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REFUGE

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FOCUS ON GENDER ISSUES AND REFUGEE LAW

Reflections on the Gender Guidelines

It has now been several months since the Immigration and Refugee Board released its *Guidelines for Women Refugees Fearing Gender-Related Persecution*. They were released on March 9, 1993, coincidental with International Women's Day.

Canada has been lauded as making a massive leap forward with the introduction of the guidelines; we are much the envy of those lobbying for similar action in their respective jurisdictions. Nurjehan Mawani was given the American Immigration Lawyers Association (AILA) "Humanitarian Award" citing her ability to forge ahead with the gender agenda in times where the national mood of host states in the Western world is one typically characterized as increasingly restrictionist, not expansive. But all reaction has not been laudatory. Essentially, criticism of the potential effect or reach of the guidelines generally falls into three broad categories.

First, they are criticized as being a defective mechanism of change, given that they are in the form of guidelines and not regulations; that is, they are not law. Generally, this argument is met by reference to the difficulty in the legislative route required to put regulations in place. Furthermore, goes the argument, while the guidelines may not have the force of law, they present the advantage of flexibility and can be monitored and changed more easily than legislation. They will be applied by decision makers who are being encouraged to provide written reasons and initially will be subject to scrutiny by the Board and the advocacy community in keeping with the fundamental principle of administrative law of the independence of decision makers. In the meantime, the general mood is that we should feel quite

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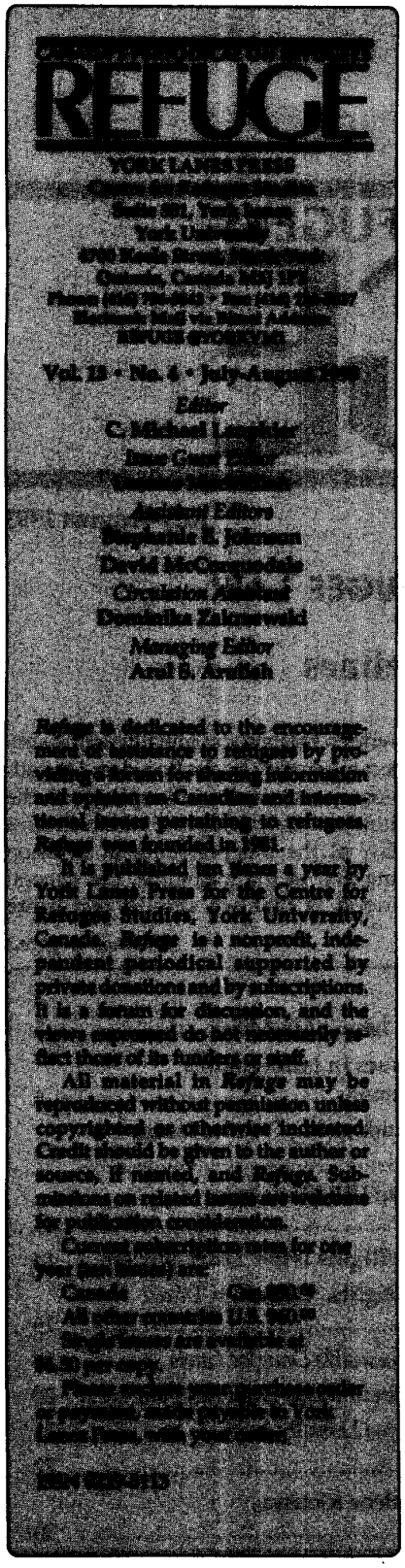

A note of welcome from the new Editor

With this issue we bid farewell to Howard Adelman's distinguished editorship of *Refuge*. Throughout the past five years of momentous change in the world refugee situation and in the policy of Canada on refugee matters, Howard has deftly steered a course which avoided the shoals of superficiality and navigated steadfastly through the storms of controversy. Following the tradition at the Centre, I return to take the helm as Editor of *Refuge* with the same voyage plan—but not before expressing to Howard my admiration and gratitude. Fortunately, he will be remaining alongside for a few months. The Editorial Committee and I shall continue to profit from his clear vision and deliberate charting—however murky the weather! Ready, aye, ready!

C. Michael Lanphier

Letter to the Editor:

Re Special Issue on Sri Lanka, Vol. 13, No. 3, June 1993

• I found this to be nicely presented and informative. It might have benefited by having one piece contributed by a Sinhalese or Sinhalese-speaking scholar in order to give it the advantage of ethnic balance. I also thought that essay [on Ethnic Conflict in Sri Lanka], although good, grinds to a halt too soon on p. 8. Several vital aspects of the scenario you are discussing really need to be developed. First, in my opinion, the failed District Development Councils of 1981–82 are a watershed event in modern Lankan history. They demonstrated that no Sinhalese head-of-state, no matter how theoretically powerful in terms of executive authority and control of a parliament, has the political will or strength to give federal concessions to Ceylon Tamil demands. Second, mention should have been made about the very destablized situation in the country due to the referendum of 1983 and the rise of the Janatha Vimukthi Peramuna. Third, something might be put forward about the ethnic policies of [the late President] Ranasinghe Premadasa. (It might be argued that he had none, but in fact he was careful to cultivate good relations with both Ceylon and Indian Tamil communities in his own way.) I think he was prepared to let the civil war fester as a low-scale infantry engagement for a long time. Those who have taken over from him now, particularly [Prime Minister] Ranil Wickremesinghe, will blunder along in the same messy way for the time being. At any rate, these are mere observations. The main thing is you have produced a nice special issue, and I welcome your initiative.

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Authors' note: *The essay did conclude on page 8 since we were primarily interested in the evolution of the conflict up to the period of the solidification of the Tamils position to the ethnic conflict, as enunciated by Tamil United Liberation Front's Vaddukoddai resolution in 1976, and its subsequent 'ratification' in the general election of 1977 by the Ceylon Tamil population. The explosive development in Sri Lanka (literally and figuratively) since that period will form the subject of a separate essay.*

• I read the entire issue with care and thoroughness. I thought it constituted a very special focused issue on that unfortunate island. The contributors were well informed and packaged their presentations in a readable and excellent style.

[On Professor Howard Adelman handing over his responsibilities as the editor of *Refuge*], the community owe considerable debt for the significant work, especially his leadership qualities and talents, and the work of his Centre for Refugee Studies for work on the unfortunate victims of the world. I wish there was some award that could be made for the work of such great humanitarian worth.

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fortunate to be this advanced on a comparative basis in bringing a gender-conscious approach in refugee status determination.

A second category of criticism has to do with what might be typically referred to as the "floodgates argument" against any holus bolus change to any rules about how Canada fulfils its international obligations to protect women refugees. Consider the reaction typified by Barbara Amiel in her recent *MacLeans* editorial. According to Amiel, the inclusion in the guidelines of "gender discriminating religious or customary laws and practices in their country of origin" as a foundation for a refugee claim is the biggest offence, not only because it smacks of "100 percent Canadian-Fem cultural imperialism," but, if applied as written, she suggests that "immense numbers of people from all over the world will make that claim, come here and be accepted. Those who do will then turn around and sponsor husbands or family members whose approach to gender relations gave them refugee status in the first place." While it is difficult to know to whom this type of argument appeals, it must be addressed.

The floodgates criticism fails under any sort of serious scrutiny on several grounds, the most evident of which is the fact that because of other obstacles, only a third of refugee claimants accepted to Canada are women. It is well accepted that it is the males, mobile and moneyed, that actually make it to these shores. This more-considered position is reflected by the comments of James Hathaway as quoted in the *Globe and Mail*, ("Domestic Abuse Accepted for Refugee Status," February 10, 1993) that "we are not going to see a flood of refugee claimants. Most women can't get out of their countries, and when they can, they're lucky to make it to the next country." Essentially, it is Canada's duty, at a minimum, as a member of the international community ascribing to international standards to protect those who do make their way to our shores. It is indeed sobering to look at North America's miniscule refugee population compared with that in the African continent and continued references to "floodgates arguments" are tiresome and offensive to the very idea of what it is to be a refugee in need of asylum.

The third fundamental criticism of the guidelines goes much deeper and has to do with a vision of why and how gender persecution ought to be addressed in refugee determination. That is, the guidelines do not create a separate category of persecution labelled as "gender," and that to not separately categorize gender as one of the five grounds upon which to found a refugee claim, renders the gender approach—through the "membership of a particular social group"—a deficient approach. In addition to the location of the Convention definition ground upon which to plead the specific gender-related aspects to any claim is the content of the claim. The proposition put forward in the guidelines is, in one instance, that the claimant must show an individuated persecutory foundation to her claim, and, in another instance, it would seem that a situation of generalized oppression of and violence against women will not be a ground for a claim to be rejected. In the absence of a number of decisions being made yet under the guidelines it is difficult to know when an individual basis for the fear of persecution need be shown and when it need not. Clearly, the relative merits of the content of the current gender guidelines and the effect of not providing a separately enumerated category of gender as a ground upon which to found a Convention refugee claim is a debate that will continue. However, we now have the guidelines and the opportunity to examine how they have changed the face of refugee determination in Canada and, for that matter, internationally.

In this issue of *Refuge*, the spill over effect of the guidelines is shown in the efforts to have their provisions applied to at-risk women who fall under the rubric of the entire immigration and refugee protection mandate of the federal government. The beginning of this process is reviewed in the following pages where the results of an agenda-setting meeting for future consultations between the government and refugee advocacy and interest groups is provided. The expectation is that the principles enunciated in the guidelines will be applied to at-risk women in the overseas refugee protection process, humanitarian and compassionate immigration programs domestically and in the post-determination refugee claimant designated class. Again, as with the gender guidelines applied by the Immigration and Refugee Board, an international precedent is being set.

Additionally, the recent decision of the Supreme Court of Canada in *Canada v. Ward* is reviewed in terms of elaborating the Convention refugee definition and elucidating its constructs. Fundamental to the *Ward* decision is the vision of refugee law as being international in formulation and a backup to the protection one expects from the state of which an individual is a national. In keeping with this theme is the article by Diana Bronson regarding violence against women as an international human rights law issue and her critique of the adequacy of human rights approaches to "women's rights."

The following pages are provided in the rather insecure state of refugee policy matters in Canada today given the political and bureaucratic shifts. Apparently, the federal agenda in refugee matters has not changed, according to the recent speech given by the new minister responsible for refugee issues to a group of ethnocultural agencies that deal with immigrants and refugees. While it is not clear yet what the implications of the new Public Security affiliation will be, admittedly, the Orwellian-sounding title itself suggests some seemingly obvious clues, as does the fact that within the same department are the RCMP, CSIS, the Office of the Solicitor General and the parole board. However, in Minister Lewis' speech, he stated that "there is no hidden agenda in the creation of this new department." In any event, the public relations value of the Public Security affiliation in and of itself may appeal to an increasingly xenophobic and intolerant populace, but it will likely prove to be a very unhelpful addition to how refugees are viewed in Canada. ■

Leanne MacMillan, Guest Editor

National Consultation on Women's Issues in Immigration and Refugee Protection: Report of Agenda-Setting Meeting of June 28, 1993

James C. Hathaway

An agenda-setting meeting was convened at the Centre for Refugee Studies, York University, on June 28, 1993 to set in motion the consultation process announced by the Minister of Employment and Immigration on the protection of refugee women. The meeting was convened by Mr. André Juneau, Executive Director (Immigration Policy), Employment and Immigration Canada, and chaired by Professor James Hathaway of the Osgoode Hall Law School. In attendance were representatives of each of the non-governmental, institutional and responding agency sectors.

First, it was agreed that this Consultation process should address the concerns of refugee and other at-risk women. While recognizing the importance of a review of general immigration policy as it impacts on women, the participants determined that it would be preferable to establish a distinct process to assess these more general issues.

Second, the following set of governing principles was agreed to as the basis for the Consultation process.

1. Human rights-driven commitment: The policy response ought reasonably to respect and promote Canada's international and domestic human rights undertakings, including a fundamental commitment to holistic non-discrimination. What place do migration-based programs have in the broader commitment to end the systemic disfranchisement of women throughout the world? How might the domestic components of immigration programs more fully affirm the dignity and rights of women?
2. Gender inclusiveness: How might we move from a policy of gender neutrality towards a commitment in all standards and procedures to meaningful gender inclusiveness?
3. Affirmative outreach: The implementation of policy through essentially responsive mechanisms is inappropriate in the context of the social and economic barriers to access with which women are disproportionately confronted. How might standards and procedures be reframed to achieve an affirmative outreach to women?

Third, the participants developed a list of policy concerns that the Consultation process should address. These concerns were divided into three groups: matters involving the inland Convention refugee determination process, issues arising in the inland discretionary admissions process and questions regarding overseas selection, admissions and integration. The list of policy concerns to be addressed by the Consultation process includes the following points.

I. Inland Convention Refugee Determination Process

1. Convention refugee definition: What substantive gaps, if any, remain in the refugee definition as interpreted by the Immigration and Refugee Board (IRB) guidelines, and what standard-setting process (directive, regulation, statute, international convention) is required to meet any perceived inadequacies?
2. Making the claim: What impediments exist to effective access by women to the Convention refugee determination process? In particular, are there aspects of the immigration interview and detention/release process which fail to address the particular concerns of women or which discourage women from pursuing claims to refugee status?
3. Eligibility criteria: Ought the *Immigration Act*'s eligibility criteria to be amended to ensure that women refugee claimants are not returned to countries in which no mechanism is in place to ensure comparable gender sensitivity in the substantive and procedural aspects of refugee status determination?
4. Aids to decision makers: What educational and other support mechanisms (substantive and attitudinal education, documentation, advisers) are required to maximize the gender sensitivity of decision makers? Is the Board's current Code of Conduct a sufficiently clear statement of expectations, or is a specific antisexism policy required?
5. Compliance with guidelines: Is the procedural mechanism to monitor compliance by IRB decision makers within the refugee definition and guidelines adequate? Is there a need for a comprehensive procedure to monitor and/or review negative decisions in cases that raise gender-related concerns at the eligibility/access and full determination stages?
6. Determination setting: How might the determination process itself (including issues of hearing-room design and atmosphere, support structures, translators, etc.) be improved to ensure a genuinely fair hearing for women refugee claimants? Is the stated commitment to a non-adversarial hearing capable of realization?
7. Mandatory joinder: Is the prevailing policy under which the claims of family members are heard and decided jointly (unless an application for severance is granted) conducive to allowing women to present their

Professor James C. Hathaway, Chair, Agenda-setting Meeting, National Consultation on Women's Issues in Immigration and Refugee Protection, is an associate director at CRS.

independent grounds for refugee status?

8. Possible special procedure for gender-based claims: Might consideration be given to the assignment of specialized members, hearing officers and translators to determine claims in which special sensitivity to gender-related concerns is required? What procedural innovations might be appropriate to such a context?
9. Federal Court review: To what extent is the Federal Court likely to embrace the expansive definitional approach advocated by the IRB guidelines? Insofar as judicial review fails to affirm a gender inclusive optic on the Convention refugee definition, what educational and other steps might be considered to promote the full and fair consideration of claims by women?
10. Landing of Convention refugees: Are inappropriate considerations brought to bear in determining whether women recognized as Convention refugees are landed as permanent residents of Canada?

II. Inland Discretionary Admissions Process

1. Post Determination Refugee Claimants in Canada Class (PDRCC): Is the definition of this class adequate to encompass the needs of at-risk women found not to be Convention refugees by the Immigration and Refugee Board? How might the spirit of the IRB guidelines be operationalized, including by training, within the PDRCC process? Ought risk of sexual violence or inhumane treatment based on gender, including risk of spousal assault to which the state is unable or unwilling to offer an effective response, to be specifically included as a basis for relief from deportation? Is the requirement to show an element of individuated risk distinct from the risk affecting others in the country of origin an unreasonable criterion? Should length of time in Canada be a relevant consideration? Is a process for monitoring of decisions reached on applications for PDRCC status warranted?
2. Ministerial discretion: Is the Minister's discretionary authority under S. 114 of the *Immigration Act* exercised so as to ensure that the broader humanitarian concerns of women in Canada are recognized? What steps might be adopted to ensure that a woman who is a sponsored spouse does not risk deportation by leaving an abusive husband? To what extent are the objectives of this procedure undercut by official concern that, in addition to showing humanitarian and compassionate grounds for avoiding deportation, applicants must also demonstrate the capability for successful establishment in Canada?
3. Access: What barriers, if any, exist to effectively accessing either the PDRCC or ss.114(2) discretionary admissions processes? In particular, should a substantial processing fee be assessed for s.114(2) review? How might both procedures be made more transparent and known to rejected refugee claimants?
4. Possible special-measures initiative: Ought consideration to be given to the formalization of a special measures program expeditiously to admit at-risk women in Canada who face deportation? Might this be a more comprehensive and cost-effective alternative to the present array of quasi-judicial, departmental and ministerial resources involved in the consideration of claims?

III. Overseas Selection, Admissions and Integration

1. Convention refugees: While administrative steps have been taken to bring the IRB guidelines to the attention of visa officers, ought the Minister further to require visa officers to substantiate non-compliance with the guidelines in line with the precedent of the Chairperson of the IRB? How could principled consistency in decision making best be ensured?
2. Designated classes: What amendments to the designated class regulations should be considered to embrace the broader category of women in refugee-like circumstances, but who may not meet the technical requirements of the Convention refugee definition? To what extent should broader human rights-derived standards drive the revised class designations?
3. Access: What problems exist for refugee women in accessing Canadian visa officers? In particular, are settlement interviews conducted in all major refugee camps and temporary protection sites?
4. Agency relationships in the field: How might Canada better profit from the network of international and non-governmental agencies working in the field, including the United Nations High Commissioner for Refugees (UNHCR), to identify refugee women in need of protection by Canada?
5. Aids to decision makers: Do visa officers have adequate training on the interpretation of the Convention refugee and designated class definitions, in particular as they may apply to the situations of at-risk women? Are sufficient educational and other support mechanisms (substantive and attitudinal education, documentation, advisers) available to maximize the gender sensitivity of decision makers? Do senior officials set a sufficiently clear expectation of gender inclusiveness and antisexism for the selection process?
6. Selectivity: Does the "successful establishment" emphasis of the selection criteria applicable (albeit in less stringent terms) to both Convention refugees and the members of designated classes create an unwarranted disadvantage for women? Is the means by which "successful establishment" is interpreted fully responsive to the particular hardships and disadvantages faced by women? Does it adequately take account of survivorship skills demonstrated by refugee women?
7. Women at Risk program: Has the redefinition of the mandate to include both women in precarious situations and those living in perma-

nently unstable circumstances proved sufficient? How might the spirit of the IRB guidelines be incorporated in the progam's ambit? Ought there to be consideration of suitability for successful establishment, even at the prescribed level of leniency? Have new procedures for application and sponsorship identification sufficiently reduced processing time? Is there a need for a more pro-active seeking out of candidates by contact with local non-governmental organizations (NGOs)? Why has the UNHCR referred so few women to the program? What enhancements to information and training for visa staff are needed? Is the prescribed array of post-arrival services sufficient?

8. Humanitarian admissions: Should the general discretion afforded visa officers to exempt applicants from normal regulations be tailored to meet the concerns of women in need of admission to Canada?
9. Settlement and integration: Have the 1992 language-training policy and implementing programs successfully responded to the needs of immigrant women? Have accessible training options and childcare been made available to promote labour-force participation? Has enough been done to involve non-governmental organizations, including immigrant women's groups, in the settlement and integration process? Is it appropriate to limit eligibility for settlement and integration services to women who have not become Canadian citizens? Are adequate protections in place to respond to privately imposed subjugation of immigrant women through traditional cultural practices? Has enough been done to confront the risks faced by immigrant women as a result of the racial and sexual discrimination in Canadian society?

Fourth, the participants divided into smaller discussion groups, each including representation from the non-governmental, institutional and responding agency sectors to elaborate concerns within each of the policy concern areas. These discussions were later transcribed and made available to those participating in the Consultation process.

Fifth, the participants agreed that the Minister should give urgent consideration to the implementation of a process to guard against the deportation from Canada of at-risk women whose claims to Convention refugee status were heard prior to the issuance of the IRB guidelines. This interim procedure should remain in place pending the completion of a review of the adequacy of the inland discretionary admissions process as a means of protecting individuals who have advanced a need for protection based on gender-specific circumstances.

Sixth, it was agreed that the scheduled review of the Women at Risk program should proceed as an integrated part of the more general Consultation.

Seventh, it was determined that the Consultation process itself should be commenced not later than September 1993. To this end, it was agreed to establish a Coordinating Committee composed of two representatives from each of the non-governmental, institutional and responding agency sectors not later than July 9, 1993, which would take responsibility to establish a process within which the governing principles and policy concerns identified might be fully explored. André Juneau undertook to convene the Coordinating Committee and to provide secretariat and other support requisite to its functioning. The critical matters to be addressed by the Coordinating Committee were identified to include: whether the Consultation should proceed as a single, integrated process or by way of segregation of issues; who ought to be invited to participate in the Consultation; how regional input might be meaningfully achieved; the deliberative timeframe; a process for education and implementation; and the extent of resources to be made available for the Consultation process. ■

Participants

Non-Governmental Participants
Rivka Augenfeld, *Table de concertation des organismes de Montréal des réfugiés*
Janet Dench, *Canadian Council for Refugees*
Caroline McChesney, *Refugee Lawyers' Association*
Elsa Tesfay Musa, *Working Group on Refugee Women's Issues, Canadian Council for Refugees*

Institutional Participants
Ed Broadbent, *International Centre for Human Rights and Democratic Development*
Diana Bronson, *International Centre for Human Rights and Democratic Development*
Linda Gama-Pinto, *Status of Women Canada*
Lois Adams, *United Nations High Commissioner for Refugees*
Wendy Robbins, *Canadian Advisory Council on the Status of Women*

Responding Agency Participants
Nicole Brodeur, *Ministère des communautés culturelles et de l'immigration du Québec*
Pamela Cullum, *Employment and Immigration Canada*
Nurjehan Mawani, *Immigration and Refugee Board of Canada*
William van Staalduinen, *Employment and Immigration Canada*

Invitees Unable to Attend
Laura Chapman, *Employment and Immigration Canada*
Sebastien Gignac, *Office of the Minister of Employment and Immigration*
Denise Laine, *Centre social des immigrants de Montréal*
Sunera Thobani, *National Action Committee on the Status of Women*
Penny Van Esterik, *York University Conference on Gender Issues and Refugees*

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André Juneau [Convenor]
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James Hathaway [Chair]
Associate Director (Law), Centre for Refugee Studies
Leanne MacMillan [Consultation Coordinator]
Legal Programmes, Centre for Refugee Studies
Elizabeth Adjin-Tettey [Asst. Consultation Coordinator]
Jacqueline Greatbatch Fellow in Law, Centre for Refugee Studies

The Factual and Legal Legitimacy of Addressing Gender Issues

Nurjehan Mawani

I believe a preliminary question in addressing gender issues in refugee protection and immigration is the legitimacy of such an approach. In other words, why it is necessary to single out women's problems in refugee protection and immigration, and why it is justified to analyse them in light of our definition of fundamental rights. The Diplomatic Conference on Human Rights in Vienna brought out the tensions regarding this issue and illustrated the need for clarification. The justification for the Immigration and Refugee Board's (IRB) approach rests both on facts and law.

Facts show that the vast majority of refugees are women. Contrary to men, most of them are accompanied by children; they often experience a different kind of persecution than men, for example, of a private or sexual nature; and they do not have the same remedies for state protection as men nor the same opportunities for escape.

International human rights instruments such as the *Universal Declaration of Human Rights*, approved by the vast majority of states, or the *Convention on the Elimination of All Forms of Discrimination Against Women*, to which 104 states are parties, enshrine the duty to offer protection to those in need, without discrimination. These instruments and other relevant international human rights instruments reflect the fact that human rights inherently transcend culture, religion and borders. Universal recognition of these rights serves both as the legal basis and evidence of their universal nature. We must be categorical in this our deepest belief.

We are not alone in bringing this belief to gender issues in refugee protection and immigration: for some years, the United Nations High Commissioner for Refugees (UNHCR) has promoted a gender-conscious approach in the determination of refugee status; the European Community has formally adopted the same view. On specific gender issues, the United States has recognized forced sterilization as persecution; in France, a recent negative decision on credibility asserts that genital mutilation constitutes persecution; the World Health Organization has stated that genital mutilation is not a protected cultural or religious practice but rather a health hazard that will be the subject of its information program.

I will now turn to the three themes suggested for this agenda setting meeting on Women's Issues in Immigration and Refugee Protection and comment on gender issues in the refugee determination system.

Theme 1 — Gender Issues in the Refugee Determination System

The Definition of Refugee as Applied to Women

Characteristics of persecution against women

One-third of refugee claimants in Canada are women, and our acceptance rate for 1992 was 64 percent, compared to 58 percent for males.

Addressing gender issues in the refugee determination system reveals that persecution is often of a different nature against women than against men and is experienced differently by women than by men. In addition, substantiating the specific forms of persecution against women runs into specific difficulties.

Persecution against women is characterised mainly by:

- the much higher incidence of sexual assault,
- informal persecution, i.e., continuous, minor acts of harassment,
- indirect persecution, i.e., persecution by individuals, tolerated by the state, and
- intermediary persecution, i.e., persecution for the activities of a relative.

These specific forms of persecution raise particular legal, practical and evidentiary problems.

Legal issues in the substantiation of refugee claims by women

From a legal point of view, the notion of responsibility of the state is challenged in its traditional form since, in persecution against women, the state is often not the author of the persecution. Yet, states are responsible for ensuring equality before the law. Therefore, a state that does not afford equal protection to men and women is responsible for persecution by individuals and the lack of protection for women legally amounts to persecution by the state.

Persecution against women also challenges the traditional legal notion of persecution: often, persecution against women is insidious, consisting of continuous harassment with acts that, taken in isolation, would not amount to persecution. Also, the political nature of the persecution is less obvious where it is based on the activities of a relative.

Another legal hurdle to the application of refugee protection to persecuted women is the confusion between persecution on the basis of cultural or religious values and legitimate state measures to maintain social order. My preliminary remark is particularly relevant here to distinguish between state measures that entail a restriction of individual rights proportionate to their objective of social order and measures that contravene universally recognized human rights such as equality before the law, protection against torture or the right to life by imposing sanctions disproportionate to their goal of social order or by applying only to certain persons in a discriminatory way.

The notion of internal flight alternative is another legal issue that warrants specific application in the case of women: it is not realistic to ask a woman to resettle to another part of the country when a woman alone in that country is in constant danger or ostracized. In other

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words, it is unreasonable to expect the same mobility from women as for men and therefore to apply the same criteria to women and men for the existence of an internal flight alternative in the determination of refugee claims.

The last legal trapping I will mention in the application of the refugee definition to the specific situation of women claimants is the traditional view that does not readily recognize rape or sexual assault as a form of torture or persecution, thus complicating the legal substantiation of women refugee claims.

Practical issues in the presentation of refugee claims by women

Persecuted women face practical hurdles in the country of origin that compound the effects of persecution: for instance, the difficulty or impossibility for a woman to file a complaint with authorities of states where women have no independent legal status; the problems of filing a complaint against a male state official to another male official; the personal and social consequences of revealing sexual assault that prevent any denunciation or even confiding of the incident; and the confinement of women to the family that precludes access to remedies from persecution or to state protection.

Evidentiary issues in the presentation of refugee claims by women

From an evidentiary point of view, women must surmount specific obstacles:

- it may be difficult to prove the often informal persecution that is typical against women, taking the form, for example, of continuous harassment rather than warrants or detention which are more easily verifiable,
- it is also particularly onerous for women whose life has been confined to family to express themselves outside the family, let alone before a tribunal, and
- many women victims of persecution do not view their activities as political and therefore will not properly answer questions to substantiate their claim under the Convention; this is all the more pronounced in cases of intermediary persecution, where the woman is not even aware of the reasons for her persecution, as she is often estranged from the political activities of relatives.

Psychological trauma also complicates substantiation of many refugee claims typical to women. Guilt and shame make sexual abuse extremely painful, if not impossible, to be brought in evidence, particularly as members of the family are often present during the presentation of evidence and may be unaware of the incidence of sexual assault. In addition, lack of self-confidence undermines women's capacity to relate humiliating experiences that substantiate their claims.

Adding to the evidentiary problems pertaining to the claim or the claimant, Canadian decision makers are often trapped in cultural differences in assessing the credibility of the claimant or the evidence presented.

These observations led some members of the IRB to recommend the establishment of a Working Group to address the specific needs of women refugee claimants. The Working Group organized training sessions to sensitize members to gender issues. Ultimately, coupled with extensive consultations, this work culminated in the issuance of guidelines to assist members in applying the refugee definition to women claimants. Essentially, the IRB is seeking to apply the notion of persecution in a way that reflects the reality of persecution against women, an aim not fully envisaged at the time of the adoption of the Convention. A number of recent IRB decisions address the gender-conscious approach.[2]

For my part, the next steps are:

- monitor the impact of the guidelines on individual refugee claims, and
- revise the guidelines accordingly, from time to time, as the law on gender-related persecution evolves.

We are encouraging our members to provide written reasons for positive decisions in gender-related claims. By doing so, we hope to build a body of jurisprudence on gender-related persecution. We believe that this will be of tremendous value in promoting the recognition of gender-related claims not only in Canada but also internationally.

If the IRB guidelines are to be effective, our members need objective and current documentation on the position of women in their countries of origin, on the incidence of sexual and domestic violence and on the adequacy of state protection. Through the resources of our internationally acclaimed Documentation, Information and Research Branch, we are taking steps to provide this documentation. I am also pleased that the United Nations Commissioner on Human Rights recently adopted a resolution "to ensure that information concerning violations of the rights of women is integrated regularly and systematically into all United Nations mechanisms for the promotion, protection and implementation of human rights."

The recent document, "Gender Issues and Refugees," prepared by Employment and Immigration Canada (EIC), asked:

- whether we should monitor the guidelines to determine if they adequately cover situations involving gender persecution, or whether we should press for an amendment of the refugee definition in the Convention, or
- whether Canada should press for strengthening of Conclusion 39 and international acceptance of the guidelines, or
- whether Canada should amend its own legislation to expand the definition or give the guidelines force of law.

So far, in the international forum, we have been persuaded by experts not to tinker with the definition at a time when "Canada is the best player on a very bad team," to quote James Hathaway. On the other hand, promoting Conclusion 39 and international acceptance of the guidelines could present a much more successful approach for incremental change in the interpretation of the definition leading to protection of women persecuted on the grounds of gender.

Domestically, the political context may not be conducive to legislative changes to include gender in the refugee definition. In fact, it may not be necessary: the guidelines present the advan-

tage of being more flexible and easier to monitor than legislative change. As to the suggestion that they be made binding, it runs counter to the fundamental principle of administrative law regarding the independence of decision of members of an administrative tribunal.

It seems to me that the definition should, if properly interpreted, address the situations of women at risk of persecution, whether the persecution is based on gender or not. Consequently, I do not think we should take any action until we have assessed the efficiency of the IRB guidelines in this respect. This being said, my reluctance to favour an amendment of the refugee definition is based on practical considerations—that is, a fear that it may be politically detrimental to refugees to attempt this *now*—and not on philosophical considerations.

Also, we have accepted that however broadly the guidelines or the definition are interpreted, the refugee protection system will never apply to all situations of violence or discrimination against women.

For consideration in our common agenda development, I believe the situation of women refugee claimants calls for:

- taking into account in the refugee determination process the specific difficulties of presenting evidence of persecution typical to women, particularly sexual assault, and showing general sensitivity to gender issues through administrative measures such as ensuring that claims are heard by female members, if that is proven to be helpful, or by excluding family members from the hearing,
- providing cross-cultural training to decision makers to decipher various social codes of behaviour and treating claimants with respect and in a way that will best bring out the relevant evidence, and
- most importantly, building and resorting to the expertise necessary to determine women refugee claims, for example, with regard to country conditions and psychological trauma from sexual assault.

Another question submitted in the EIC's "Gender Issues and Refugees"[3] refers to the determination process. We have addressed the need for improvement in gender and cultural sensitivity among IRB members and refugee hearing officers, for user-friendly hearing rooms and for special procedures to hear evidence of sexual assault. We are also encouraging the use of experts on country conditions and sexual assault trauma.

Theme 2 — Gender Issues Related to Alternative Inland Mechanisms for Protection

The complementary nature of refugee protection and alternative inland mechanisms for protection

It is also crucial in our current agenda to make the distinction between treatment of women that constitutes persecution within, the meaning of the Convention and situations that, however intolerable, do not give way to the refugee protection regime as established. This is where alternative inland mechanisms for protection become complementary to the refugee determination system and essential in the full protection of those in need.

Alternative inland mechanisms for protection are a requirement both to the preservation of the integrity of the refugee determination system and to the protection of women in danger, albeit not Convention refugees.

Post-Determination Refugee Claimants Class

It follows that the automatic Post-Determination Refugee Claimants Class (PDRCC) is an essential tool in offering the necessary protection. As it applies to situations akin to those giving rise to refugee status, the PDRCC is all the more relevant to women, considering the difficulties of substantiating claims of persecution based on gender or against women in general, as I mentioned earlier, and considering the precarious situation of women in so many states.

In this context, the Acting Executive Director for Immigration Operations stated in a memorandum to all regional directors that EIC is recommending that decisions in the PDRCC cases and applications for humanitarian and compassionate review be taken in light of the IRB guidelines. I believe this reflects the general basis of the guidelines and will ensure consistency in our sensitivity to gender issues.

It does not seem to me that changes to the PDRCC criteria or humanitarian review process are necessary as long as they are applied in a way that is gender sensitive, that takes into account the particulars of violence or persecution against women in terms of remedy and protection.

Compassionate and humanitarian reviews

Although not necessarily based on conditions in the country of origin and thus not directly within the purview of international protection, humanitarian and compassionate review is also a crucial tool in addressing problems typical to women. One that is coming more frequently to the fore, and that I am glad to see listed in EIC's "Immigration and Gender," is that of the vulnerability of women waiting in Canada for landing as sponsored spouses. Specifically, their vulnerability to conjugal violence and, in some cases, subjugation to the status of the sponsor locks them into abusive or unhappy relationships, particularly where the marriage includes children.

It would seem pressing to include in our agenda further examination of domestic violence as a complicating factor for women sponsored as spouses, waiting for landing in Canada. We must also address the issue of the subjugation, legal or de facto, of a woman to her husband's status in Canada.

EIC's suggestion in "Immigration and Gender," that the abusive spouse could not be sponsored by a spouse admitted under humanitarian review based on conjugal violence, seems to impose itself as logical and as a valid protection to both Canadian society and the abused spouse, who could be lured into reconciliation so that the abuser may gain entry into Canada and then fall back into his abusive behaviour.

Humanitarian review may serve as a case-by-case solution where, for example, a marriage will break down before landing of the sponsored spouse but after the birth of a child. However, special provisions may be needed to take into account the vulnerability of sponsored spouses landed in Canada. I agree that

the Australian example mentioned in EIC's document may be too cumbersome, but it is clear to me that exceptional measures must be taken to allow consideration of conjugal violence in the determination of a sponsored woman's status in Canada. Perhaps the Australian example could be simplified by eliminating the requirement of a court order so as to leave the decision as to the existence of domestic violence to an immigration official.

Theme 3 —Gender Issues Relating to Refugees and Immigrants Abroad

Facts

With respect to gender issues relating to refugees and immigrants abroad, a few facts must first be recalled as relevant to the kind of protection called for and its urgency. As I mentioned earlier, women form the greater part of the refugee population, and they are usually in charge of children and sometimes of handicapped men. All the problems previously mentioned in regard to the substantiation of refugee claims are applicable in the process abroad, perhaps even more so. There is usually less opportunity to reach authorities for protection and refugee status and to express a claim in such a fixed, structured procedure as exists in the Canadian refugee determination process. Abroad, problems of presenting evidence of persecution are difficult to resolve in the presence of family members, and access to state authorities for protection is complicated.

Needs

It follows that the need for expertise that I stressed in the context of the refugee determination system in Canada is at least as important to secure abroad: visa officers must receive assistance such as cross-cultural training and information on country conditions as well as on the psychological manifestations and consequences of sexual assault trauma.

Considering that most women refugees cannot reach Canada, any shortcoming of our selection process abroad only compounds their disadvantage. In other words, are we failing to reach those most in need?

I believe that, in an agenda for consultations on gender issues relating to refugee and immigrants abroad, we should provide for:

- development of strong expertise to integrate the overseas refugee selection process (the IRB training program provides an appropriate model),
- improvement of the Women at Risk program, which I understand from EIC's documents is under way (the application of the program to only 500 people, including children, since 1988, would seem to point to operational problems), and
- further examination of the alleged disadvantage of women as refugees and immigrants with regard to our selection system.

To answer EIC's question, I would definitely recommend the application of EIC's guidelines to selection staff abroad as a natural extension of the protection we seek to provide: the bases for gender sensitivity in Canada are the same for applicants abroad; the facts about persecution against women are as true for applicants abroad as in Canada. Moreover, I understand that our visa officers abroad are in great need of the assistance the guidelines may provide.

EIC also asked us at the agenda-setting meeting to suggest ways to improve the Women at Risk program, and we replied that improvement requires an in-depth revision of the sponsorship requirement.

As a related issue, I would also add to our agenda consideration of the role of counsel and non-governmental organizations (NGOs) in assistance to women refugee claimants or immigrants. In particular, our experience points to two pressing matters:

- delivery of information to NGOs, and
- assessment of the impact of legal aid cutbacks on women refugee claims.

Integration

As to the specific challenges of the integration of women immigrants and refugees, significant efforts have been made to tailor Canada's integration programs to women's needs. Language and occupational training programs are now fully available to independent or family-class women immigrants, and efforts are made to accommodate their family obligations; most immigrant women end up on the labour market whether it was their initial intention or not. I believe EIC should be commended for its efforts and encouraged to pursue this effort crucial to both the well-being of new Canadians and to the social peace and economic prosperity of Canada.

Still, I echo the remarks in EIC's "Immigration and Gender" stressing the need to address the specific issues for the integration of women, such as the redefinition of their role and the development of their autonomy outside the family.

Conclusion

I think it is as important to recognize Canada's leading role and exceptional progress with respect to women's issues as it is to identify the need for improvement. Canada's leadership in this area was striking at the World Conference on Human Rights in Vienna. The United States and Australia are looking at our guidelines on Women Refugee Claimants as an example, and some of our members are assisting them in developing similar instruments. We must keep our role as leader in mind, as an unfairly critical approach may deflate the enthusiasm that led to the progress already made and which is still crucial to further progress. ■

Notes

1. These comments were prepared by Mrs. Mawani regarding the National Consultation on Women's Issues in Immigration and Refugee Protection Agenda Setting Meeting held at the Centre for Refugee Studies on June 28, 1993 under the sponsorship of Employment and Immigration Canada.
2. See in particular the following: Immigration and Refugee Board Decision U92-06668, February 19, 1993; Immigration and Refugee Board Decision M92-11219, April 29, 1993; Immigration and Refugee Board Decision T91-02744, 02745, 02743, March 12, 1992; Immigration and Refugee Board Decision V92-00883, 00884, March 23, 1993; and Immigration and Refugee Board Decision U92-08714, June 4, 1993.
3. See page 7 of "Gender Issues and Refugees," Ottawa: Employment and Immigration Canada, (March 9, 1993).

Gender Case Analysis: A Look at Recent IRB Decisions

Leanne MacMillan

The work of the Immigration and Refugee Board (IRB) has just begun to lend structure to the analytical framework that was proposed in the gender guidelines. It has been several months since the introduction of the guidelines, and a few cases decided by the Board are noteworthy.

In addition to those cases decided by the Board is the recent decision of *Canada v. Ward* [1993] SCJ 74, June 30, 1993 of the Supreme Court of Canada. The meaning of "membership of a particular social group" was given greater expression and clarity. The Supreme Court's very extensive examination of the Convention refugee definition is discussed at length on page 16 of this issue.

The following summaries of two cases illustrate how the analytical framework proposed by the IRB in cases of women refugee claimants fearing gender-related persecution might be followed.

The framework of analysis proposed in the guidelines has been reproduced for the reader on page 12.

Case 1

This case reviews 'membership of a particular social group' on the basis of persecution at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned person. (Decision U92-06668, February 19, 1993.)[1]

The claimant, a 24-year-old woman born in Zimbabwe whose nationality was Zimbabwean, claimed to have a well-founded fear of persecution in Zimbabwe because of her membership in a particular social group.

The claimant was forced at age 14 into a traditional marriage with a wealthy, influential man several times her age. He had three wives senior to the claimant and thirteen children. The claimant was compelled to marry him ostensibly because her parents could no longer afford her school tuition fees and the future husband promised to do so. The claimant's parents received the bride's dowry despite her objections, and she was forced to join him in another city. He proved to be an alcoholic and very abusive. Within four months, he stopped paying her school fees, and what was to become almost a decade of physical and psychological abuse began.

On several occasions after being severely assaulted, the claimant appealed to the police authorities for relief, but to no avail. She was advised by the police that her problem was a domestic affair, not assault, and she was never given any assistance. She was also told that the police could do nothing because she did not have a marriage certificate, and therefore was not officially recognized as the wife of her husband. Her pleas to her parents and to other relatives to repay the dowry went unanswered. The claimant twice left the "relationship" and fled to South Africa and Malawi, in both cases she was forced to return. In September of 1991, about one year after the birth of her second child, the claimant was severely beaten by her husband. She went immediately to the police, but they refused to take a written report. However, they did notify the husband that his wife had tried to make a report, and when she returned home she was beaten again. She fled Zimbabwe soon thereafter.

The claimant's testimony was found wholly credible and trustworthy, and the only issue was that of the well-foundedness of her fear of persecution by reason of her membership of a particular social group. In establishing whether the claimant's fear of persecution was well-founded, the panel first established that the harm feared by the claimant amounted to persecution. In concluding that the treatment she was subjected to constituted persecution, several aspects of international human rights instruments were relied on, most notably, Articles 3 and 5 of the United Nations *Universal Declaration of Human Rights*, which state:

Article 3: Everyone has the right to life, liberty and security of the person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

In referring to these instruments, the Board concluded that the *"continued physical, sexual, and emotional abuse constitutes a violation of the claimant's security of the person and amounts to cruel, inhuman and degrading treatment."*

In referring to these instruments, the Board concluded that the "continued physical, sexual, and emotional abuse constitutes a violation of the claimant's security of the person and amounts to cruel, inhuman and degrading treatment."

The Board further relied on the United Nations *Universal Declaration of Human Rights* Article 16:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall only be entered into with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

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IRB Framework of Analysis

1. Assess the particular circumstances which have given rise to the claimant's fear of persecution. Is the form of harm feared by the claimant one that is directed at or experienced predominantly by women:
   i. because of reasons pertaining to kinship?
   ii. as a result of severe discrimination against women?
   iii. on grounds of religious precepts, social mores, legal or cultural norms?
   iv. because of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection.
2. Assess the general conditions in the claimant's country of origin.
   (a) Is the social and political position of women in that country such that it engenders the degree of discrimination likely to amount to persecution?
   (b) Are there oppressive laws and regulations imposed specifically upon women or certain women? How severe are the penalties for non-compliance?
   (c) Do the state authorities inflict, condone or tolerate violence, including sexual or domestic violence? Do non-state groups or individuals use sexual violence against women as a means of punishing or reinforcing their dominance over other groups?
3. Determine the seriousness of the treatment which the claimant fears.
   (a) For the treatment to likely amount to persecution, it must be a serious form of harm which detracts from women's human rights and fundamental freedoms.
   (b) In passing judgment on what kinds of treatment are considered persecution, an objective standard is provided by international human rights instruments that declare the lowest common denominator of protected interests.
4. Ascertain whether the claimant's fear of persecution is for any one, or a combination, of the grounds enumerated in the Convention refugee definition.
5. Is adequate state protection available to the claimant?
6. Determine whether, under all the circumstances including the possibility of an internal flight alternative, the claimant's fear of persecution is well-founded.

In further elucidating the basis upon which to decide if the treatment of the claimant constituted persecution, the Board also noted that the above mentioned fundamental human rights are reiterated in the *International Covenant on Civil and Political Rights*, Articles 7, 9 and 23. They also considered the recent Federal Court of Canada Appeal Division decision of *M.E.I. v. Mayers* (F.C.A. A-544-92, November 5, 1992) and refugee law authorities.

In referring to *Mayers* they found that the case was helpful only insofar as it clearly stated that issues of women subject to wife abuse constitute a particular social group, and whether fear of abuse, given the indifference of the authorities, was persecution was to be decided by the tribunal.

The Board relied on paragraph 51 of the United Nations High Commissioner for Refugees Handbook:

> Paragraph 51: There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From article 33 of the 1951 Convention, it may be inferred that the threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.

And, they relied on Hathaway in his book:[2]

> persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources...

The categories to which Hathaway refers are:

1. basic non-derogable rights (i.e., right to life, right to be protected from torture and cruel, inhuman and degrading treatment);
2. basic derogable rights (i.e., derogable only during times of emergency);
3. realizable or obtainable rights; and
4. rights which may be beyond the state's duty to protect.

In a very comprehensive application of international human rights instruments and authorities and an examination of the documentary evidence regarding Zimbabwe, the Board concluded that the harm the claimant feared amounted to persecution:

> The documentary evidence indicates that Zimbabwean women have died at the hands of their husbands as a result of domestic violence; that wife battering and rape is endemic and country wide in Zimbabwe.[3]

The remaining issue of whether the claimant is unable, or by reason of her fear, unwilling to avail herself of the protection of the Zimbabwean authorities is determined according to the evidence of the claimant and the documentary evidence. The panel found that the documentary evidence clearly established that women, particularly from rural areas, generally experience serious discrimination at the hands of Zimbabwean male society; that physical abuse, rape and killings are an integral part of their abuse; that the authorities are not yet able to provide adequate safeguards to control the situation; and that the government is not above monitoring reports of human rights abuse from private citizens or soliciting the support of the state agencies to repress activities of human rights organizations.

The Board concluded that the claimant had reasonable grounds to fear that if returned to Zimbabwe the state would not protect her from persecution at the hands of her husband.

Since the Convention definition requires that the claimant's fear of persecution be linked to one of the enumerated five grounds, in considering the term "particular social group," the Board referred to the ordinary dictionary meaning for the word "particular." They were also guided by paragraph 77 of the United Nations High Commissioner for

Refugees Handbook and by Hathaway's description of a social group:

> This formulation includes within the notion of social group (1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.[4]

Accordingly, gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic. This position supports that of the IRB in the "Preferred Position Paper on Membership in a Particular Social Group," that the determinative criterion is the nature of the membership in the social group and whether it could readily be withdrawn by the individual concerned in order to avoid persecution.

In referring to Hathaway and the Preferred Position Paper, the Board found this claimant to have good grounds to fear persecution by reason of her membership in two particular social groups:

1. unprotected Zimbabwean women or girls subject to wife abuse;
2. Zimbabwean women or girls forced to marry according to customary laws of *Kuzvarira* and *Lobala*.[5]

The innate and unalterable characteristic which defines the first group is that of their gender, which the group cannot repudiate, and which the documentary evidence regarding Zimbabwe clearly show places them at risk. Second, the practices of *Kuzvarira* and *Lobola* violate fundamental human rights. The Board concluded this decision by noting that the claimant's tormentor would likely always be able to retain control over her and have the power to persecute her without any reasonable expectation of effective state protection. Finding no available internal flight alternative, the panel found that the claimant was a Convention refugee.

Case Two

This decision relates to women who fear persecution resulting from acts of violence by public authorities from whose actions the state is unwilling or unable to adequately protect. (Decision V-92-00883;-00884, March 23, 1993)

In this case the panel argued that one of the main reasons that the claimants had a well-founded fear of persecution was based on their fear of a gender-specific form of persecution—rape. This, coupled with the blatant racism and discrimination against their indigenous group established in the documentary evidence, completed the foundation of their claim.

The claimants were two sisters, aged seventeen and nineteen, from Guatemala. They are Mayan Indians with no formal education who helped in the family enterprise of growing beans and corn. In mid-1990, they learned, as did the rest of their community, that their father was involved in the guerilla movement. Soon thereafter, their family was visited by soldiers on a number of occasions, and the claimants were threatened with kidnapping.

Accordingly, gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic.

During these visits by the soldiers, the claimants were molested and threatened with rape and murder. The claimants were sent to another town where they found work in a cafeteria. Off-duty soldiers who were vacationing in the town recognized the claimants and harassed and threatened them with rape. The sisters fled Guatemala as soon as arrangements could be made.

The two sisters framed their refugee claims on grounds of a fear of persecution because of their race, their political opinion and their membership in a particular social group. The panel found that the claimants fell within a particular social group—that of young Mayan women living without the protection of their families. In their opinion,

> members of this social group are particularly vulnerable because of their age, gender, and race...these two women have been singled out and identified by members of the armed forces in Guatemala. This singling out happened because of their father's political opinion. They also could be subject to persecution because of their association with their father. However, it is because of their gender and their race that we find them to be particularly vulnerable and we find that the fear that they suffer, i.e. the fear of rape, falls within the definition of persecution.[6]

The panel assessed whether there was a local flight alternative. They found that there was no local flight alternative given that they were very young women unaccompanied by their parents, and that they were Kanjobal-speaking Mayans with no formal education and with limited employment skills. The history of Guatemala's repression against Mayan Indians and its appalling human rights record with respect to their treatment of indigenous people also contributed to the panel's finding that the claimant's have a well-founded fear of persecution in Guatemala because of their membership in a particular social group. ■

Notes

1. While this decision was written two weeks prior to the date that the "Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Immigration Act* Women Refugee Claimants Fearing Gender-Related Persecution" were released, it was clearly written according to the principles and framework of analysis enunciated in the guidelines. See also, Decision U92-08714, June 4, 1993 for a finding of "Ecuadorian women subject to wife abuse."
2. James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), pp. 109-112.
3. Decision at p. 10.
4. Hathaway, *supra* note 1 at 161.
5. *Kuzvarira* is the practice of giving of young girls for marriage without their permission. *Lobola* is the custom of giving bride money for the purchase of a bride to the parents of the would-be wife.
6. Decision at p. 2.

Violence Against Women as a Human Rights Issue

Diana Bronson

I would like to try to unpack the slogan "women's rights are human rights" by looking specifically at the issue of violence against women. I want to underline some of the theoretical and methodological issues—which of course have very practical and even life-and-death implications—involved in trying to see women's rights as human rights.

What do we mean when we say women's rights are human rights? This slogan is being used by different people and different groups to mean different things. In its most limited interpretation, we are saying merely that women are human and that they deserve the same rights as men. In a more expansive interpretation, we are saying that what we traditionally think of as women's rights—issues that feminists have raised, such as reproductive choice, violence or pornography—are fundamentally human rights issues. Not surprisingly, the latter interpretation is considerably more controversial and can even pit the women's rights advocates against some more traditional human rights and/or civil liberties groups. It is interesting to note that, in the document the new administration in the U.S. has put out for the world conference on human rights, there is an emphasis on the rights of women, including "battering in the family, rape, female infanticide, honour killings and dowry murder" but no mention is made of reproductive rights.[1] There is a very wide spectrum of voices chanting this slogan—from the National Action Committee on the Status of Women to the Conservative government in Canada, and the range is even broader if we look at the international picture. This is not necessarily a negative thing, but it is something of which we should all be aware.

I have been asked to address the issue of violence against women as a human rights issue, and I will try to do so by looking at the issue of domestic violence. I draw heavily on the arguments made by Dorothy Thomas and Michele Beasley in a recent issue of the *Human Rights Quarterly*,[2] and I recommend that article to anyone who wants a more thorough examination of the issue.

First of all, I think it is important to have a human rights discourse that can lay some kind of claim to universality. Not everything that is undesirable can all of a sudden become a human rights issue. Human rights discourse gains its legitimacy and therefore its power precisely by claiming that all human beings share the rights that it enumerates and that there is some kind of international legitimacy in the discourse. That legitimacy cannot be taken for granted, but, relatively speaking, a human rights discourse does quite well in comparison to feminism. As Hilary Charlesworth from Australia has argued, human rights provides a significant vocabulary for women because it is recognized by the powerful.

Developed from Western political theory, international human rights law concentrates exclusively on acts for which the state can be held accountable.

The challenge for women is therefore to use the tools that have already been developed to defend their own interests. We know these tools have been developed by men; they suit men's needs and speak to male realities. You will recall the case last year of a 14-year-old Irish girl who was raped and became pregnant. The Irish government refused to allow her to go to Britain to obtain an abortion, and the injunction it obtained against her was eventually overturned. Women's groups argued that her right to control her own body had been violated, and while I don't have any special insight in the decision-making process, I think it was useful that human rights groups could intervene on her behalf, pointing to a specific article in the *Universal Declaration of Human Rights* that guarantees freedom of movement. Unfortunately, feminist arguments do not carry the same weight internationally: freedom of choice is not guaranteed in the *International Bill of Human Rights*. It is useful to use the language of human rights to speak to female experiences of oppression even if the international instruments do not deal directly with those experiences: clitoridectomy can be understood as a form of torture, domestic violence as an assault on the security of the person, and restrictions on travel as violations of freedom of movement. Human rights can give women a powerful language to express their opposition to their second-class status.

Developed from Western political theory, international human rights law concentrates exclusively on acts for which the state can be held accountable. In recent history, this has come to mean not only acts which are committed by the state, but acts which the state fails to prosecute systematically.

International human rights law, while recognizing that the rights proclaimed in its various treaties apply equally to women and to men, is basically gender neutral—with the exception of the convention to Eliminate all Forms of Discrimination Against Women, which incidentally does not mention violence at all.

That is to say, international human rights law ignores the fact that men and women do not have the same access to the public sphere and that the most

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persistent violations of women's life, liberty and security of the person occur in the private sphere. This creates a problem in proving that the state is accountable, the dominant ethos being until very recently that the state has no business in the bedrooms of the nation and that every man is a master in his own home.

As refugee advocates have recently argued in this country, and as is recognized in the new guidelines on gender-related persecution, the state can in fact be considered accountable for failing to act to protect women from domestic violence. The Washington-based Human Rights Watch group was the first human rights group, to my knowledge, to unequivocally and explicitly recognize that domestic violence was a human rights issue. In its Brazilian report,[3] the group showed that the state was complicit in the crime because it failed to prosecute it equally to other crimes and to guarantee women the fundamental civil and political right to equal protection before the law without regard to sex. Furthermore, not every act that the state fails to prosecute becomes a human rights issue; it only becomes one when the reason the state fails to prosecute is discrimination on the grounds of race, religion, sex and so on.

This report marks a very fundamental shift in the dominant paradigm of human rights theory. While international human rights law has recognized the state obligation to punish human rights violations by private actors, this report takes it one step further; it takes it more clearly into the domestic sphere and, at the same time, makes human rights relevant to women's experience.

The difficult part in a court of law or at a refugee hearing is proving that the state is accountable in the sense defined above. How can anyone document that a crime such as wife abuse is widespread and non-prosecutable if no one is keeping statistics or documenting abuse? In many countries, police will not record a woman's complaint, and women know that it is not worth the effort.

Human rights advocates have, over the years, developed rigorous methodologies for documenting abuses. Objectivity and neutrality are perceived as being absolutely essential to any credible human rights report. Yet the orientation that feminist scholarship has adopted over the last decade has taken the opposite direction, and it offers a rather profound critique of objectivist epistemologies and methodologies. I think this is a key problem that we will be forced to address if the human rights movement is to take women's rights seriously. Perhaps human rights groups and refugee documentation centres will have to be satisfied with more anecdotal, qualitative evidence, and women's groups will have to start using the methodologies and gathering the kind of traditional documentation that is needed if they are to be able to effectively use the international mechanisms of human rights protection. I think there has to be some movement in both directions. So far, women's and human rights groups are not really using the same language; but that is beginning to change.

International human rights law ignores the fact that men and women do not have the same access to the public sphere and that the most persistent violations of women's life, liberty and security of the person occur in the private sphere.

The challenge for women is to use the language and mechanisms of international human rights law in a way that makes it relevent to their experience. The challenge for the human rights movement is to start taking the violations of women's rights as seriously as the violations of men's rights. Women must use the paradigm that exists already and begin to forge a new one for the realities that the old language of human rights still cannot address. ■

Notes

1. *New York Times* (May 9, 1993).
2. Dorothy Q. Thomas and Michele E. Beasley, "Domestic Violence as a Human Rights Issue," *Human Rights Quarterly* 15 (1993): 36-62.
3. "Criminal Injustice: Violence Against Women in Brazil," *Americas Watch* (New York: Human Rights Watch, 1991).

Post-Determination Refugee Claimant Class (PDRCC)

According to federal government sources, of the few hundred cases reviewed under this class since April 1, 1993 less than 1 per cent have been accepted.

The policy response has been that the number of those accepted should be low; otherwise, it would show that there is either a major deficiency in the decision-making ability of the Immigration and Refugee Board members or a significant change in country circumstances post-determination. This conclusion, however, belies the fact that mistakes are made by all those in the refugee determination process—board members, advocates and claimants themselves—and that there is virtually no opportunity for re-opening or a review at the Board level. It also does not address the fact that the majority of cases are denied leave to appeal by the Federal Court. Also, the policy justification of the negligible acceptance rate under the PDRCC category does not address the fact that country conditions do change or that new evidence presents itself and the failed claimant may be able to assert a claim that warrants new consideration. The advantage of the PDRCC approach was to be that the decision-making criteria were provided by way of regulation, and it marked progress over the previous system that was not transparent to claimants and counsel. Perhaps the total number of cases is too small to draw any statistically sound conclusions; perhaps the humanitarian and compassionate category is where failed claimants are finding relief. However, one wonders what the circumstances of those few accepted under this new category might have been to warrant such seemingly unique treatment. ■

L.M.

A Step Forward in Protecting Human Rights: *Canada v. Ward*

Linda E. Tranter

> "International refugee law was formulated to serve as a backup to the protection one expects from the state of which an individual is a national." (Par. 28)

In its first thorough examination of the Convention refugee definition, the Supreme Court of Canada has powerfully affirmed that protection of those at risk of serious human rights violations is the lens through which refugee law must be focused. The decision of June 30, 1993 in the appeal of Patrick Francis Ward is a carefully tailored guide to interpreting almost every aspect of the refugee definition in this light. This formulation broadens the scope of the definition to include those genuinely lacking protection from imminent harm while cutting shy of those who have other viable options than to seek refugee status. The decision steers a course away from the days when refugee law was used to condemn publicly enemy states for their misbehaviour or to weed out the undesirable immigrants from the welcome ones.

The *Immigration Act* (s. 2(1)) defines a Convention refugee as:

> "any person who
>
> a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a social group or political opinion,
> i) is outside the country of the person's nationality and is unable or, by reason of that fear, unwilling to avail himself of the protection of that country..."

In recent years, as the Federal Court of Appeal has gradually defined the parameters of refugee status, it has issued a series of somewhat conflicting precedents as to whether the persecution feared must come from the government or, if not, when one may rely on international refugee protection against a private abuser of one's rights. Likewise, the boundaries defining the classes of persons offered protection as Convention refugees and in particular those who are persecuted on the basis of their "particular social group" have remained slightly hazy. It is in these two areas that the *Ward* decision offers the most assistance.

> "The rationale underlying international refugee protection is to serve as 'surrogate' shelter coming into play only upon failure of national support. When available, home state protection is the claimant's sole option... The assessment of Convention refugee status most consistent with this theme requires consideration of the availability of protection in all countries of citizenship." (Par. 130)

By focusing on the goal of protection, Justice La Forest separates out those who have more appropriate solutions at their disposal, while extending protection to some who have been excluded as Convention refugees in the past. He identifies two categories of persons who are not in need of refugee status. Those who can gain protection from their own governments or from another country of citizenship must avail themselves of that protection in lieu of refugee status. Refugee protection is a last resort reserved for those who need it most.

> "My conclusion that state complicity in persecution is not a prerequisite to a valid refugee claim is reinforced by an examination of the history of the provision, the prevailing authorities, and academic commentary." (Par. 37)

Writing for a unanimous court, Justice La Forest includes in the gamut of the Convention those whose rights are at risk of violation from actors other than the state but only in circumstances where the state is unable to secure effective protection. Thus he resolves conflicting positions in the Court of Appeal and cuts to the heart of the matter. Those who may obtain protection of their rights from their own government are denied international protection, but those who have no protection from the harm that they fear are included in the class of possible refugees.

By focusing on protection and not condemnation of wayward states, the previous artificial equation of a state's inability to protect with state complicity in persecution is jettisoned. The artificiality of this equation, advocated in such decision as *Rajudeen*, *Surujpaul* and *Zalzali*, is clear on the facts of this case. Mr. Ward feared persecution from the INLA, a military organization seeking to overthrow the Irish government. Despite the government's admission that it was powerless to protect Mr. Ward, clearly that government cannot be characterized as an accomplice in the group's activities.

The Supreme Court also does away with previous attempts to distinguish those who are "unable to avail themselves of the protection of the state" from those who are "unwilling" to avail themselves of state protection because of a fear of persecution. This distinction, relied on by the Federal Court in this case, required that those who were unwilling to rely on the state for protection were only eligible for refugee status if the state was complicit in persecuting the claimant. The Supreme Court recognizes that Mr. Ward was both unable and unwilling to depend on the Irish government's protection because they had informed him that they were unable to protect him effectively.

> "It would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate its ineffectiveness." (Par. 67)

This decision also disposes of any strict requirement that the individual must formally request protection before concluding that it is unavailable. Again, this is done in view of best achieving the

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goal of effective protection. The test which Judge La Forest advocates is that formulated by Professor James Hathaway—that the person would only be required to approach the state for protection "if it might reasonably be forthcoming." This allowance is tempered by a new presumption that nations are capable of protecting their citizens. The presumption can only be rebutted by "clear and convincing confirmation" of a state's inability to effectively protect the claimant.

While this presumption increases the burden on the claimant, a second favourable presumption comes into play if one is able to demonstrate the state's inability to protect oneself.

> "Having established that the claimant has a fear, the board is, in my view, entitled to presume that persecution will be likely, and the fear well-founded, if there is an absence of state protection." (Par. 62)

The *Ward* decision makes lack of protection by the state the central element of the refugee definition. The above presumption indicates that those who are so marginalized as to feel their security to be threatened and who lack protection by the state can be presumed to be in need of international protection as refugees. Of course, this presumption only acts in conjunction with the presumption that states are presumed to be able to protect their citizens except in the face of clear evidence to the contrary.

> "...[T]he international community did not intend to offer a haven to all suffering individuals." (Par. 85)

The focus on protection of the marginalized is taken up again in Justice La Forest's lengthy discussion of the classes of persons included in the provision for protection from persecution because of "membership in a particular social group." The Convention refugee definition requires not only that the claimant be at risk of serious human rights violations but that one be at risk because of one's race, nationality, religion, political opinion or membership in a particular social group. Justice La Forest affirms that these five grounds were intended to narrow the class of persons eligible for protection to those marginalized through discrimination.

Therefore, he rejects an interpretation of "social group" which would offer protection to any persecuted person who merely belongs to an association or sociological classification. Instead he imports an interpretation from Canadian antidiscrimination law by finding that "membership in a particular social group" subsumes grounds of persecution which are analogous to the other four grounds.

> "Canada's obligation to offer haven to those fleeing persecution is not unlimited... Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted. Surely there are some groups, the affiliation in which is not so important to the individual that it would be appropriate to have the person dissociate him- or herself from it before Canada's responsibility should be engaged." (Par. 102)

Justice La Forest identifies as most in need those who face mistreatment because of a personal characteristic which they cannot change or should not be required to change because it is fundamental to their human dignity. These persons fall into three categories:

1. groups defined by an innate or unchangeable characteristic,
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, and
3. groups associated by a former voluntary status unalterable due to its historical permanence. (Par. 103)

While these categories cover most persons persecuted on a discriminatory basis, note that what is omitted are those who face persecution for a former involuntary status, for example, persons formerly conscripted into an army, former prisoners or persons born in a particular region or taken there by their parents. These too are conditions which are unalterable due to their historical permanence.

Nonetheless, the framework is extremely helpful in putting an end to ad hoc characterizations of social group and steers clear of any temptation to find those persons in current political favour to fit within the "particular social group" ground while excluding others equally deserving and in need of protection.

On the facts of the *Ward* case, the court found that the INLA is not a "particular social group" for the purpose of the refugee definition because its commitment to violently overthrow the Irish government is not a purpose which is so fundamental to their human dignity that they should not be required to forgo it. More importantly, it ruled that Mr. Ward was persecuted by the INLA not because of his membership or former membership in that group but because of his dissenting opinions and actions against the group. Therefore, the court concluded that Mr. Ward was persecuted because of his political opinion in opposition to the INLA.

This decision thus clarifies that it is essential to correctly identify the reason for the persecution when determining whether it is within the five grounds. It is not enough to show that the claimant belongs to a particular social group, but the claimant must show that her fear of persecution is because of that membership or characteristic.

Finally, Judge La Forest examines the claimant's fear of persecution on the basis of his dissenting political opinion. He adopts Professor Goodwin-Gill's broad definition of political opinion which encompasses "any opinion on any matter in which the machinery of the state, government, and policy may be engaged." (Par. 118)

Justice La Forest lays out the governing principles for assessing a fear of persecution based on political opinion. He writes that the perception of the persecutor is the determinative one. That is to say that if the persecutor believes that the claimant holds an opposing political opinion and persecutes the claimant for that reason, the claimant can be said to fear persecution on the basis of political opinion. It is immaterial whether the claimant has expressed or actually holds the imputed opinion.

He emphasizes that the relevant view is not necessarily that of the governing authority, the claimant or the refugee

board, but the perception of the persecutor.

Justice La Forest notes that this principle would also apply to each of the other four grounds. (Par. 120)

The court concludes that Mr. Ward feared persecution from the INLA because his political opinion opposes their stance on hostage taking.

Throughout this far-reaching examination of the law governing refugee status, the court keeps in centre-view the goal of protecting the human rights of those who have no effective protection in their home state. In order to best achieve this end, it includes in the definition those whom the state cannot protect from non-state persecutors and those who are persecuted on grounds analogous to the original four grounds identified by the Convention definition. Nonetheless, it recognizes that Canada's international obligations only extend to those who have no other options for protection in their own countries. It concludes that Mr. Ward was persecuted by the INLA because of his political opinion and that he could not be protected by the Irish authorities, but it directs the case back to the refugee board to decide if he would be able to find protection in Britain, his second country of citizenship. Thus, Convention refugee status is reserved for those who have no alternative but to seek international protection after a failure of domestic protection of their human rights.

The decision in *Attorney General of Canada v. Ward* brings Canadian law one large step closer to ensuring that those in danger of human rights violations receive protection. Professor James Hathaway has observed that this decision is "easily the most far-ranging decision issued by the senior court of any country." ■

Note

1. James Hathaway, *Canada v. Ward*: Table of Concordance to the Law of Refugee Status, July 1993, unpublished. Note that paragraph numbers correspond to those of the preliminary version of *Canada v. Ward* [1993] SCJ 74, June 30, 1993.

The New Public Security Portfolio

Honourable Douglas Lewis, P.C., M.P.

Let me say, at the very outset of my remarks, that the organizational changes introduced last month do not alter in any way Canada's immigration policy. There has been no shift in the focus of that policy. We begin and end any debate with the certainty that immigration is good for Canada.

It has often been said before that sometimes it sounds like a religious chant, but the plain fact is we are a nation built by immigrants; to reach Canada's full potential we must increase our population. There are many reasons. Let me give you one. It is easier to supply residents of California with consumer products than Canada's 27 million, 75 percent of whom are within 175 kilometres of the 6,000-kilometre Canadian-U.S. border.

As the grandson of an immigrant, I believe Canada's position in the world community owes as much to the genus and energy of waves of new Canadians as it does to our wealth in natural resources. And if you listen closely to those who predict the future, you will hear them say that it is our human resources that are the key to Canada's future prosperity.

That is why immigration has been an integral element of this government's social and economic agenda since 1984. We believe that the economic and social contributions made by new Canadians are essential to Canadian growth.

A decade ago, at a height of a previous recession, the government slashed immigration. This government chose another path. During nine years in office, we have gradually increased the annual level of immigration. In 1993, Canada will welcome as many as 250,000 immigrants—almost three times the number we welcomed in 1983.

Our record demonstrates our belief in the importance of immigration. We have no intention of changing.

The approach we have taken towards immigration matters can probably best be described as yanking Canada's head out of the sand. The world is changing and we had better be prepared to meet the challenges it poses or lose control of valuable programs like immigration.

The global community is awash with people seeking new homes. This is a phenomenon that has steadily grown over the past decade. A United Nations report estimates that more than 100 million people are on the move as migrants or refugees.

In these circumstances, faced with this rising tide of humanity, developed nations such as Canada have two basic options. They can either retreat behind high walls or work to manage those pressures at home and seek solutions to the root causes of migration in the source countries. We can either reinforce and defend the integrity of a generous and valuable immigration policy, or we can watch public confidence and support for the policy collapse.

We choose to take action and not to retreat. During the past eight years, we have either reinforced existing programs or established new programs to help newcomers adjust to life in Canada. We rebuilt Canada's refugee determination system and introduced a specific five-year plan for immigration levels. Last winter, we passed Bill C-86. The legislation updated Canada's *Immigration Act* for the first time since 1976.

But through all these reforms, the heart of Canada's immigration policy has remained unchanged. Its primary objective is still to bring to Canada individuals who can contribute to our eco-

This article was extracted from notes for an address by the Honourable Douglas Lewis, Minister of Public Security, at a meeting with the representatives of ethnocultural agencies in Toronto on July 19, 1993. It is reproduced here in the hope of gleaning some insight on what to expect in the new public security approach to refugee matters in Canada—an approach that has not yet been satisfactorily outlined.

nomic development and to reunite families and protect refugees. At the same time, the series of new measures introduced with Bill C-86 allow Canada to address the realities of the 1990s. These measures will assist us to more effectively select newcomers and to accelerate their processing. They allow us to better protect a vital national program and Canadians from those who would abuse our generosity or break our immigration laws, and they further streamline a highly regarded refugee determination system.

The changes we proposed in C-86 were hotly debated. They didn't satisfy those people who wanted us to slam the door on immigration, and they weren't supported by those who told us to throw the door wide-open. Instead, they appealed to the vast majority of Canadians who found themselves between two viewpoints.

I believe that an effective immigration policy for Canada must balance our compassionate character as a people with our pragmatic requirements as a nation. The policy changes we introduced with C-86 achieved that goal. I am confident that the broad middle ground of public opinion views those changes in the same way—as balanced, fair and pragmatic. It is this same sense of pragmatism which motivated the prime minister to place large elements of this vital national policy within the protective envelope of the Public Security portfolio.

Again, we have chosen action over inaction. Since we took office in 1984, we have pursued a policy of growth in immigration levels because we are convinced of the benefits of this policy. Last Winter, Bill C-86 gave us the tools to effectively meet the challenges and opportunities of immigration in the 1990s. Now, the reorganization of departmental responsibilities will permit us to better integrate a range of government functions that have complemented each other in the past.

For example, customs officers and the RCMP have had a long and close association with the immigration program. Each organization operates within its own area of jurisdiction, but each has certain responsibilities in helping to manage the arrival of immigrants, refugees or visitors to Canada. The establishment of the new department draws the threads of these various organizations more closely together.

Canada and Canadians will benefit from these changes through improvements in the management of our immigration policy and programs and through more effective control over the security of our borders.

Claims to the contrary, there is nothing in this reorganization of responsibilities that signals a shift in Canada's immigration policy. The government remains absolutely committed to the immigration policy as set out in the *Immigration Act*.

I will not deny that we have given extra weight to the issue of enforcement by placing key elements of the immigration program within a Public Security portfolio. This action is intended to preserve the integrity of a bedrock policy for Canada.

I know we both share the same anger when a foreign criminal slips through the system to claim the rights of Canadian citizenship. I know we share the same revulsion when an unscrupulous consultant is caught swindling defenceless migrants. And I know that we share the same knowledge that these incidents are the exception and not the rule. They do not represent the true face of immigration.

It is also true that senseless and violent attacks on new Canadians is a malicious assault on the basic sensibilities of all Canadians. This is not the Canada that generations of immigrations have worked to build. This must not be our future. As Minister of Public Security, I am determined to deal forcefully with the corrosive hatred of racial intolerance which pits Canadian against Canadian. There can be no tolerance for intolerance in Canada.

I believe we must do more to celebrate the success of immigration as part of the counterbalance to the hatred by ignorance. Immigration success stories far outweigh the controversies. Of the 220,000 newcomers who arrived in 1991, only a very tiny percentage were mired in controversy.

Unfortunately, that is not a perspective which many Canadians share. The sad fact is controversy attracts attention.

A recent report prepared by researchers for the Fraser Institute of Vancouver found that Canada's main television networks in general cast news stories on immigrants and refugees in a negative light.

Let me quote one of the researchers. She said, "The lack of attention to the positive economic impact of immigration has allowed the public to continue to believe that immigrants...are generally a liability rather than an asset for Canada." But while abuses are generally small in number, this does not preclude the need for enforcement measures. An immigration policy is worthless without the ability to enforce removal or deny entry to a country's sovereign territory. The United Nations High Commissioner for Refugees readily acknowledges this fact.

By consolidating management of our border activities and our immigration enforcement activities, I am convinced that we can exercise more effective control over entry to Canada, ensure that we better protect all Canadians, and reduce abuse of Canada's generous immigration and refugee programs.

When the prime minister announced the changes to the government's structure, she was asked if it was wise to call a new department, the department of Public Security.

She simply replied that one suggestion had been to call the department, the department of Home Affairs. "That's a lovely and elegant term," she said, "except if you ask Canadians what's in the department of Home Affairs, they wouldn't have the foggiest clue." "Let's start a new government," said the prime minister, "by communicating with Canadians in a language they understand."

There is no hidden agenda in the creation of this new department. There is just a profound commitment to the importance of the tasks at hand—that is the protection of Canadian society from those who would break our laws and preservation of a vital national policy which has contributed to our sense of identity and served as a source of prosperity for more than a century. ■

The New Refugee Advocacy Staff Office

Ontario Legal Aid Plan

The Ontario Legal Aid Plan will be establishing a staff office in Toronto to represent refugee claimants at hearings before the Refugee Division of the Immigration and Refugee Board. This office will be established on a three year pilot project basis, and it is estimated that the office will represent about 1,150 refugee claimant cases annually. Refugee claimants who are entitled to legal aid retain the right to choose representation by staff counsel or counsel of their own selection retained on a legal aid certificate.

The feasibility of the delivery of legal aid to refugee claimants by a staff model clinic was examined by the Refugee Pilot Sub-Committee, a group of refugee lawyers, legal aid committee members and executive members of the Ontario Legal Aid Plan. Those representing the refugee lawyers bar were Joyce Chan, Greg James, Karen McCullough, Peter Showler and Lorne Waldman.

The Sub-Committee concluded that there is not a problem of access to legal services for refugee claimants in Ontario that would justify a method of delivery of those services different from the current method. However, there is to some extent a problem of access to competent legal services. Furthermore, the Sub-Committee is of the view that the provincial government is committed to undertaking a pilot project to deliver legal services to refugee claimants through a staff model as a cost-saving initiative. In those circumstances, the Sub-Committee believes that the Ontario Legal Aid Plan is in the best position, with the expertise and assistance of the private bar, to ensure that legal services delivered through a staff model are independent and of good quality and that proper resources are made available. It is within this context that the Sub-Committee made the recommendations that follow.

Extracted from the "Report to the Legal Aid Committee of the Refugee Pilot Sub-Committee, June 1993," Ontario Legal Aid Plan.

Quality of Service

The Sub-Committee concluded that the issue of paramount concern in refugee law cases was the quality of legal representation available to refugee claimants. There is often no remedy available for refugee claimants who have received incompetent representation. They face speedy deportation back to the country from which they fled.

There is a wide range of competence among lawyers representing refugee claimants. Members of the refugee bar who do appellate work have expressed concern about the lack of adequate preparation by some lawyers who represent refugee claimants at Board hearings. Comments about the competence of the representation of some lawyers should not, however, be taken to derogate from the overall contribution of the private bar to the body of refugee law that has developed rapidly in the last few years.

Refugee cases are becoming more vigorously contested. Counsel require greater advocacy skills and more detailed country knowledge to address arguments related to issues such as change in country conditions and the existence of an internal flight alternative. That is, as political changes occur in the countries from which refugee claimants have fled, their counsel must be familiar with those changes and must search out and submit to the Board information about the likely durability of the changes in order to address the reasonableness of the refugee claimant's continued fear of persecution should he or she return to that country. In addition, many arguments arise around what is termed the "internal flight alternative." In countries such as India and Sri Lanka, the Board may conclude that the refugee claimant would be likely to be safe in another part of the country other than the area from which he fled and accordingly, reject his or her refugee claim. Those are two examples of the many issues that now confront refugee lawyers in representing their refugee clients.

The newly amended *Immigration Act* permits the minister of immigration to intervene more often, and, as a result, cases will become lengthier and more complex legally. At the same time, the percentage of refugee claimants determined by the Immigration and Refugee Board (IRB) to be Convention refugees, and thus subject to Canada's protection, has fallen more than 75 percent from 1989 to 1992.

Monitoring Quality of Service

Monitoring the quality of representation of refugee claimants presents unusual difficulties that do not generally arise in other areas of practice. There are a number of reasons.

Hearings before the Refugee Division of the IRB are generally conducted *in camera* and do not permit the informal peer review of counsel's competence that occurs naturally in criminal and family court where hearings are conducted in open court.

In addition, refugee claimants themselves are generally not knowledgeable consumers of legal services as are persons who have a greater connection with the structure of society in this culture. They are less likely to know that they are not being well served and to have knowledge of their ability to make a complaint to the Law Society of Upper Canada. Refugee claimants are vulnerable in a number of ways. As a result of their experiences in the country from which they have fled, they are often distrustful and do not wish to call themselves to the attention of anyone in a position of authority in this country. If they are not well served and are determined not to be Convention refugees, they may well be deported before they are able to make a complaint about the quality of representation they received.

Guiding Principles

The Sub-Committee recommended that the following five principles be adhered to:

1. Access to a staff office in refugee cases must not derogate from the freedom of choice of counsel. Refugee claimants who are eligible for legal aid assistance must be entitled to choose between representation by staff counsel and representation by counsel of their own selection retained on a legal aid certificate.
2. Staff counsel must be independent in all aspects of their relationship with their client to the same extent as in a relationship between a solicitor and a legally aided client.
3. There must be assurance of necessary resources, including both sufficient resources for the full and proper preparation of each case by lawyers and paralegal staff and sufficient resources for necessary disbursements.
4. The existence of a staff office must not in any way result in less recognition by the plan and the government of the importance of continuing the private bar delivery of legal aid services to refugee claimants or any lesser remuneration to those lawyers in the private bar providing legal aid services to refugee claimants than to other lawyers. As part of the evaluation of the pilot project, there must be an assessment of the impact of the staff office on access to legal services in refugee law delivered by the private bar.
5. The practice of refugee law has an inherent community advocacy function that should be part of any pilot project.

The Sub-Committee recommended that the refugee pilot staff office focus primarily on representing refugee claimants at hearings before the Refugee Division of the IRB. A secondary aspect of their work would be on internally generated appellate work and test-case appellate work. The staff office should also make available through the Legal Aid

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Empower the Most Vulnerable: A People-Oriented Planning Workshop

Véronique Lassailly-Jacob

This workshop, sponsored by the Reconstruction and Rehabilitation (R and R) Fund of the Canadian Council for International Co-operation (CCIC), was held in Ottawa, April 19-20, 1993.

This very informative workshop conducted by Mary B. Anderson and Tim Brodhead regrouped many Canadian NGO representatives involved in refugee programs. The main target of this training session was to discuss ways of improving the efficiency and effectiveness of international assistance provided to refugees in the context of developing countries. Improving refugee programs implies using resources more efficiently, increasing the opportunities for refugees to assume responsibility for their own management and programs and ensuring that programs benefit everybody in the community—men, women, children and the most vulnerable.

The audience was introduced to two concepts presented as compulsory prerequisites of successful programs. The first concept discussed was change—change in the customary social and economic roles of each individual in a refugee context—"it is essential in planning activities for refugees that you have an in-depth understanding of the dynamics of change working within the society. These determine, to a great extent, the acceptance and success of any project." Second, the concept of refugee participation was defined as "recognizing that full participation requires the involvement of refugee women, men and children."

The ways of assessing socio-economic changes in a refugee community as well as determining the ability of refugees to participate in and benefit from the programs was then examined. We were invited to discuss a framework built as an analysing tool for socio-cultural and economic components in a refugee community. This three-step framework, based on a UNHCR report,[1] is conceived as " a new analytical framework which combines elements of gender analysis and capacities-vulnerabilities analysis."

The first step focuses on the profile and context of a refugee population. Refugee workers should remember that the overall population profile has been distorted by the refugee situation and major demographic distortions must be taken into consideration when delivering programs. The second step of the framework is an Activities Analysis. "It is essential to find out what people were doing before and what they are doing or are able to do now in the refugee situation for which you are planning." The old patterns as well as the refugee situation pattern of the female/male division of social and economic roles and responsibilities should be investigated. As for the third step, it is devoted to what resources refugees controlled and used before they became refugees and what resources they control and use now: what they have lost, what they have brought with them and what they have been provided with in their refugee situation.

Finally, we were invited to test this framework on some typical refugee situation managed by the UNHCR. Discussions focused on two study cases, the Ukwimi Refugee Settlement set up in Zambia for Mozambican refugees and the repatriation of Cambodian refugees from Thailand.

As far as I am concerned, two main points were not sufficiently mentioned. The first one is related to the great amount of time required for such an in-depth analysis; refugee workers are usually very busy in implementing their programs. Will they have the time for conducting this survey? The second

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point is linked to a major component, not sufficiently tackled during the workshop, the socio-political context of a refugee situation. Planning refugee programs without having an in-depth knowledge of the host society, the host government's refugee policy or the country of origin at the time of repatriation is prone to failure.

However, this framework will be a very useful tool which will facilitate program and project planning, implementation and evaluation. It points out some critical components too often overshadowed. "It reminds us that women, as well as men, are active producers in the economy and society and that one critical variable in program planning is change in the gender division of roles, responsibilities and resources". ■

Notes

1. Anderson, M. B., Howarth, A. M. and Overholt, C.: "A Framework for People-Oriented Planning in Refugee Situations, Taking Account of Women, Men and Children. A Practical Planning Tool for Refugee Workers," UNHCR, Geneva, December, 1992.

The New... *continued from page 21*

Research Facility to the refugee bar precedents and materials supporting refugee claims and appeals, particularly in test cases. This latter recommendation is aimed at improving the quality of the representation generally available to refugee claimants through the private bar and as also saving legal aid costs that would otherwise be incurred by the production of those arguments and materials in individual lawyers' offices.

The refugee pilot project staff office will operate for the next three years at the provincial office of legal aid on University Avenue in Toronto. It is estimated that about 1,150 cases annually, including hearings and expedited cases before the IRB and applications for judicial review in the Federal Court, could be handled by this office. It is projected that some cost savings on a per-client basis to the Ontario Legal Aid Plan should be realized over the three years. ■

"God Has Left Me."

Lloyd Jones

The day blossomed as Canada celebrated its 126th birthday. The early morning Thunder Bay sunshine gave us a sigh of relief after days of rain, cloud and below normal temperatures. Biniam was our Ethopian guest. Sponsored a few months back, Biniam came to us through Greece as a refugee. Escaping the horrors of civil war, Biniam was only fourteen when he was sent to Athens by his mother and brother. Now in Canada, we had noticed Biniam retreating inside himself. His replies to questions were barely a few words or short sentences. For long periods, he stared into space as he sat on a bench outside our home. The grass was velvet green, thicker than usual because of the rain. The petunias, marigolds and lilacs glistened with the early morning dew. The birds sang their cheery songs. Such was the beginning of Canada Day, 1993.

Our house already had the buzz of activity. As our home is also an international hostel, travellers were up and about, toileting, packing, preparing breakfast and planning their day's activities.

Our home is very close to the 11-17 highway, the two-lane, 80 kilometre stretch of roadway where all trans-Canada traffic is funnelled leading to and from Thunder Bay. Traffic was heavier than usual going west. Many were tourists crossing Canada. Others were locals going to Old Fort William where Canada Day is celebrated in grand style. Still others were Thunder Bayites heading to their cottages along Lake Superior or to Dorion Bible Camp or to Sleeping Giant Provincial Park. Some local people stayed home to tend their gardens, receive family friends and relax at home.

"We're having pancakes, Biniam," I shouted. "Would you like some?" No response; but then, that was like Biniam sometimes. The night before, for some strange reason, Biniam had been pouring over our National Geographic atlas. He had also shown me two New Testaments in the Ahmaric language. I commented to him that one was a Gideon Testament, to which he acknowledged with a slight smile, something rare in Biniam's behaviour. During one of his many moments of sitting and staring on the white bench by the front lawn, I tried to find out more about his solitary, meditative behaviour. He replied several times, "God has left me."

Biniam had wandered away before but had returned after walking long distances. But somehow on that day, we became concerned after a few hours and called the Ontario Provincial Police to be on the lookout for him. He had not taken his belongings, and had left his running shoes where they had been the night before. He had carefully made his bed. That he had wanted to go back to Ethiopia was apparent. He had even sent his passport to the Ethiopian embassy for renewal. Our thoughts had wandered back to a church outing the weekend before in nearby Sleeping Giant Provincial Park. Biniam joined us, and we were impressed with his skill, agility and strength as he played volleyball on the beach of Lake Marie-Louise. We had spent a happy time touring the new visitor centre, with Biniam taking interest in the exhibits.

He had been interviewed for a "Futures" program with Youth Employment, and his prospect of being accepted was strong. He had never shown academic promise in his tests to enter high school in Thunder Bay, and we felt this would buoy him. His morose and depressed condition continued to gnaw at us, and this good news cheered us up considerably, hoping that Biniam too, would rejoice.

It was 10:30 p.m., the sun having just set in the northern sky. I remember the relief when the squad car rolled into the

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driveway. "They've found Biniam," I thought.

A Pass Lake resident had responded to Biniam's request for water. An ambulance driver had spotted him sitting by the side of the road then departing into the bush near Pearl. Later in the evening, an off-duty R.C.M.P. officer found Biniam's body hanging from a hydro pylon. Biniam had climbed the twelve feet and hanged himself by a rope he had fashioned from joining three strands he had found along the highway. He had bound his hands with his belt in such a fashion that would not interfere with his proposed plan of action.

A memorial service was held the following Sunday—our moments with Biniam were recounted, along with expressions of our own guilt, "What if we...?" Questions we could not answer. Biniam was gone. We talked about his honesty, his friendship and our concerns about lost dreams and hopes.

The obituary in the Chronicle Journal concluded: the work of the Lord never ends,

to find the lost
to heal the broken
to feed the hungry
to release the prisoner
to rebuild the nations
to bring peace among people
to make music in the heart.

We will miss him. ■

Book Review

Storm and Sanctuary: The Journey of Ethiopian and Eritrean Women Refugees

By Helene Moussa

Dundas, ON: Artemis Enterprises, 1993.
ISBN 1-895247-08-x. $18.95. 288p.

Reviewed by Yohannes Gebresellasie

There are more than seventeen million refugees worldwide today. The majority of these refugees are women and children and many of them are from the Third World countries, particularly, Africa.

A few scholars have contributed extensively to the study of African refugees (Rogge, 1989), (Gaim, 1990), (Rogge and Akol, 1989). However, their studies have not been based exclusively on a gender perspective. Thus, research on women in general and on African women in particular has been neglected despite the particular difficulties these refugee women face.

By presenting the personal experiences of Ethiopian and Eritrean refugees who fled their country of origin during the years 1974-1991 (the time when Ethiopia was under the military regime lead by former Ethiopian dictator Mengestu Haile Mariam), Helene Moussa explains the unique situation that refugee women encounter not only as refugees, but most importantly as refugee women. Also, to explore the refugee issue from a gender perspective, Moussa reaches out directly to these refugee women from Ethiopia and Eritrea who now reside in Canada. She encourages them to share their experiences and, in her book, skilfully presents their personal interpretations in a very direct and frank way. This book, which consists of ten chapters (284 pages), focuses mainly on gender and refugee law, and refugee and other labels or identities. It also deals with the politics involved in doing research exclusively on refugee women as opposed to refugees in general. In the book, one can clearly understand that "refugee" is not a "homogeneous entity" because each refugee experience varies even among refugee women themselves. The book thus brings out all the differences that are not assumed in settlement policies. It also provides an overview of the Ethiopian revolution of 1974, the complexities of the nationality question within the context of Ethiopia and the conflicts and wars that followed. Here, the reconstruction of the experiences of the refugee women in question, in particular, their decisions to leave and the processes they recall, become the focal point of Helene's analysis.

The book covers a much broader argument than the current immigration policy which has historically defined the term "refugee" as gender neutral; thus, the term has been confused. Moussa's work is therefore a valuable contribution in highlighting the needs of refugee women with regard to refugee assistance or with regard to resettlement or repatriation. This study contributes highly to a gender analysis of women's experiences which are widely misunderstood or perhaps intentionally neglected in a traditionally patriarchal society. The book also provides statistical data, figures and an extensive bibliography covering a number of areas on women refugees useful for academics as well as for policy makers. The methodology is very different because a constant interchange was maintained between the author and the people in question.

The reader will find the book very passionate and clear. Its content is essential for anyone who would like to understand the problems women refugees experience before, during and after they are traditionally labelled as "refugees" as well as the courageous struggle they have to endure to maintain their identity as women wherever they are. ■

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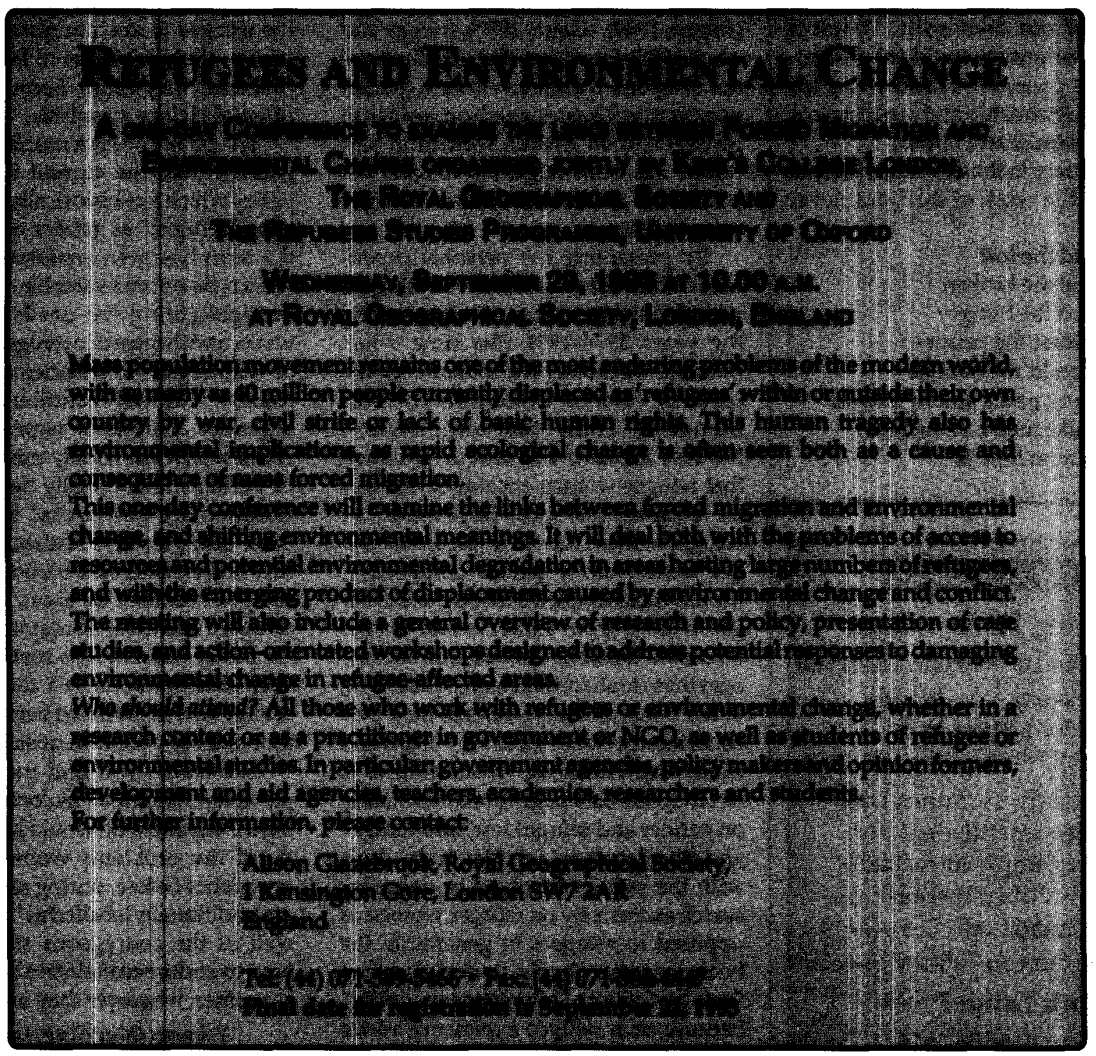

REFUGEES AND ENVIRONMENTAL CHANGE

A one-day Conference to examine the links between Forced Migration and Environmental Change, organised jointly by King's College London, The Royal Geographical Society and The Refugee Studies Programme, University of Oxford

Wednesday, September 29, 1993 at 10.00 a.m.
at Royal Geographical Society, London, England

Mass population movement remains one of the most enduring problems of the modern world, with as many as 40 million people currently displaced as 'refugees' within or outside their own country by war, civil strife or lack of basic human rights. This human tragedy also has environmental implications, as rapid ecological change is often seen both as a cause and consequence of mass forced migration.

This one-day conference will examine the links between forced migration and environmental change, and shifting environmental meanings. It will deal both with the problems of access to resources and potential environmental degradation in areas hosting large numbers of refugees, and with the emerging product of displacement caused by environmental change and conflict. The meeting will also include a general overview of research and policy, presentation of case studies, and action-orientated workshops designed to address potential responses to damaging environmental change in refugee-affected areas.

Who should attend? All those who work with refugees or environmental change, whether in a research context or as a practitioner in government or NGO, as well as students of refugee or environmental studies. In particular: government agencies, policy makers and opinion formers, development and aid agencies, teachers, academics, researchers and students.

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Final date for registration is September 22, 1993