international complicity as well as indifference, resembles what occurred during and following the First World War. It is tempting to draw parallels between past and present: the immense flows of forced migrants across international borders, the even larger scale of internally displaced people, the drive to contain the population in the region of conflict, and the rise of smuggling, trafficking, and sexual violence across the Middle East. As Watenpaugh reflects, these “echoes resound across the same territories of inhumanity and humanitarian response” (xv).

This book explores the role of humanitarianism in the history of human rights in the twentieth century and addresses how the concept of shared humanity informed bureaucratic, social, and legal humanitarian practices. While humanitarianism existed before the early twentieth century that Watenpaugh addresses in this book, in previous periods

humanitarianism was more closely tied to notions of charity for the poor and less well off, as well emerging from understandings of religious duty and obligation. The Eastern Mediterranean is where much of modern humanitarianism was born. With the collapse of the three great empires—Russian, Ottoman, and Austro-Hungarian—at the close of the First World War, waves of displaced persons and the new borders between states forced the international community—in the form of the League of Nations—to manage the conceptualization and iteration of the “refugee.” The sheer scale of the postwar effort needed secular, professional, and bureaucratized intergovernmental forms of aid and development to replace the independent missionary-based charity of previous times. This book describes that process and analyzes the way in which human rights discourse came to be a cornerstone of modern-day humanitarianism.

Chapter 1 sets out the intellectual and social context of Western humanitarianism in a comprehensive and transnational way and allows the author to disentangle humanitarianism from colonialism in the region, restoring a measure of agency to the objects of the Western humanitarian agenda. A key argument here is that modern Western humanitarianism represents a significant shift from the work of Protestant Christian missions and missionaries in the non-West. The author argues that in the lead-up to the First World War, it was the Ottoman state’s absence from the sphere of care for non-Muslims that led a collection of Protestant missionaries from Scandinavia, Germany, Great Britain, and the United States to become deeply involved in the education, health care, and social development of the community of largely early or “primitive” Christians. There is certainly truth in these associations, but as likely it may well have been that the “Capitulations” of the Sublime Porte in Constantinople ceded much of that responsibility to the West centuries before and found that the majority Muslim population of the empire was not serviced by these Western institutions.

Chapter 2 addresses international relief in the wartime Eastern Mediterranean between 1914 and 1917, beginning with the Year of the Locust in 1915 and the way it contributed to widespread starvation, plague, and death as part of the larger dislocations of war made worse by the British and French blockade of Beirut. Eventually international aid and food supplies reached Jerusalem through privately funded committees such as the American Committee for Armenian and Syrian Relief. Even in these early years, the humanitarianism expressed by America and Americans was a form of colonial paternalism without the brutality of foreign rule. As Watenpaugh writes, it presaged the emergence of a philanthropic coalition that brought Progressive-era social scientific reformers together with old school missionaries.

Chapter 3 follows the evolution of humanitarian knowledge as it was formed from the reports of the era around the treatment of non-Muslims in the Ottoman Empire—largely Armenians. It examines the reporting about the Hamidian massacres of the 1890s, the Adana massacres of the 1900s, the 1914–18 death marches, and massacres of Western Anatolian Armenians and the dire conditions they suffered.

Chapter 4 examines the development of the American Near Eastern Relief and the growth of American humanitarian exceptionalism between 1919 and 1923, which focused almost exclusively on the “refugee child” and Armenian orphan. The American humanitarian effort at this point was just emerging as a quasi-colonial political project to transform the New Near East.

Chapter 5 focuses on the rescue of trafficked Armenian women and children and the paradox of modern humanitarianism between 1920 and 1936. This rescue movement, Watenpaugh elucidates, reflected a collision between emerging Western expectations of how women and children should be treated (i.e., not enslaved) and late nineteenth- and early twentieth-century Ottoman concepts of domestic patriarchy, property, and the social position of non-Muslims.

Chapter 6 addresses the practical failures of modern humanitarianism between 1923 and 1939 and focuses entirely on Armenians and the Armenian nation state that failed to come into being. While it is true that Armenian national aspirations were abandoned by the League of Nations, it was also a time when other national aspirations such as those of the Kurds and the Assyrians were also abandoned.

Chapter 7 then takes up modern humanitarianism’s troubled legacies between 1926 and 1948. The effort to transform the Near Eastern Relief’s mandate from addressing the suffering caused by war and genocide into one that focused rather generally on development problems—social and health problems of the Near East—is addressed in the book’s concluding chapter. In many ways it predicted what, in contemporary terms, would be called a “rights-based” development from traditional humanitarian practices.

This is an immensely important book shedding new light on the study of the modern Western humanitarian impulse in the Near East and set primarily in the elaboration of the Armenian Genocide and post-genocide survival. It is a book that will find a strong readership among social scientists and historians, as well as the general public.

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## *Immigration Detention: The Migration of a Policy and Its Human Impact*



Edited by Amy Nethery and Stephanie J. Silverman

London: Routledge, 2015, 182 pp.

This collection comprises sixteen short country surveys, which together provide a detailed panorama of immigration detention across the contemporary world. An important novelty is the inclusion of chapters on countries in Asia, as well as South Africa and Israel, rather than just the more familiar scholarship on detention from European and North American systems. The book therefore provides insights into how the detention paradigm has multiplied beyond its traditional heartlands. Each chapter represents an expert author's view of the key issues arising in his or her country. The format is thus non-standard, as often happens with collections involving a wide range of authors. The scholars' disciplines and their methods also range across law, anthropology, politics, and refugee studies. Most of the country reviews touch upon the law, history, statistics, and some of the political context of detention. It is not, however, possible to use the volume to systematically compare across countries, because the chapters are not structured in this way. This limitation is both frustrating and intriguing, because the contributors give greater emphasis to aspects that might be ignored entirely if the editors had asked them to conform to a "template" style of chapter. Certainly the editors' introduction does not seek to argue that there is a common thread throughout the volume, save for an emphasis on detention of asylum-seekers rather than other categories of migrant.

The tone of writing is generally critical of the growth of immigration detention and finds little support for governmental justifications for the practice. Each author finds flaws in his or her own system, but it is plain from reading across the volume that the legal safeguards, duration, and conditions of detention vary enormously, from a relatively "benign" system like that of France (maximum forty-five days' detention) set against "hostile" systems like Australia's (no legal limit on detention, with many years not uncommon). Conditions in some Asian countries emerge as being particularly bad, with Malaysian, Indonesian, and Australian facilities (including those controlled on Papua New Guinea) appearing very harsh, dangerous, and destructive to immigrants' health and welfare.

Common themes include the way that detention facilities and indeterminate detention have been employed by some governments as a kind of "reserve army" of enforcement to meet new challenges. Thus in the United Kingdom, initially failed asylum-seekers were targeted, then fresh asylum

claimants were detained under fast-track arrangements, and, more recently, foreign criminals facing deportation have comprised a major element of the detention estate. The United States deploys the world's largest detention estate of around 34,000 spaces to target similar groups, particularly foreign prisoners. Similarly, the use of private contractors has encouraged a "detention" lobby to emerge and created pressure to fill beds that have been contracted for. Another theme is the way that boat arrivals have triggered the emergence of harsh detention regimes across widely different locations including Australia, Cyprus, Malta, Guantánamo Bay (the U.S. territory in Cuba), and Indonesia. Governments have also off-shored processing and refused to accept such persons onto the mainland, even if they are recognized as refugees. These measures are unapologetically used as a deterrent to stop the flow of migrants.

A more positive model emerges from the French chapter, which discusses the inside of a detention centre based on field-work. It demonstrates how strong political resistance to the use of detention forced the government to allow substantial independent oversight. Thus, remarkably, NGOs and lawyers are based in the centres themselves and have a high degree of access to both detainees and officials to ensure that legal standards are maintained. They are also mandated to produce annual reports, which can be highly critical of the centres. Thus in France, the usually closed alienated world of the detention centre is laid bare in ways that are scarcely imaginable in most countries.

Many of the chapters from European nations show how the EU Returns Directive has been implemented in national detention law and the variable change that this has encouraged. Some has been positive, with its requirement that detention be based upon a risk of absconding. Other nations have used the directive to increase the maximum period of detention to eighteen months. However, the EU Reception Conditions Directive, which regulates asylum-seekers (as opposed to failed asylum-seekers slated for removal), did not provide clear guidance until recast in 2013. Thus European states were rather freer to devise their own detention policies for this group, including the harsh regimes in Malta, Greece, and Cyprus. These "gateway" states were reluctant to accept asylum-seekers at all. Turkey, although not an EU member, has been strongly criticized by the Council of Europe for its treatment of asylum-seekers transiting towards Europe. The current migrant influx from Syria increases the challenges

facing Turkey in managing migrants without infringing liberty rights. With the EU now set to fund Turkish “take-back” and asylum-processing systems, the issue of detention in Turkey will become a European responsibility.

In summary, the collection provides a rich source of data on immigration detention and gives fascinating insights into “dark corners” of the global detention estate. The effect would have been more powerful if there had been a stronger thematic chapter attempting to develop common themes. This also might have been helpful in trying to explain the

underlying causes for the growth of detention (and its continued abeyance in some countries), which scholarship has not fully addressed. There is an urgent need to understand the political processes that created the system with a view to developing strategies on how to reverse these inhumane and arbitrary practices.

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### *Refugees and the Meaning of Home: Cypriot Narratives of Loss, Longing and Daily Life in London*



Helen Taylor

Basingstoke, UK: Palgrave MacMillan, 2015, 188 pp.

In the past couple of decades, a large body of literature has developed in the social sciences to engage with questions of home and belonging in the context of displacement. A significant part of this work has been committed to challenging established sedentarist perspectives that tend to naturalize the attachment of refugees to their homes left behind. Sedentarism is underpinned by nationalist logics that peoples and cultures belong to clearly defined geographical spaces contained within national borders. Within this framework, repatriation and the return of refugees to their homes and houses are privileged as solutions to displacement. Helen Taylor’s book makes an insightful contribution to these debates through the study of Cypriot refugee narratives of loss, longing, and daily life in London. Taking a “middle ground” approach, Taylor shows very effectively how on the one hand “home” is socially and culturally constructed, and the way it is experienced varies among groups of refugees and individuals. On the other hand, she is cautious not to undermine the role sedentarist meanings of home play in refugees’ pleas for rights and/or return.

Inter- and intra-communal violence in Cyprus in the 1950s and 1960s resulted in mass displacement of mainly Turkish Cypriots from villages, towns, and city districts. In 1974 a Greek-backed coup was followed by a Turkish military operation that resulted in the separation of the island into two parts. The war and the division produced further mass displacement of about 170,000–200,000 Greek Cypriots and 40,000–50,000 Turkish Cypriots. Although there are a large number of studies concerned with the displaced within Cyprus, less attention has been given to those who left the island as a result of their displacement. This book closes this gap by focusing on Greek and Turkish Cypriots

who fled to Britain during and after the violent events. Britain was an obvious choice for many of the displaced, as some had already established family networks there or held British passports after having worked for the colonial administration before Cyprus’s independence in 1960. Although Britain never legally recognized these Cypriots as refugees, Taylor uses the term refugee in a broad definition, not least because it is widely used by her research participants to self-identify.

The book is based on field-work research conducted between 2004 and 2005. This was a significant historical period, as the checkpoints in Cyprus opened in 2003, allowing displaced Cypriots to visit their homes for the first time in almost thirty years. The field-work included participant observation in political and cultural events in London as well as narrative research with twenty-two Greek and Turkish Cypriots. The refugee narratives are a major strength of the book. They allow individual stories and “voices” to emerge and illustrate the overall theme of the work; that home and home-making are multi-layered and complex processes embedded within both broader political and socio-historical processes as well as individual life trajectories and cycles. Indeed, some of the protagonists of the study still maintain a strong connection with the home left behind and struggle to see themselves as fully emplaced in Britain. Others express longing for a life before displacement, but they also acknowledge that they have managed to create a home away from Cyprus. For some of those who went to visit their homes after 2003, the journey consolidated their feelings of loss and displacement and the sense of their town or village as the main site of belonging. For others, visiting long-lost homes destabilized the ways in which such places

had been remembered and strengthened the emphasis on home-making in London.

Each of the main chapters engages with discussions of a different analytical element of home: the spatial home, the temporal home, the material home, and the relational home. Beyond just a concrete physical location, it is clearly demonstrated through biographical narratives and personal accounts that for Cypriot refugees home is multi-faceted, encompassing a house, the village, the island, and often the new house in Britain. Also, refugeeness should not always imply a previous condition of sedentariness. Some Turkish Cypriots had already been displaced and forced to live in enclaves in Cyprus since the 1950s and 1960s. Others had become internal migrants from rural areas to towns and cities long before becoming refugees. Such mobilities make the notion and experience of home far more complex. Beyond spatial accounts of belonging, longing for home also involves longing for a time before loss. One of the most powerful parts of the book describes how Cypriots who visited their places after thirty years realized that even if return to the physical space would ever be possible, a return to a past life as articulated through nostalgic recollections had been lost forever. However, refugees try to make and remake home in their new situations, and chapter 4 illustrates the role of materiality and the senses in how refugees remember and construct a Cypriot home in London through food, gardening, smells, and tastes. Of course, on top of its spatial, temporal, and material elements, home is about social relationships and networks. Refugees have managed to rebuild lost networks and relationships through community associations, cultural centres, and political organizations in London. Others, however, have chosen a looser connection to Cypriot community life and developed alternative types of social and cultural capital. After all, as Taylor discusses, as much as community can be a locus of belonging and reconstructing home “away from home,” it can also be hierarchical, internally divided, and exclusive. Although many refugees long for relationships and social networks that were disrupted when they left Cyprus, London has become

their new relational home where many have now established families with children and grandchildren, friendships and social circles. In a complex turn of events, returning to Cyprus would now jeopardize this relational home and lead to further loss.

Given that the refugee narratives are one of the strongest and most illuminating aspects of the book, there could have been further explanation of how and why these particular research participants were selected. The book includes a useful appendix with a list of the protagonists’ short biographies; however, some of this information could have been integrated more into the text to help contextualize the different “voices” even more constructively and allow the reader to follow life trajectories as well as social connections. Also, the “refugee issue” in Cyprus has been a highly political and politicized topic. It has occupied a central place in state rhetoric and agendas on both sides of the island and has formed a strong negotiating point in the peace talks on the reunification of Cyprus, especially around the themes of return of the refugees and their property. Taylor raises such issues in parts of the book, but a more developed discussion on the history of refugee politics, policies, and rights in Cyprus would have brought to the foreground analyses of economic and property loss that evidently play a role in refugees’ pragmatic strategies and pleas for rights and justice. In spite of a few such missed opportunities, Taylor’s book bridges a considerable gap in the field of Cyprus studies and offers an important case study to the literature on home and belonging. It tells powerfully a painful but at the same time heartwarming story of refugees’ resilience—not in the often-used sense of the term as individualized coping strategies and success, but as an ultimately social mode of (re)building relationships and home.

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### *Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France*



Leila Kavar

New York: Cambridge University Press, 2015, 232 pp.

**L**eila Kavar’s book is an innovative extension of Bruno Latour’s method of studying how scientists make knowledge in laboratories to how lawyers create law

through daily practice. She argues that legal contestation reshapes how power arrangements affect the law and policy-making, which in turn has radiating effects. Put differently,

activism at one moment and in particular institutional domains sets legal precedent and frames subsequent activism in multiple domains. In contrast to other studies of the dynamics of immigration policymaking that focus primarily on “the coercive power of official rules and remedies” (5), *Contesting Immigration Policy* narrates the ability of legal rights activism to make and remake social relations.

Methodologically, Kawar’s exploration of the cultural life of law relies on a comparison of legal activism in France and the United States after 1970. The author selects the two country cases because they are both immigrant-receiving countries with long-standing contentious politics surrounding immigration and where immigration legal activism developed at about the same time. “Legal activism” refers to practices that explicitly aim to influence official law (see 20). A dialogic, comparative strategy reveals differences as well as “unexpected similarities” and de-centres the U.S. experience. The comparative approach, the author argues, allows her to build theory not through hypothesis testing but by “identifying particular assemblages of actors and activities in one setting and then examining the extent to which those assemblages can profile insights into our understanding of other settings” (15). Concretely, the study results from sixty in-depth interviews with key informants, substantial participant observation, and an analysis of archival sources.

*Contesting Immigration Policy* consists of an introduction and six chapters arranged to show points and counterpoints between France and the United States on legal practices. The introduction identifies shortcomings in previous attempts to understand the constitution of law, Kawar’s alternative approach and related argument referenced earlier, and a discussion of the benefits of adopting a Latourian approach. Chapter 2 traces the historical emergence of “immigrant legal rights activism” in France and the United States among progressive lawyers and grassroots immigrant social movements. Chapter 3 focuses on key cases that brought attention to rights activism in each national context. It examines how political mobilizations around litigation campaigns of the 1970s assisted immigrants and set legal precedents, which framed subsequent activism (radiating effects). Chapter 4 examines the role of litigators and how the contestation of policies generated a shift in how jurists approached their professional projects. Chapters 5 and 6 study how the institutionalization of legal activism patterned the dispositions of national administrative officials who were objects of lawyers’ activism. The study’s conclusion offers a useful restatement of findings as well as arguments and implications for

socio-cultural research about law and for the politics of reform.

The application of perspectives and methods from the sociology of knowledge stands out among the many strengths of this meticulously researched and thoughtfully written book. Kawar advances our understanding of what happens inside the “blackbox of law” by taking up Latour’s invitation to examine how jurists create law, much as how experimental scientists do science and thus constitute their profession (see the very useful methodological aside in Box 1, on 11). Her analysis makes the crucial move beyond the claim that law is socially made to showing how it is made. The result is a granular and illuminating depiction of how lawyers and organizations practise and constitute law. Scholars of immigration and asylum law will appreciate how Kawar puts into relief processes that are often opaque and infuriating to both practitioners and researchers. In addition, she offers a generative discussion of implications: a call for creative, technical innovation in immigrant-related lawyering, a rethinking of immigrant vs. immigration lawyering so as to foster alliances across groups separated by legal status, and an examination of transnational systemic harms to people out of legal status.

The approach and argument of *Contesting Immigration Policy* raise a number of questions. To what extent are its findings limited by the selection of countries that share a Western understanding of law and strong legal institutions? What are the prospects of applying the Latourian analysis to national contexts in which lawyers and courts have not been as influential as in France and in the United States or where borders do not neatly circumscribe political and legal jurisdictions? These questions probe the comparative limits and transportability of the findings of this work.

A reader’s ability to raise such questions, however, attests to the strength of Kawar’s exhaustively researched and methodologically innovative book. In my view, this book will set the course for future studies of how people and organizations make law. I highly recommend *Contesting Immigration Policy* for scholars of law and society, immigration and refugee policy, and anyone interested in unpacking the black box of formal law.

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