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# The 1951 Refugee Convention's Contingent Rights Framework and Article 26 of the ICCPR: A Fundamental Incompatibility?

Marina Sharpe

**Abstract**

*This article addresses the relationship between two primary structural features of the 1951 Convention relating to the Status of Refugees—that many benefits under it accrue on the basis of a refugee's degree of attachment to his or her host state and that many rights under the convention are guaranteed to a refugee only to the extent that they are enjoyed by a particular reference group—and the 1966 International Covenant on Civil and Political Rights' article 26 equality guarantee. Specifically, it examines whether attachment contingencies and reference groups, when incorporated in the refugee laws of states party to the ICCPR, might run afoul of article 26.*

**Résumé**

*Cet article examine les liens dialectiques entre deux principes essentiels du régime général des réfugiés. Il s'agit du principe d'attachement et de groupe de référence prévus par la Convention de 1951 sur le Statut des réfugiés et de l'égalité devant la loi telle que garantie par l'article 26 du Pacte international relatif aux droits civils et politiques de 1966 (PIRCP). L'étendue des droits garantis par le régime conventionnel dépend du degré d'attachement du réfugié à son pays d'accueil et de la reconnaissance de ces droits au groupe de référence. Plus précisément, l'article analyse les conflits potentiels entre les garanties offertes par le régime général du PIRCP et la réception du principe de contingence et de groupe de référence dans les droits nationaux des Etats parties.*

## 1 Introduction

This article addresses the relationship between two primary yet often overlooked structural features of the 1951 Convention relating to the Status of Refugees,[1] on the one hand, and the 1966 International Covenant on Civil and Political Rights'[2] (ICCPR) article 26 equality guarantee, on the other. The first feature of the 1951 convention at issue is that many rights under it accrue on the basis of the refugee's degree of attachment to the host state. In other words, whether a refugee is entitled to certain rights under the convention depends on the nature of his or her stay in the country of asylum. The 1951 convention includes five types of presence in the host state: mere jurisdictional control, physical presence, lawful presence, lawful stay, and habitual residence. The second feature of the 1951 convention at issue is that many rights under it are guaranteed to refugees only to the extent that a particular reference group also enjoys the right in question. The convention includes three reference groups: aliens generally in the same circumstances, most-favoured foreigners, and citizens.

This article examines whether attachment contingencies and reference groups, when reflected in the domestic refugee legislation of states party to the ICCPR, might be inconsistent with that instrument's article 26 equality provision. It does not, however, attempt to apply ICCPR article



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26 equality analysis to the differential allocation of a particular right as between different groups of refugees, or to rights guaranteed to refugees at a standard lower than that enjoyed by nationals or other aliens, because such analysis is entirely dependent on particular facts: the right at issue and the nature of the unequal treatment suffered. Even if facts were invented for the sake of hypothetical analysis, the resulting conclusion would be no more than speculative because the Human Rights Committee (HRC)—the ICCPR treaty-monitoring body—has never applied article 26 scrutiny to a state party's domestic refugee law. What this article does do, however, is deconstruct the 1951 convention's system of attachment contingencies and reference groups, explain the scope of the ICCPR article 26 equality guarantee, and highlight that this guarantee applies to the 1951 convention system of attachment contingencies and reference groups when these are reflected in the refugee laws of states party to the ICCPR. This is with a view to encouraging refugee advocates to consider article 26 among the arsenal of legal arguments available for the advance of refugees' rights.

The article begins with a more detailed explanation of the 1951 convention's attachment criteria and its reference group approach, enumerating the rights subject to each contingency, and then demonstrating how certain rights are dually contingent. This is followed by an overview of ICCPR article 26 and the criteria set by the HRC to determine when differential allocations of rights run afoul of the provision. The article's fourth section then argues that the 1951 convention's reference group approach and its attachment criteria could each reasonably be found to be incompatible with ICCPR article 26 when such an approach and criteria are reflected in domestic laws. It also notes that the ICCPR's and the International Covenant on Economic, Social and Cultural Rights'[3] (ICESCR) common accessory non-discrimination provision prohibits distinctions between refugees and nationals, and among refugees, in respect of rights also protected by one of the covenants. A concluding section briefly contemplates the systemic implications of the analysis for the 1951 convention and its domestic counterparts.

In should be noted at the outset that in developed countries, refugees are rarely accorded a particular package of rights based on the 1951 convention; refugee legislation in developed countries does not usually follow the 1951 convention's contingent rights framework. Canada's Immigration and *Refugee Protection Act*,[4] for example, does not address refugee rights. Refugees' rights are protected in general by the *Canadian Charter of Rights and Freedoms*,[5] which applies to every person in Canada,[6] and certain rights and/or benefits are the subject of specific laws and/or policies, such as the Interim Federal Health Program in the case of medical care for asylum seekers and refugees recently resettled to Canada. In some developing countries, by contrast, refugee legislation follows the 1951 convention's rights framework exactly. *Ghana's Refugee Law, 1992* is an example. The act's rights framework mirrors the 1951 convention, providing simply that a "person granted refugee status in Ghana shall be entitled to the rights and be subject to the duties specified in (a) … [the 1951 convention]; (b) the Protocol Relating to the Status of Refugees of 1967 …, and (c) the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa."[7] These three international instruments are then attached to the Ghanaian act as schedules. The issue this article addresses is salient only in states such as Ghana, which approach refugee rights in line with the 1951 convention.

It should be further noted that nothing in this article should be taken to suggest that a treaty can invalidate an earlier international instrument with which it is incompatible. In other words, the incompatibility between the 1951 convention and the ICCPR suggested here should not be taken to imply that ICCPR article 26 invalidates the 1951 convention's contingent rights framework. Nothing in international law suggests that such is possible. Moreover, the Vienna Convention on the Law of Treaties contains a framework for the resolution of such conflicts (though it is usually applied to conflicting bilateral instruments).[8] Rather, this article is about the effect in ICCPR states parties of that instrument's article 26 on domestic refugee laws that follow the 1951 convention framework.

## 2 The 1951 Convention

The 1951 convention is the international treaty relating to qualification for and disqualification from refugee status, and to refugee rights. Unlike international human rights law, most rights under the 1951 convention are not universally guaranteed. While article 3 of the 1951 convention prohibits discrimination on the grounds of race, religion, and country of origin, and the convention's article 5 clarifies that nothing in it impairs any right granted by any other law, most 1951 convention rights are themselves dependent on the nature of the refugee's presence in the asylum state and on the standards of treatment enjoyed by other groups in the host state. Each of these two features of the convention is discussed in turn.

Hathaway explains that the 1951 convention's attachment criteria represent an attempt to make rights contingent upon the strength of the bond between a refugee and his or her host state.[9] He explains this "assimilative path":[10] "While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state.… Before any given rights can be claimed by a particular refugee, the nature



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**Table 1: 1951 Convention rights categorized by attachment criterion**

| [Subject to jurisdiction] | [Physical presence] | Lawful presence | Lawful stay | Habitual residence |
|---|---|---|---|---|
| Art 3 non-discrimination | Art 4 freedom of religion | Art 18 self-employment | Art 15 right of association | Art 7(2) exemption from legislative reciprocity |
| Art 13 property rights | Art 25 administrative assistance | Art 26 freedom of movement and residence | Art 17 wage employment | Art 14 artistic and industrial property |
| Art 16(1) access to courts | Art 27 identity documents | Art 32 protection from expulsion | Art 19 liberal professions | Art 16(2) legal aid and exemption from cautio judicatum solvi |
| Art 20 rationing | Art 31 no penalization for unlawful entry | | Art 21 housing | Art 17(2) exemption from labour market restrictions |
| Art 22 public education | | | Art 23 public relief | |
| Art 29 fiscal charges | | | Art 24 labour legislation and social security | |
| Art 33 non-refoulement | | | Art 28 travel document | |
| Art 34 naturalization | | | | |

of his or her attachment to the host state must therefore be defined. The structure of the attachment system is incremental: because the levels build on one another,… rights once acquired are retained for the duration of refugee status."[11]

Usually, a refugee will become subject to the host state's jurisdiction at the same time as he or she becomes physically present in, or enters, the country of asylum. However, one can think of exceptional instances in which jurisdictional control precedes entry. For example, Edward Snowden was arguably subject to Russian jurisdiction during the 40 days he spent in Sheremetyevo Airport before officially crossing the border there. Physical presence is established as soon as the refugee is within host state territory. The contours of "lawful presence" are less straightforward. Hathaway addresses them in depth.12 For the purposes of this article, it is sufficient to note that lawful presence certainly refers to "the stage between 'irregular' presence and the recognition or denial of refugee status, including the time required for any appeals or reviews."[13] "Lawfully staying" is also complex;[14] for our purposes, it suffices to note that lawful stay is characterised by "officially sanctioned, ongoing presence in a state party, whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile there."[15] Habitual residence is generally achieved when the refugee has lived in the host state for a statutorily defined continuous period of time.[16] In sum, "some rights apply simply once a state has jurisdiction over a refugee; others by virtue of physical presence in a state's territory, even if illegal; a third set when that presence is either officially sanctioned or tolerated; further rights accrue once the refugee has established more than a transient or interim presence in the asylum state; and even the most demanding level of attachment requires only a period of de facto continuous and legally sanctioned residence."[17]

**Table 2: Rights guaranteed to a standard below national treatment**

| Rights |
|---|
| Art 13 property rights |
| Art 15 right of association |
| Art 17 wage employment |
| Art 18 self-employment |
| Art 19 liberal professions |
| Art 21 housing |
| Art 22(2) public secondary education |
| Art 26 freedom of movement and residence |

All 1951 convention rights are categorized according to their related attachment criteria in table 1.[18] In the column headings, "Subject to jurisdiction" and "Physical presence" are bracketed because they represent a very low bar to the enjoyment of rights; indeed, it would be nonsensical to guarantee a right to a refugee not subject to host state jurisdiction. Nevertheless, they are included in the table in order to exhaustively deconstruct 1951 convention rights according to attachment criteria.

The 1951 convention's attachment criteria are the first of two ways in which most rights under that instrument are contingent. The second is its system of reference groups. Again, Hathaway's explanation is instructive. He notes that the standard for compliance with rights under the 1951 convention "varies as a function of the relevant treatment afforded another group under the laws and practices of the receiving country. Under these contingent rights standards, refugees are entitled to be assimilated either to nationals of



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**Table 3: Dual contingencies on 1951 Convention rights**

| | [Subject to jurisdiction] | [Physical presence] | Lawful presence | Lawful stay | Habitual residence |
|---|---|---|---|---|---|
| Aliens generally in the same circumstances | Art 13 property rights<br>Art 22(2) public secondary education | — | Art 18 self-employment<br>Art 26 freedom of movement and residence | Art 19 liberal professions<br>Art 21 housing | — |
| Most favoured foreigners | — | — | — | Art 15 right of association<br>Art 17 wage employment | — |
| [Nationals] | Art 20 rationing<br>Art 22(1) public elementary education<br>Art 29 fiscal charges | Art 4 freedom of religion<br>Art 25(4) fees for administrative assistance | — | Art 23 public relief<br>Art 24 labour legislation and social security | Art 14 artistic and industrial property<br>Art 16(2) legal aid and exemption from *cautio judicatum solvi* |

a most-favoured state, or to citizens of the asylum state itself. If no absolute or contingent standard is specified for a given right, refugees benefit from the usual standard of treatment applied to non-citizens present in the asylum state."[19]

This system "clearly presumes the legitimacy of treating refugees less favourably than citizens with respect to any of the rights defined by a contingent standard less than nationality."[20] Those 1951 convention rights for which the reference group, and hence the standard of treatment, is below national treatment are listed in table 2.

Taken together, the 1951 convention's attachment criteria and its reference groups create a system of dual contingencies on certain refugee rights. Such rights are subject to both an attachment criterion and a reference group standard. This is represented in the contingency table (table 3).[21] Each right in the table is subject to the attachment criterion in the column heading above it, and the same right is guaranteed only to the extent that the reference group named in the stub heading to the left also enjoys it. For example, under the 1951 convention, only refugees lawfully staying in the host state enjoy article 15 freedom of association, and the right is guaranteed to the standard enjoyed by the most favoured non-nationals in the host state. Again, "Subject to jurisdiction" and "Physical presence" are included for the sake of exhaustiveness; the brackets around these column headings indicate that these attachment criteria are a low bar to the enjoyment of rights. Similarly, national treatment is the highest standard of treatment and so does not represent a true contingency, as indicated by the brackets around it in the table; it is included for the sake of exhaustiveness.

When these reference groups and attachment criteria are incorporated into the domestic refugee laws of states party to the ICCPR, they may raise article 26 equality issues. This provision is discussed below.

### *3 ICCPR Article 26*

A threshold consideration is whether the ICCPR applies to non-nationals, including refugees. The language of the ICCPR is such that its rights are generally owed to "everyone." Moreover, the HRC has clarified that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."[22] Thus refugees in their host countries enjoy ICCPR rights.

The right at issue here is that to equality, which is given effect by states' duty of non-discrimination. The legal duty of non-discrimination requires that the treatment accorded to individuals not be based on their status, group membership, or irrelevant physical characteristics.[23] Article 26 of ICCPR articulates this duty with particular force because the ambit of the guarantee is not limited to the ICCPR alone;[24] rather, it applies to the "allocation of all public goods, including rights not stipulated by the Covenant itself."[25] Nowak explains through an example: the ICCPR "contains no provision granting a right to sit on a park bench. But when a state party exacts a law forbidding Jews or blacks from sitting on public park benches, then this law violates Art. 26."[26] Refugee rights are thus subject to ICCPR article 26,[27] rendering the international refugee convention as incorporated by ICCPR states parties justiciable by the HRC.[28]

ICCPR article 26 provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all



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persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[29]

This guarantee ensures both formal equality (equality before the law) and substantive equality (equal protection of the law). Thus "refugees … are entitled to invoke Art. 26's duty to avoid arbitrary allocations and its affirmative duty to bring about non-arbitrary allocations."[30] Article 26 does not, however, establish an unconditional right to equality, because not every instance of differential treatment amounts to discrimination.[31] In many circumstances, it is perfectly reasonable for a state to differentiate between groups; affirmative action programs are the classic example. Rather, equality requires that any unequal treatment be "properly justified, according to consistently applied, persuasive, and acceptable criteria."[32] The classic statement of this principle was made by Justice Tanaka in his dissenting opinion in the *South West Africa* case.[33] In the context of apartheid, Tanaka explained that differential treatment is permitted when it is just or reasonable, but justice and reasonableness always preclude arbitrary distinctions.

The HRC has accordingly read the following proviso into article 26: "[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[34] Thus to amount to discrimination under ICCPR article 26, unequal treatment must be based on criteria that are neither reasonable nor objective, nor in pursuit of a legitimate aim. Pobjoy has distilled this into a convenient three-pronged test for establishing unlawful discrimination:

1. Has there been differential treatment between individuals in similar circumstances? In other words, is there an inequality *basis* for a discrimination claim?
2. Is the unequal treatment based on a ground captured by art 26?
3. Is the unequal treatment based on "reasonable and objective" criteria?[35]

The section that follows considers the impact of the 1951 convention's reference group approach and whether it can be reconciled with ICCPR article 26.

## *4 The 1951 Convention and ICCPR Article 26*

### *4.1 The 1951 Convention's Reference Group Approach and ICCPR Article 26*

The 1951 convention's system of reference groups protects certain convention rights to a standard lower than that enjoyed by nationals and/or most-favoured foreigners. If this lesser treatment can be construed as resulting from refugees' status as such, then article 26 is invoked. The applicable prohibited ground of discrimination is "other status," which can be construed as including refugee status because the HRC generally interprets "other status" broadly,[36] and because it has understood the ground to include non-citizens.[37] Indeed, Hathaway has noted that ICCPR article 26 might "be a sufficient basis to require asylum states to bring an end to any laws or practices that set refugees apart from the rest of their community."[38] To determine whether an instance of discrimination is saved by the HRC's proviso, one must apply Pobjoy's test to the right at issue.

There is, however, a more direct route to challenging below-national treatment than that provided by ICCPR article 26, which has been highlighted by Hathaway.[39] Both covenants include an accessory non-discrimination provision. Article 2(1) of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2(2) of the ICESCR provides substantively the same protection.

This article is subject to a similar proviso as ICCPR article 26: distinctions "are prohibited as discriminatory only when they are not supported by reasonable and objective criteria."[40] Yet in general terms, article 2(1)/2(2) effectively precludes discrimination relative to citizens.[41] It is accordingly "not necessary to rely on the relevant refugee right in order to contest treatment below national treatment. Since virtually all rights in the Covenants must be implemented without discrimination between nationals and non-citizens, refugees who invoke the cognate Covenant protection can effectively avoid the lower standard of treatment prescribed by the Refugee Convention."[42] In respect of contingent 1951 convention rights also protected by the ICCPR or the ICESCR—article 15 on rights of association, article 17 on wage employment, article 18 on self-employment, article 21 on housing, article 22(2) on secondary education, and article 26 on freedom of movement and residence[43]—refugees are thus entitled to national treatment unless the state can establish that treating refugees differently from nationals is reasonable.

It should be noted, however, that the ICESCR permits that developing countries—where the majority of the world's refugees are found—"with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[44] Recourse to the ICESCR to raise less than national treatment in respect of economic rights is therefore most likely to be successful in developed states (where, as mentioned above, refugee rights are not usually contingent).[45] Moreover, ICESCR rights are



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not guaranteed on an absolute basis; the standard is one of progressive realization.[46] Finally, and most importantly, non-citizens often face significant obstacles to the enjoyment of their rights, at international law as well as under municipal law. Detailing the jurisprudence in this regard is beyond the scope of this article, and others have in any case already conducted such work.[47] It suffices to note here that any reliance on the covenants to raise less than national treatment to the national standard will have to overcome several hurdles: the limit placed on their common accessory non-discrimination provision, the allowances made by the ICESCR for developing countries in terms of both economic rights and in terms of the standard for implementation, and more generally, negative jurisprudential trends. At the very least, the covenants' common accessory non-discrimination provision represents an additional avenue through which to challenge less than national treatment of refugees in respect of rights also protected by the ICCPR or the ICESCR. Indeed, the Committee on Economic, Social and Cultural Rights has explained that "the ground of nationality should not bar access to Covenant rights … The Covenant rights apply to everyone including non-nationals, such as refugees, asylum seekers."[48]

In respect of those contingent 1951 convention rights found in neither the ICCPR nor the ICESCR—the rights to property (article 13) and to the practice of liberal professions (article 19)—the only approach to challenging less than national treatment is to subject the right at issue to Pobjoy's test to determine whether distinction between refugees and nationals might impugn ICCPR article 26, the critical third prong of which employs the HRC's proviso and asks whether less than national treatment can be said to be "reasonable and objective." The results of the analysis will differ depending on the host country and right at issue;[49] in the context of scarce resources, restricting socio-economic rights would likely be more easily justified than limiting civil and political rights. For example, in the context of scarce resources, it may be "reasonable and objective" to protect the local labour market by prohibiting refugees from practising their professions. Discrimination in the protection of property rights, by contrast, would probably be less easily saved.

Hathaway has noted three jurisprudential trends suggesting that the HRC might be reluctant to find distinctions between non-nationals and citizens unreasonable. First, the HRC "has too frequently been prepared to recognize differentiation on the basis of certain categories, including non-citizenship, as presumptively reasonable. Second and related, the Committee has paid insufficient attention to evidence that generally applicable standards may impact differently on differently situated groups … third and most generally, the … [HRC] routinely affords governments an extraordinarily broad margin of appreciation."[50]

He concludes by noting that "non-discrimination law has not yet evolved to the point that refugees and other non-citizens can safely assume that it will provide a sufficient answer to the failure to grant them rights on par with citizens."[51]

This is not to say that the HRC has never referred to article 26 in connection with non-citizens. In its 2003 Concluding Observations on Latvia, the HRC expressed "its concern over the perpetuation of a situation of exclusion, resulting in lack of effective enjoyment of many Covenant rights by the non-citizen segment of the population, including political rights, the possibility to occupy certain State and public positions, the possibility to exercise certain professions in the private sector, restrictions in the area of ownership of agricultural land, as well as social benefits (art. 26)."[52]

Regarding refugees specifically, in its Concluding Observations on Germany, the HRC "warned that anti-terrorism measures might create an 'atmosphere of latent suspicion' towards foreigners, in particular asylum-seekers, and referred to Article 26 in support of its observations."[53] The HRC has never, however, applied article 26 scrutiny to a refugee law's system of reference groups. Thus the current moment can most accurately be characterised "as one of legal uncertainty … until and unless the … [HRC] assesses the propriety of categorical differentiation based on citizenship … it will be difficult to know which forms of exclusion are likely to be found valid, and which are in breach of Art. 26."[54]

### *4.2 The 1951 Convention's Attachment Criteria and ICCPR Article 26*

As a result of the 1951 convention's system of reference groups, refugees suffer differential treatment relative to citizens. The convention's attachment criteria, by contrast, distinguish among different groups of refugees. Hathaway notes that the 1951 convention's levels of attachment are also "subject to scrutiny under Art. 26 to ensure that the withholding of benefits from some refugees is justifiable."[55] Clark and Niessen have implied the same.[56] Hathaway does not, however, pursue the point. Rather, his extensive analysis of discrimination among refugees is based on other criteria, such as refugees' countries of origin.[57]

To offend article 26, whether a refugee is subject to host state jurisdiction, physically present, lawfully present, lawfully staying, or habitually resident would have to be found to fall within the provision's final enumerated ground on which discrimination is prohibited: "other status." Yet, as above, there is also a simpler solution. Because the covenants protect everyone on state territory, refugees who are merely physically present have the benefit of those 1951 convention rights that require lawful presence, stay, or habitual residence if such rights are also included in the ICCPR or, in some cases, in the ICESCR. In other words, certain



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rights weakly protected in international refugee law benefit from the complementarity of international human rights law. Accordingly, the 1951 convention's rights to artistic and industrial property (article 14), of association (article 15) and access to courts (article 16(2)), and to self- and wage employment (articles 17 and 18), housing (article 21), and labour legislation and social security (article 24), which under international refugee law are guaranteed only to those lawfully present, staying, or habitually resident, are by virtue of the ICCPR or ICESCR equally available to refugees physically present (and lawfully present, as applicable).[58]

Note, however, that the degree of protection accorded under the relevant covenant will, of course, depend on the particular right at issue. For example, intellectual property rights are protected only weakly under the ICESCR.[59] Moreover, as above, in developing countries the ICESCR article 2(3) caveat, and in general its standard of progressive realisation, applies to 1951 convention rights contingent upon lawful presence, stay, or habitual residence and also included in the ICESCR. More generally, the hurdles faced by non-citizens in the enjoyment of their rights apply equally in this context.[60]

For the remaining rights—those 1951 convention rights dependent on strong attachment, which as refugee-specific rights feature in neither the ICCPR nor the ICESCR, or more general rights subject to limitations under these instruments—the analysis to determine whether the 1951 convention's attachment criteria approach contravenes ICCPR article 26 is as above: by application of Pobjoy's test in context to differential allocations of rights as between different classes of refugees. The rights susceptible to such analysis are listed in table 4.

**Table 4: 1951 Convention rights with strong attachment criteria (> physical presence) and no international human rights law complementarity**

| Art 7(2) exemption from legislative reciprocity |
|---|
| Art 19 liberal professions |
| Art 23 public relief |
| Art 26 freedom of movement (ICCPR art 12 requires the person be "lawfully within" state party territory)[61] |
| Art 28 travel document |
| Art 32 protection from expulsion (ICCPR art 13 requires the person be "lawfully in" state party territory) |

On a normative basis at least, it has been argued that "while a State is exercising its jurisdiction over a person with respect to the determination of any one right, including the right to a status, the person should enjoy other rights to the extent possible."[62] Whether the ICCPR article 26 analysis will suggest the same will depend on the right, how it has been differentially protected, and the particular host country situation at issue. The HRC has never assessed whether a domestic refugee law featuring attachment criteria offends article 26. However, it should be noted that in his analysis of discrimination among refugees (on grounds other than their degree of attachment to the host state), Hathaway finds that ICCPR article 26 "has considerable value as a complementary prohibition of discrimination between classes of refugees in the allocation of a wide-ranging set of rights."[63]

## *5 Conclusion*

This short article has deconstructed the system of attachment criteria and reference groups that underlies the 1951 convention. It has also highlighted that the ICCPR's article 26 applies to domestic refugee laws based on this system in states party to the ICCPR. It is hoped that this will encourage refugee advocates to consider article 26 among the tools available to them to advance refugee rights. Furthermore, it has emphasized that in respect of 1951 convention rights that are also protected by one of the covenants, their common accessory non-discrimination provision can raise less than national standards of treatment to the national level, provided that the distinction at issue is neither reasonable nor objective. The covenants similarly protect refugees who are merely physically present from a lower standard of treatment than that accorded to more attached refugees.

On a more systemic level, this article has highlighted a particular instance of a fairly common issue on the international plane: treaties can be inconsistent with earlier international instruments. In this case, ICCPR article 26 is inconsistent with the international refugee convention that came before it. Certainly, if the ICCPR had existed when the 1951 convention was drafted and adopted, the latter would have emerged as a completely different instrument, likely without its facially discriminatory system of reference groups and attachment criteria. Today, there is only one route through which these facets of the 1951 convention might be challenged: via its article 38, which allows disputes over the interpretation or application of the convention to be referred to the International Court of Justice (ICJ) by one of the parties to the dispute. Thus a state would have to view the 1951 convention's reference groups and/or attachment criteria as untenable in view of ICCPR article 26, and would have to take the issue to the ICJ for resolution. However, it is unlikely that an article 38 referral would ever occur, nor would it be desirable. The convention's reference groups and attachment criteria underlie almost the entire instrument; invalidating them would virtually open the 1951 convention up for renegotiation, and in the current global climate any new refugee convention would surely be less generous than that adopted in 1951.

On the municipal plane, this article has highlighted the relationship between ICCPR article 26 and domestic refugee



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laws that follow the 1951 convention's rights framework. An interesting avenue for future research would be to examine what, if any, impact the ICCPR has had on national refugee laws adopted or amended after the state in question became party to the ICCPR. Uganda's 2006 Refugees Act, for example, features no attachment criteria and only one reference group: "aliens generally in similar circumstances."[64] Whether this was a result of the ICCPR is unclear, but Hansard and drafting committee records might be revealing in this regard.

Whatever the effect of the ICCPR, at the very least it represents a litigation tool. It may also be used as a shield rather than as a sword, to borrow the metaphor usually applied to estoppel. Given the current state of HRC and municipal jurisprudence on the rights of non-nationals, the real potential of ICCPR article 26 in respect of the contingencies on refugees' rights may lie in its potential as an interpretive tool to update our understanding of the 1951 convention. Under article 31(3)(c) of the Vienna Convention on the Law of Treaties,[65] "relevant rules of international law applicable in the relations between the parties" are applicable in the interpretation of treaties. This expresses a more general principle of treaty interpretation: the systemic integration of the international legal system.[66] According to this principle, states and courts, in interpreting and applying the 1951 convention (and perhaps domestic laws based on it), could consider ICCPR article 26, as well as international human rights law more generally.[67] It is hoped that such consideration will occur and that it will promote a generous interpretation of refugees' rights under the 1951 convention and its domestic equivalents.

## Notes

1 *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 [1951 Convention].
2 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 [ICCPR].
3 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 [ICESCR].
4 *Immigration and Refugee Protection Act*, RSC 2001, c 27.
5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
6 See, however, Catherine Dauvergne, "How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58 *McGill LJ* 663.
7 *Refugee Law, 1992* (Ghana) PNDCL 305D, s 11.
8 *Vienna Convention on the Law of Treaties*, 23 May 1969,1155 UNTS 331, Can TS 1980 No 37 [VCLT] art 30.
9 James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 154.
10 *Ibid* at 156.
11 *Ibid* at 154–5.
12 *Ibid* at 173–86.
13 *Ibid* at 175.
14 *Ibid* at 186–90.
15 *Ibid* at 189.
16 See Hathaway, *supra* note 9 at 190–192.
17 *Ibid* at 192.
18 The host state's duties of non-discrimination (article 4) and *non-refoulement* (article 33) are not contingent.
19 Hathaway, *supra* note 9 at 155.
20 *Ibid* at 248.
21 This presentation and tables 1 and 2 above, which table 3 combines, is based largely on Hathaway's presentation in *The Rights of Refugees under International Law*, *supra* note 9. Other authors have offered slightly different presentations. See, for example, Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law" in Ruth Rubio Marin eds, *Migrations and Human Rights: Collected Courses of the Academy of European Law* (Oxford: Oxford University Press, 2014).
22 HRCOR, 27th Sess, "General Comment No. 15: The Position of Aliens Under the Covenant" (11 April 1986) para 2.
23 Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011) at 109.
24 HRCOR, 37th Sess, "General Comment No. 18: Non-Discrimination" (11 October 1989) para 12.
25 Hathaway, *supra* note 9 at 125.
26 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (Kehl: NP Engel, 2005) at 605.
27 Tom Clark, "Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation" (2004) 16 *Int J Ref L* 584 at 586.
28 Tom Clark and François Crépeau, "Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law" (1999) 17 *Nethl QHR* 398 at 408.
29 ICCPR, *supra* note 2, art. 26.
30 Hathaway, *supra* note 9 at 127.
31 Fredman, *supra* note 23 at 8.
32 Christopher McCrudden, "Equality and Discrimination", in David Feldman ed, *English Public Law* (Oxford: Oxford University Press, 2004), cited in Hathaway, *supra* note 9 at 124.
33 *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ Rep 6.
34 HRCOR, *supra* note 24, para 13.
35 Jason Pobjoy, "Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection" (2010) 34 *Melbourne UL Rev* 181 at 210.
36 Santhosh Persaud, "Protecting Refugees and Asylum Seekers under the International Covenant on Civil and



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Political Rights", New Issues in Refugee Research Paper No. 132 (November 2006), online: <http://www.refworld.org/pdfid/4ff150762.pdf> at 22.

37 HRCOR, *Ibrahima Gueye et al v France*, Comm No 196/1985, [1989] UN Doc CCPR/C/35/D/196/1985 para 9.4; note that it is unlikely that the "national origin" ground covers non-nationals.

38 Hathaway, *supra* note 9 at 127–8.

39 *Ibid* at 249–50.

40 Nowak, *supra* note 26 at 45–6.

41 *Ibid* at 249.

42 *Ibid*.

43 Freedom of movement and residence, which under the 1951 Convention require lawful presence, are included in the ICCPR, but under that instrument they are guaranteed only to everyone "lawfully within" the state. As the issue hhas never been adjudicated, it is unclear whether refugees physically present would qualify as being "lawfully within" the host state within the meaning of the ICCPR.

44 ICESCR, *supra* note 3, art 2(3).

45 Especially in light of the European Court of Human Rights decision in *MSS v Belgium and Greece* (*MSS v Belgium and Greece*, Application No 30696/09 [Merits 21 January 2011]), which held that refugee hosting states must guarantee certain core economic rights, lest they violate the European Convention on Human Rights' prohibition of torture (Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 3).

46 ICESCR, *supra* note 3, art 2(1).

47 See generally, Alice Edwards and Carla Ferstman, eds., *Human Security and Non-Citizens* (Cambridge: Cambridge University Press, 2010); David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford: Oxford University Press, 2008). For the Canadian context, see Dauvergne, *supra* note 6.

48 CESCROR, 42nd Sess, "General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)", UN Doc E/C.12/GC/20 (2 July 2009) para 30.

49 Spencer and Pobjoy have conducted such analysis for the United Kingdom. See Sarah Spencer and Jason Pobjoy, "The Relationship between Immigration Status and Rights in the UK: Exploring the Rationale", Centre on Migration, Policy and Society Working Paper No 86 (2011), online: <http://www.compas.ox.ac.uk/publications/working-papers/wp-11-86/>. Relevant in the Canadian context is Steve Sansom, "Refugee Claimants, OHIP Eligibility, and Equality" (1997) 12 *J L & Soc Pol'y* 202.

50 Hathaway, *supra* note 9 at 129–30; for a summary of the case law, see Hathaway, *supra* note 9 at 124–47.

51 *Ibid* at 238.

52 HRCOR, 79th, "Concluding Observations of the Human Rights Committee: Latvia" UN Doc. CCPR/CO/79/LVA (6 November 2003) para 18, cited in Persaud, *supra* note 36 at 23.

53 HRCOR, 80th Sess, "Concluding Observations of the Human Rights Committee: Germany" UN Doc CCPR/CO/80/DEU (4 May 2004) para 20, cited in Persaud, *supra* note 36 at 23.

54 Hathaway, *supra* note 9 at 133.

55 *Ibid*. at 251.

56 Tom Clark and Jan Niessen, "Equality Rights and Non-Citizens in Europe and America: The Promise, the Practice and Some Remaining Issues" (1996) 14 *Nethl QHR* 245 at 267.

57 See Hathaway, *supra* note 9, at 238–60.

58 See *supra* note 43.

59 See Hathaway, *supra* note 9 at 839–40.

60 See *supra* note 47.

61 The contours of the contingency have been clearly articulated by the HRC: "In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12. Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3" (HRCOR, 67th Sess, "General Comment 27: Freedom of Movement (Art 12)", UN Doc CCPR/C/21/Rev. 1/Add. 9 (1999) para 4).

62 Clark and Niessen, *supra* note 56 at 267.

63 Hathaway, *supra* note 9 at 260.

64 See Marina Sharpe and Salima Namusobya, "Refugee Status Determination and the Rights of Recognized Refugees under Uganda's Refugees Act 2006" (2012) 24 *Intl J Refugee L* 561 at 566–7; Uganda ratified the ICCPR in 1995.

65 VCLT, *supra* note 8.

66 See Campbell McLachlan, "The Principle of Systemic Interpretation and Article 31(3)(c) of the Vienna Convention" (2005) 54 *Intl & Comp LQ* 279; Gardiner, *Treaty Interpretation*, 2nd ed (Oxford: Oxford University Press, 2010) chap 7.

67 Assuming, of course, that the jurisdiction in question is an ICCPR state party.

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# Arrested Development? UNHCR, ILO, and the Refugees' Right to Work

Adèle Garnier

***Abstract***

*This article contributes to literature assessing power dynamics in the emerging global migration governance. Drawing on Barnett and Finnemore's analysis of bureaucratic culture in international organizations, it investigates inter-agency cooperation between the Office of the United Nations High Commissioner for Refugees and the International Labour Organization in the promotion of refugees' right to work in the last two decades. While the mandate and activities of both organizations appear to significantly intersect in the promotion of this right, practical constraints related to states' diverging interests, differences in institutional structure, and discursive ambivalence in the situation of the refugee worker limit coordination and effectiveness.*

***Résumé***

*Cet article contribue aux études des relations de pouvoir dans la gouvernance mondiale des migrations. S'inspirant des travaux de Barnett et Finnemore sur la culture bureaucratique des organisations internationales, il analyse la coopération, lors des deux dernières décennies, entre le Haut-Commissariat aux Réfugiés des Nations Unies et l'Organisation Internationale du Travail en matière de promotion du droit au travail des réfugiés. Le mandat et les activités des deux organisations semblent faire preuve de complémentarité dans la promotion de ce droit. Cependant, des contraintes pratiques liées aux intérêts divergents des États, des différences de structure institutionnelle au sein des deux organisations ainsi que les ambivalences de leur discours sur le réfugié travailleur limitent la coordination et l'efficacité entre les deux organisations.*

***Introduction***

This article explores the cooperation of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Labour Organization (ILO) in the promotion of refugees' right to work during the last two decades. It offers empirical insights into an example of collaboration between international organizations that has yet to attract much attention. It also aims to contribute to literature critically assessing power dynamics in the emerging global migration governance with a focus on its institutional dimension. The article shows that, in spite of significant potential for both United Nations agencies to jointly promote refugees' right to work, achievements in the 21st century have remained limited. An explanation is offered. While the significance of an inauspicious international environment cannot be understated, pathologies related to the bureaucratic culture of international organizations also weakened joint achievements.

The next section develops the theoretical framework. The article subsequently points to intersections between the ILO's and the UNHCR's mandates to promote refugees' right to work and presents their joint activities on the issue. Three challenges to effective cooperation are then presented: limited state interest in and institutional competition over the focus of UNHCR-ILO cooperation, organizational obstacles within both agencies, and broader lack of visibility



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of the refugee worker. The second and the third challenges are related to what Barnett and Finnemore label "bureaucratic pathologies."[1] The conclusion discusses the significance of the findings.

## *Exploring Interagency Cooperation in Emerging Global Migration Governance*

As Geiger and Pécoud recently noted, although international organizations (IOs) have become considerably more significant in the politics of migration since the end of the Cold War, research focusing specifically on IOs in this field is still emerging.[2] The International Organization for Migration (IOM) and the UNHCR have attracted most scholarly attention.[3] In contrast, literature on the ILO is limited, despite the ILO's engagement with migration policy since its establishment in 1919, reflected in the migration governance suggestions of the ILO's first director general, Albert Thomas.[4] This research can therefore shed light onto the IO that until the end of 2014 heads the Global Migration Group, one of the main forums of emerging global migration governance.[5]

In addition, the article adds to the small number of studies exploring interrelations between IOs in this field. Among these studies, Newland suggests a set of patterns of competition, cooperation, and transformation among IOs.[6] Betts focuses on the UNHCR's response to an increasingly complex and competitive global governance architecture in which its leadership over the global refugee regime is challenged.[7] Drawing on a governmentality framework, Geiger shows how IOs such as the IOM cooperate with European Union (EU) institutions to develop migration regulations at the EU periphery.[8] Focusing on the UNHCR's and IOM's joint legitimization of states' migrant return policies, Koch highlights the significance of state interest in inter-IOs cooperation and the joint capacity of the two IOs.[9] Similarly, this article will address state interest and IO capacity, albeit in a different international and institutional environment. To this purpose, I shall show the relevance of Barnett and Finnemore's discussion of bureaucratic culture and "bureaucratic pathologies" in IOs in the analysis of interagency cooperation.

Barnett and Finnemore are critical of the functionalist assumption of most international relations scholarship, which focuses on why IOs exist rather than on how they work. Drawing on literature on organizations and on Weber, they argue that states grant IOs legitimacy because rational bureaucracies make impersonal rules on cross-border issues. Realist and neoliberal institutionalist accounts respectively contend that IOs gain authority primarily because of their power over material resources and information. In contrast, Barnett and Finnemore state that IOs gain authority because "they use [it] to orient action and create social reality … [transforming] information into knowledge."[10] IOs not only define norms and categories in international law, they also interpret the meaning of these categories and promote their worldwide diffusion. Yet what makes IOs efficient as impersonal, rational bureaucracies also fosters internal problems, which Barnett and Finnemore refer to as "bureaucratic pathologies": "We call 'pathologies' those dysfunctions that are attributable to bureaucratic culture and internal bureaucratic pressures and that lead the IO to act in a manner that subverts its self-professed goals."[11] Accordingly, IOs can create norms that contradict each other ("irrationality of rationalization"); tolerate breaches of long-established norms ("normalization of deviance"); focus so much on universal standard as to ignore the local context ("bureaucratic universalism"); isolate themselves from scrutiny and feedback ("insulation"); and are riddled with internal struggles ("cultural contestation").[12] Bureaucratic expansion can fuel such pathologies, and so can factors external to IOs, such as funding shortages.[13] In the following empirical analysis, I intend to show that bureaucratic pathologies not only weaken the authority of single IOs but can also impede inter-agency cooperation. Barnett and Finnemore's framework has yet to be used in this perspective, which could fruitfully contribute to global migration-governance literature. I shall return to this last point in the conclusion.

## *Intersections in UNHCR and ILO Mandates and Framework for Inter-Agency Cooperation*

The right to work is protected in binding universal human rights treaties, most significantly in articles 6 to 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), while the International Covenant on Civil and Political Rights and other core UN human rights treaties such as the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of the Child protect against forced labour and slavery.[14] Given that all UN agencies promote compliance with human rights treaties, it can be said that the UNHCR and the ILO mandates intersect, as they share this normative basis.

Refugee rights are more specifically defined in the Convention relating to the Status of Refugees (the Refugee Convention).[15] The Refugee Convention stipulates non-discrimination of refugees in wage-earning employment (article 17; the convention recommends that refugees be treated like nationals as much as possible), self-employment (article 18), and the liberal professions (article 19). More than 20 countries impose restrictions on article 17. Among them,



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a dozen consider the article to be a recommendation, not an obligation.[16] Because of the Refugee Convention's obligations, refugees have been excluded from the remit of the 1990 UN Convention on the Rights of All Migrant Workers and Their Families.[17] The UNHCR is mandated to supervise the application of the Refugee Convention (article 35). The Refugee Convention provisions on the right to work do not apply to asylum seekers, as they are not recognized refugees.[18]

The ILO is the only tripartite organization of the UN system. Its normative instruments are drafted, adopted, and supervised by representatives of governments, employers, and unions, yet ratification of adopted instruments is done by government representatives only. While the ILO also focuses on the right to work, the bulk of its conventions and standards address rights *at* work and aim to ensure that work is fair and decent. ILO conventions and standards apply to all workers, with no discrimination between nationals and foreign nationals. Several conventions deal specifically with the rights of migrant workers,[19] yet conventions and standards dealing specifically with these rights have very low levels of ratification.[20] Nonetheless, the ILO 1998 Declaration of Fundamental Principles and Rights at Work states four core principles applying to all states, regardless of their ratification of related instruments: freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation. A specific supervisory mechanism for non-ratifying states accompanies these principles.[21]

Thus, in addition to the common normative base shared by the UNHCR and the ILO (universal human rights treaties), it can be said that there is a division of labour in the setting and supervision of norms. The UNHCR monitors compliance with the non-discrimination of refugees in accessing work, as defined in the Refugee Convention, whereas the ILO's conventions and standards aim to ensure that all workers, including refugees, are treated fairly and involved in "social dialogue." This division of labour does not preclude joint activities between the UNHCR and the ILO.

Both agencies launched joined projects to identify and foster income-generating activities for refugees in Somalia and Sudan in the early 1980s. The Somali project targeted women and children who relied almost entirely on humanitarian assistance in refugee camps, while the Sudanese project aimed to help both refugees and local populations (men were the primary group of concern) broaden economic activities in poor agricultural regions. [22] In both cases, the UNHCR requested the ILO's assistance and provided funding aside from other donors. While the two projects targeted only a small minority of potential beneficiaries, they translated for several years into effective income-generation and skills-broadening for participants. Long-term sustainability was eventually compromised by the outbreak of civil war in Somalia and lack of long-term financial support in Sudan.

As these projects were getting off the ground, in 1983, ILO director general Francis Blanchard and high commissioner for refugees Poul Hartling signed a memorandum of understanding (MoU).[23] The UNHCR signed MoUs with the World Food Programme (WFP) and the IOM, with whom it cooperates steadily, only in 1985 (revised in 2002) and 1997 respectively.[24] While acknowledging the UNHCR's refugee-protection mandate and the ILO's social-justice mandate, the UNHCR-ILO MoU mentions "common areas of concern" in the treatment and assistance of refugees. Both IOs pledge to jointly work on:

- protecting the socio-economic rights of refugees and developing new standards giving consideration to the vulnerability of refugees;
- fostering the socio-economic integration of refugees in their country of residence, and of returning refugees in their countries of origin;
- building refugee skills and developing job opportunities, on the basis of early ILO assistance to UNHCR and mutual funding agreements;
- exchanging information between field offices regarding refugee assistance;
- exchanging policy information at headquarter level.

It can be argued that the MoU promisingly expanded upon the ILO and the UNHCR's joint normative basis to support refugees' right to work while fostering their rights at work, even though the latter aspect is less specific in the agreement than the former. Over the following decades, the focus of both IOs experienced significant transformations. From the 1980s, the UNHCR became increasingly involved in refugee repatriation and took responsibility for internally displaced persons (IDPs), so that its involvement in the socio-economic integration of returning refugees and IDPs gained prominence. The role of the UNHCR in humanitarian relief expanded considerably, transforming the IO into a leading agency in the field.[25] Amid institutional reforms centred on the promotion of the Decent Work agenda and aiming to increase the ILO's relevance in a context of globalization.[26] the ILO also expanded its labour-supporting activities in post-conflict situations.[27] In parallel, from the 2000s both IOs were involved in development of a rights-based discourse on migration, the UNHCR by focusing on rights in the context of "mixed migratory flows" while the ILO Governing Body mandated the organization to develop a plan of action for migrant workers in 2004.[28] We shall return to the significance of these broad developments for



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the authority of both IOs over the promotion of refugees' right to work after we have examined their joint activities in the last two decades.

### *UNHCR-ILO Activities in the 21st Century*

According to UNHCR and ILO global reports of activities, as well as specific project documentation, the main focus of UNHCR-ILO cooperation in promotion of refugees' right to work in the 21st century is the transition from relief to development. Included are activities to prepare refugees for economic reintegration into their country of origin and to assist refugees and IDPs once they have returned to their country or location of origin. This reflects opportunities to jointly promote refugees' right to work in the field delineated in the 1983 UNHCR-ILO MoU.

From 2000, the two IOs promoted micro-finance, taking into consideration the financial vulnerability of many refugees, especially female refugees, who wish to set up businesses. Activities included the organization of training workshops in field offices, publication of the manual *Introduction to Micro-Finance in Conflict-Affected Communities*, and production of policy guidelines on micro-finance.[29] While the UNHCR had used micro-finance before cooperating with the ILO, its use expanded considerably from 2000 in the context of the UNHCR's increased focus on refugee livelihoods. According to Azorbo, as of 2011 the UNHCR used micro-finance programs in 45 per cent of its country operations.[30] The IO adopted a memorandum of understanding with the leading micro-finance institution, the Grameen Bank, while continuing to work with the ILO. Yet Azorbo notes that training capacity remains very limited, questioning the practical impact of micro-finance advocacy, and observes that the UNHCR has not released a systematic evaluation of its micro-finance activities.

Between 2003 and 2007, Italy provided almost US$1 million in funding to support establishment of the "ILO-UNHCR Partnership through Technical Cooperation: Socio-economic Integration of Refugees, Returnees and Internally Displaced persons."[31] This partnership was endorsed at the top of the agencies. In November 2004, ILO director general Juan Somavia and high commissioner for refugees Ruud Lubbers signed a statement aiming for a "strengthened partnership" over the transition from relief to development so as to foster sustainable livelihoods and poverty reduction. A working group composed of ILO sections focusing on crisis and reconstruction (InFocus and IFP/CRISIS, later renamed ILO/CRISIS) and the UNHCR's Reintegration and Local Settlement Section were set up to guide and review projects as well as liaising with other departments and both headquarters.[32] The partnership received more than US$2 million in funding and intervened in 15 countries in Africa, Latin America, Central and South Asia, and Southeastern Europe.[33] The ILO also released a review of its above-mentioned projects for African refugees in the 1980s, to "guide future work" by the ILO and other agencies on the issue as well as "revive the [ILO]'s institutional memory" concerning refugees.[34]

To give an example of the ILO-UNHCR partnership's projects, in the Maratane refugee camp in Mozambique, an ILO consultant, with the support of an ILO team based in Zambia and of ILO/CRISIS in Geneva, aimed to develop "the socio-economic empowerment of women in the refugee community" of the camp in the early 1980s. A small group of local women and men was first selected to become trainers in business skills. The consultant and the trainer then focused on a group of women, who often had no previous entrepreneurial experience, to participate in a two-week workshop to develop business plans. In a climate of gender-based discrimination towards women taking up jobs, workshops were also organized with men and women to discuss gender stereotypes in the economic context.[35] Collaboration with local governments, and especially with financing institutions, was also sought. According to a UNHCR press release from 2007, the project was well perceived by participants and expanded to the entire Maratane camp, where self-reliance increased. While the original ILO report announces a three-year monitoring period, the 2007 UNHCR press release does not mention the ILO anymore, self-reliance activities now being offered by World Relief International.[36] The promised evaluation after the three-year period of implementation could not be located.

The Mozambican project added innovation to UNHCR practice, especially the training of local trainers among refugees.[37] Further innovation occurred from the UNHCR perspective in Liberia: the UNHCR local field office worked with an ILO consultant to foster employment of returning refugees. In the face of very high unemployment in post-war Liberia, employment in the informal economy was promoted with use of ILO community-based training methods.[38] In 2007, ILO/CRISIS expressed high hopes for the partnership, stating, "Potentially this program will be able to serve the entire refugee population assisted by UNHCR as it sets the framework for the rapid deployment of ILO livelihood experts to UNHCR's country operations … This project has proven its effectiveness in coupling ILO's expertise in livelihoods and sustainable development with UNHCR's expertise and mandate to provide protection and assistance to refugees, returnees and at times, IDPs, and to find durable solutions to their plight."[39]

From 2007, however, and alongside the above-mentioned micro-finance activities, UNHCR-ILO technical cooperation promoting refugees' right to work appeared to occur



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primarily in the context of the UNHCR's Strengthening Protection Capacity Projects (SPCPs). SPCPs started in 2005 and were funded largely by the European Union. While SPCPs took place in a dozen countries, the ILO seldom appears to play a prominent role in project design and is generally one partner among many. This is not surprising, as SPCPs not only aim to improve refugees' self-reliance but also to strengthen capacity of refugee-hosting countries to provide protection at the legal and institutional level. One exception is the SPCP in Thailand, which had a dedicated livelihood component designed jointly by the UNHCR and the ILO. The project first identified issues limiting the economic participation of Burmese refugees, then launched a pilot project in the Mae La camp (the largest refugee camp on the Thailand/Myanmar border) aiming to foster vegetable production, then sales of the produce with development of business strategies with a few hundred refugees.[40]

Further ILO involvement in livelihood activities in the Mae La camp is not documented; however, ILO training material, such as on the community-based development of business skills, is used by NGOs now pursuing livelihood activities in cooperation with UNHCR.[41] However, the ILO does not feature prominently in the increasing number of UNHCR publications showing renewed IO interest for the issue of refugee livelihoods besides the SPCPs. For instance, the UNHCR Global Strategy for Livelihoods for 2014–18 does not refer to previous ILO-UNHCR cooperation, nor does it quote ILO sources on the issue. In contrast, the UNHCR highlights its cooperation with the World Food Programme.[42]

To sum up, it appears that a sustained period of bilateral technical cooperation between the UNHCR and ILO (2003–7) entailed knowledge transfer and institutional innovation by the UNHCR in more than a dozen field projects worldwide, followed by a loosening of the partnership between the IOs and the absorption of their ties into wider, more multilateral projects. The dissemination of ILO knowledge to the UNHCR and other partners has occurred primarily through the use of ILO publications in the field, yet the contribution of the ILO does not appear to be much recognized beyond the field level.

This article considers that such an outcome was not inevitable. The UNHCR-ILO partnership might have expanded on the basis their shared normative base, early technical cooperation, and the 1983 MoU providing a more specific framework for normative and technical cooperation. Therefore, the following section suggests explanations to the limits of the UNHCR-ILO cooperation in the promotion of refugees' right to work in the 21st century. Drawing on Barnett and Finnemore's analytical framework, it focuses first on the international environment before addressing dynamics within and between the two IOs.

## Challenges to UNHCR-ILO Cooperation

### *Inauspicious International Environment: States' Lack of Interest and Institutional Competition*

As Suhrke and Ofstad note, there has long been a "macro-funding gap" in the relief-development continuum.[43] Donors' lines of funding for humanitarian and development aid are generally distinct. Additionally, funding is often more readily available for humanitarian projects than for reconstruction and rehabilitation. An ILO representative praised the UNHCR-ILO partnership in previous years at a UNHCR Executive Committee meeting in 2006, yet noted that important projects could not be completed as a result of a funding shortage.[44] It is reasonable to suggest that such funding shortage reflects states' lack of political will to support refugees' right to work in this context. More broadly, the UNHCR's own attempts to lead in the relief-to-development issue since the late 1990s, most notably the Brooking Process and the Convention Plus initiative, were embraced neither by key multilateral institutions nor by a majority of states. While especially the United Nations Development Programme (UNDP) was, until the mid-2000s, wary of UNHCR's involvement in the development field, states of the Global South felt marginalized from the start in the Convention Plus process.[45] Deschamp and Lohse note an increasing multilateral interest in relief-development linkages since 2008, with the design of a Framework for Ending Displacement in the Aftermath of Conflict by the UNHCR, the UNDP, and the Office for the Coordination of Humanitarian Affairs (OCHA), to which the ILO contributes alongside other IOs. Yet they conclude, "In regard to practice, principally reflected in the availability and predictability of funding to bridge the humanitarian-development gap … things have not changed much for the better."[46]

State-imposed controls on refugee mobility, and in some cases, on the right to work, in countries where ILO-UNHCR projects took place are equally problematic. In the UNHCR-ILO project on skill assessment in the Kakuma and Dabaab refugee camps in Kenya, refugees were neither allowed to leave the camps nor to work for a wage in the country.[47] Such restrictive measures prevent local integration of populations that should eventually repatriate, yet restrictions also maintain refugees in long-term survival situations while not decreasing tensions with local hosting communities. Change in regulations can also hamper self-reliance projects. In the Maratane camp project in Mozambique, the introduction of mobility control for refugees in a period of expansion of self-reliance caused a sudden swell in camp population and put pressure on resources.[48]



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### *Lack of Institutional Impact of Field Cooperation*

A difficult international environment should not imply per se that UNHCR and ILO do not have agency over the promotion of refugees' right to work. It has been argued that, since the early 2000s, the UNHCR has designed a relatively coherent strategy on refugee resettlement at the normative and operational level, and developed linkages with supranational and non-governmental agencies, even though this strategy has yet to significantly affect states' willingness to resettle refugees.[49] In the case of the UNHCR-ILO partnership, however, it appears that the engagement of both IOs' headquarters has been only sporadic. Since 2004, the heads of both organizations have not released another joint statement on strengthened cooperation. This can contribute to explaining the invisibility of UNHCR-ILO fieldwork within each agency.

Tellingly, in an ILO study titled "Integrating Migration into Development Planning," Lucas observes a lack of data on the reintegration of refugees in their country of and on refugee employment in camps. The paper seems unaware of UNHCR work on the issue, and of ILO-UNHCR reports on their joint projects, such as in Mozambique and Kenya, as this research is not quoted.[50] There is no evaluation of UNHCR-ILO projects by the agency's Policy Development and Evaluation Service (PDES), whereas there is a series of evaluations of UNHCR-WFP projects, as well as a management response. Among PDES's New Issues in Refugee Research reports, only one discusses potential links between the UNHCR and the ILO, arguing that both IOs could partner on the issue of domestic work.[51] Indeed, the ILO increased its focus on domestic work with the adoption of the Domestic Workers Convention 2011 (no. 189), and many urban refugees (especially women) work in the sector.[52] Three years later, there is no evidence of joint activities on the issue.

Within the broader framework of global migration governance, UNHCR-ILO cooperation is not discussed in the documents released by either IO on the website of the Global Migration Group.[53] Nor is it mentioned in UN documents presenting the view of the UN agencies involved in the 2013 High Level Dialogue on Migration and Development.[54] The UNHCR-ILO cooperation therefore appears to be invisible not only within each agency but also to each other, and more broadly, to the emerging global migration-governance architecture.

Can "bureaucratic pathologies" contribute to explain disjunctures between fieldwork and headquarters and lack of reciprocal knowledge diffusion? The lack of influence of field offices on ILO and UNHCR headquarters is well known.[55] Using Barnett and Finnemore's typology of bureaucratic pathologies, "bureaucratic universalism," as well as "cultural contestation" and "insulation" are apparent. According to former ILO employees Guy Standing and William R. Simpson, the ILO, which has experienced considerable reforms and thematic broadening over the last decades, has difficulty being a standard-setter, a technical-assistance organization, and a knowledge generator at once.[56] Former ILO director general Juan Somavia also regretted the ILO's lack of internal coherence as well as its tendency to resist external scrutiny.[57] Wigley stresses that the UNHCR is simultaneously caught in a dynamic of permanent "short-termism," focusing on the next crisis, while headquarters keeps producing guidelines that are not directly related to concerns in the field.[58] Standing and Wigley also point to the climate of intense competition within both agencies, which can disrupt efficient communication between the field and headquarters. Finally—and this is an issue not addressed by Barnett and Finnemore—staff casualization can limit dissemination of innovation within both institutions, given the significance of interpersonal relationships in the promotion of change within the two IOs.[59]

Yet there might also be "rational" bureaucratic reasons for the limits of the UNHCR-ILO partnership in promotion of refugees' right to work. In the context of intense bureaucratic competition for leadership over "relief-to-development" and of limited funding, the UNHCR may have opted to use the lowest-cost ILO resources (its publications) while increasing staff-based partnership with organizations perceived to deliver higher returns in the promotion of its refugee livelihoods strategy (the WFP and the UNDP). As the ILO focuses increasingly on issues such as the rights of all domestic workers, the ILO may also have so far considered it more cost-effective not to intensify cooperation on the specific issue of refugees' right to work.[60]

### *The Broader Invisibility of the Refugee Worker*

A third issue limiting the visibility of UNHCR-ILO promotion of refugees' right to work is the lack of recognition of the refugee as a worker. While the transition from relief to development is essential in post-crisis situations, it seems that within both agencies linkages are missing between emphasis on the refugee's ability to provide for his or her basic needs (the transitory period) and forms of work that go beyond the threshold of survival. For instance, similarities between the refugee worker and the migrant worker could be explored. However, on the website of the ILO, there is no way to access ILO-UNHCR reports of activities via the specific search function of the ILO Labour Migration Branch (MIGRANT)'s webpage.[61] One has to search via other ILO webpages, especially that of the Employment Policy Department (EMPLOYMENT), which has absorbed ILO/CRISIS. Reviewing the topics of ILO's International



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Migrants Working Papers (published regularly since 1995, totalling 118 issues so far), none of the papers' titles deals with refugees or, more broadly, forced migrants in the context of labour migration. Individual papers do address the issue as part of broader discussions.[62]

On the side of the UNHCR, a review of PDES's New Issues in Refugee Research (published regularly since 1999) and UNHCR evaluation reports shows that the refugee as a worker, or refugee labour, is barely ever the primary focus of either series. More often, refugee labour is discussed in reviews of refugees' social capital, livelihood approaches, reintegration in their country of origin, durable solutions, poverty reduction, and transition from relief to development. Exceptions are Colic-Peisker's paper on the labour integration of Bosnian refugees in Australia, Long's discussion of the labour migration and durable solutions, Umlas's review of urban refugees' right to work and UNHCR advocacy, and Ott's review of the labour market integration of resettled refugees, out of a corpus of 196 evaluations and 271 research papers.[63]

Nonetheless, it seems that the UNHCR is focusing increasingly on the diversity of situations of the refugee worker, as Ott's study shows. In part this the result of UNHCR responsiveness to NGO demands on the issue, even though NGOs deplore lack of implementation of this apparent conceptual shift.[64] So far, a similar evolution is not observed at the ILO.[65]

These observations contribute to scholarship pointing at the historical association of the label of "refugee" with humanitarian crises, and its dissociation from economic activities, except when the latter are challenging the genuineness of the refugee (e.g., the pejorative character of the "economic refugee").[66] More conceptually, exclusive emphasis on promotion of livelihood strategies in utterly precarious situations (refugee camps and post-conflict societies where work is scarce) bears the risk of what Barnett and Finnemore label the "normalization of deviance," that is, in this case, the legitimization of a conception of labour that deviates from full recognition of the right to work. The UNHCR's broader focus on the refugee worker can contribute to prevent this normalization, and change in this respect within the ILO could encourage normative realignment and cooperation between both agencies.

## Conclusion

The article has highlighted the potential and limits of UNHCR-ILO activities promoting refugees' right to work in the 21st century. It has uncovered a solid normative basis for cooperation and sustained technical collaboration in the field over several years, resulting in practical innovations and knowledge diffusion between both IOs and to other partners. Were this analysis to stop in 2007, one could argue, drawing on Barnett and Finnemore, that the UNHCR and the ILO were jointly reinforcing their authority as they appeared in harmony on norm definition (agreement about the population of concern and their rights, and division of labour to better assist them) while embracing norm diffusion between them and outwardly. Yet bureaucratic pathologies were already prevalent before 2007, especially cultural contestation, bureaucratic universalism, and insulation. It can be assumed that these pathologies were exacerbated after 2007, given the inauspicious character of the international environment, but perhaps also because of each agency's expansion in other directions and reach towards other actors (UNHCR's broader promotion of livelihood and stronger linkages with NGOs on this issue, ILO's focus on domestic work). Cooperation between the UNHCR and ILO was weakened in this context.

It could be argued that the UNHCR's authority was left less diminished than that of the ILO in this particular field, even though the ILO is far less associated with refugee protection than the UNHCR. Since 2007, the UNHCR has increased its strategic focus on refugee livelihoods, while joint activities with the ILO were marginalized. The ILO did not rediscover the issue for itself, yet still appears as a knowledge provider in the field, even though this is barely visible at headquarter level. While the right to work has been affirmed within a number of projects, this is hard to say of rights at work, given the context. Increasing the organizational visibility of field activities focused on the refugee worker as well as normative entrepreneurship, as recommended in the 1983 MoU, would certainly contribute to account for the political and multi-faceted nature of the socio-economic rights of refugees.[67]

Conceptually, the findings inform the critical study of migration management as they systematize factors that affect the authority of cooperating IOs, adding a stronger focus on how migration IOs work to Newland and Betts's analyses of competition and cooperation in global migration governance.[68] The analysis also shows that Barnett and Finnemore's bureaucratic perspective on IOs not only helps to grasp the strengths and weaknesses of single IOs, but also explains how internal dynamics can impede promising joint initiatives. This is relevant not just for the study of the global migration governance architecture, but potentially for any area of global governance in which IOs pursue joint initiatives. Further research on IOs cooperation in auspicious and less auspicious international environments would help put the present case study in perspective and nurture conceptual questions, such as on the usefulness of particular bureaucratic pathologies for cooperation, how bureaucratic pathology in one IO can "infect" another IO via



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socialization in the context of joint projects, and whether IO cooperation can prevent bureaucratic pathologies.

## Notes

1. Michael Barnett and Martha Finnemore, "The Politics, Power and Pathologies of International Organizations," *International Organization* 53 (1999): 699–732; Barnett and Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press, 2004).
2. Martin Geiger and Antoine Pécoud, "International Organisations and the Politics of Migration," *Journal of Ethnic and Migration Studies* 40 (2014): 865–87.
3. On the IOM see, for instance, Rutvica Andrijasevic and William Walters, "The International Organization for Migration and the International Government of Borders," *Environment and Planning D: Society and Space* 28 (2010): 977–99; on the UNHCR, Gil Loescher, "The UNHCR and World Politics: State Interests vs. Institutional Autonomy," *International Migration Review* 35 (2001): 33–56.
4. See Albert Thomas, "Albert Thomas on the International Control of Migration," *Population and Development Review* 9 (1983): 703–11; and Roger Bohning, "The ILO and the New UN Convention on Migrant Workers: The Past and Future," *International Migration Review* 25 (1991): 698–709; Antoine Pécoud and Paul de Gutcheneire, "Introduction: The UN Convention on Migrant Workers' Rights" in Pécoud and de Gutcheneire, *Migration and Human Rights: The United Nations Conventions on Migrant Workers' Rights* (Cambridge: Cambridge University Press, 2009); Juan M. Amaya-Castro, "Migration and the World of Work: Discursive Constructions of the Global in ILO Narratives about Migration," *IMIS-Beiträge* 40 (2012): 33–48.
5. International Labour Organization, "ILO and the Global Migration Group: Improving Global Migration Governance," ILO, 1 January 2014, http://www.ilo.org/global/topics/labour-migration/WCMS_241411/lang--en/index.htm.
6. Kathleen Newland, "The Governance of International Migration: Mechanisms, Processes and Institutions," *Global Governance* 16 (2010): 331–43.
7. Alexander Betts, "Regime Complexity and International Organizations: UNHCR as a Challenged Institution," *Global Governance*, 19 (2013): 69–81.
8. Martin Geiger, *Europäische Migrationspolitik und Raumproduktion. Internationale Regierungsorganisationen im Management von Migration in Albanien, Bosnien-Herzegowina und der Ukraine* (Nomos: Baden-Baden, 2011).
9. Anne Koch, "The Politics and Discourse of Migrant Return: The Role of UNHCR and ILO in the Governance of Return," *Journal of Ethnic and Migration Studies* 40 (2014): 905–23.
10. Barnett and Finnemore, *Rules for the World*, 6.
11. Ibid., 8.
12. Barnett and Finnemore, *Politics, Power and Pathologies*, 720.
13. Barnett and Finnemore, *Rules for the World*, 163–6.
14. Penelope Mathew et al. "The Michigan Guidelines on the Right to Work," *Michigan Journal of International Law* 31 (2010): 293–306. Importantly, article 2(3) of the ICESCR allows developing countries to restrict the economic rights of foreign nationals "with due regard to human rights and their national economy."
15. The article will not conduct a historical analysis of the establishment of the UNHCR and the ILO, yet it can be noted that the United States and other Western countries opposed a greater role for the ILO in the protection of refugees after the Second World War; see Rieko Karatani, "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins," *International Journal of Refugee Law* 17 (2005): 517–41; Dzovinar Kévonian, "Les Réfugiés Européens et le Bureau International du Travail: Appropriation Catégorielle et Temporalité Transnationale (1942–1951)," in *Humaniser le Travail*, ed. Alya Aglan, Olivier Feiertag, and Dzovinar Kévonian, 167–94 (Brussels: Peter Lang, 2011); Katy Long, "When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection," *Migration Studies* 1 (2013): 15.
16. United Nations, *United Nations Treaty Collection Database,* Chapter V, *Refugees and Stateless Persons,* United Nations Geneva, https://treaties.un.org/pages/Treaties.aspx?id=5&subid=A&lang=eng.
17. The application of the UN Convention on the Rights of All Migrant Workers and Their Families is by the UN Committee on Migrant Workers, not supervised by the ILO. According to Bohning ("The ILO and the New UN Convention on Migrant Workers"), the existence of the convention apart from the ILO is due to the dissatisfaction of developing countries with the ILO's earlier migrant worker conventions, and their advocacy of a UN treaty. Nevertheless, the convention foresees a supervisory role for the ILO, which can participate in Committee on Migrant Workers meetings and express opinions on state reports to the committee; see Vincent Chetail, "The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families," in *The United Nations and Human Rights: A Critical Appraisal, 2nd ed., ed.* Philip Alston and Frederic Megret (Oxford: Oxford University Press, forthcoming). Chetail also writes that the Committee on Migrant Workers has addressed the rights to work of forced migrants on several occasions, noting that its interpretation of the boundaries between the Refugee Convention and the Migrant Workers Convention has so far been "confusing."
18. The right to work of asylum seekers is discussed in Bohning (*ILO and the New UN Convention*), Mathew et al. ("Michigan Guidelines"), and Chetail ("Committee on the



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Protection of the Rights"). This article focuses exclusively on recognized refugees.

19 See ILO Convention C097, "Migration for Employment Convention," 1949, and ILO Convention C143, "Migrant Workers (Supplementary Provisions)," 1975.

20 As of August 2014, C097 has been ratified by 49 countries, and C143 by 23 countries. See Bernhard Boockmann, *Decision-Making on ILO Conventions and Recommendations: Legal Framework and Application*, Documentation 00-03 (Mannheim: Zentrum für Europäische Wirtschaftsforschung, 2000); William R. Simpson, "Standard-Setting and Supervision: A System in Difficulty," in *Mélanges en l'Honneur de Nicolas Valticos*, 47–73 (Geneva: International Labour Organisation, 2004). So far, this low level of ratification also applies to ILO Convention C189 on Domestic Workers adopted in 2011, and ratified by 14 countries as of August 2014.

21 Erica de Wet, "Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work," *German Law Journal* 9 (2008): 1429–52.

22 Eve Hall, *With an Eye to the Future: ILO Refugee Programmes in Africa, ILO,* InFocus Programme Working Paper 12 (Geneva: ILO, 2003); ILO Governing Body, *Assessment of Selected ILO Projects concerning Migrants, Refugees and Displaced Persons,* doc. GB.251/OP/2/1 (Geneva: ILO, 1991).

23 UN High Commissioner for Refugees and International Labour Organization, *Memorandum of Understanding between the Director-General of the International Labour Organization and the United Nations High Commissioner for Refugees,* published in *Official Bulletin of the ILO,* Vol. LXVII, 1984, Series A, No. 1. ILO Director General Blanchard had worked for the UNHCR's predecessor, the International Refugee Organization, and strongly advocated for the integration of competences over refugees in the ILO as he moved to the latter in 1951; see Kévonian, *Les Refugiés Européens*, 192.

24 UN High Commissioner for Refugees and International Organization for Migration, *Memorandum of Understanding between the United Nations High Commissioner for Refugees and the International Organization for Migration* (Geneva: UNHCR, 1997), http://www.refworld.org/docid/3ae6b31a70.html; UN High Commissioner for Refugees and World Food Programme, *Memorandum of Understanding between the Office of the United Nations High Commissioner for Refugees and the World Food Programme* (Geneva: UNCHR, 2002), http://www.refworld.org/docid/3d357f502.html.

25 Loescher, "UNHCR and World Politics."

26 Katherine A. Hagen, *The International Labour Organization: Can It Deliver the Social Dimension of Globalization?* (Geneva: Friedrich Ebert Foundation, 2003); Marieke Louis, *L'Organisation Internationale du Travail et le Travail Décent* (Paris: L'Harmattan, 2011); Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Oxford: Hart, 2013).

27 International Labour Organization, *ILO in Fragile Situations: An Overview* (Geneva: ILO, 2014).

28 Betts, "Regime Complexity"; International Labour Organization, *Independent Evaluation of the ILO Strategy to Improve the Protection of Migrant Workers*, doc. GB.303/PFA/3/5 (Geneva: Governing Body, ILO, 2004).

29 Michelle Azorbo, *Microfinance and Refugees: Lessons Learned from UNHCR's Experience*, Policy Development and Evaluation Services, New Issues in Refugee Research 199 (Geneva: UNHCR, 2011).

30 Ibid., 11.

31 International Labour Organization, *Highlights: ILO-UNHCR Partnership through Technical Cooperation* (Geneva: ILO, 2004).

32 ILO-UNHCR Partnership through Technical Cooperation, *Final Report: Self-Reliance and Sustainable Livelihood for Refugees in Dabaab and Kakuma Camps*, Multi-Bilateral Programme of Technical Cooperation (Kakuma/Dabaab: UNHCR, 2005); International Labour Organization, *Strengthening Strategic Partnership for ILO's Crisis Response*, ILO Evaluation Summaries (Geneva: ILO, 2005).

33 ILO-UNHCR Partnership through Technical Cooperation, *Final Report*; ILO-UNHCR Partnership through Technical Cooperation, *Building Entrepreneurial Capacity for Returnee and Refugee Women in Angola and Mozambique* (Geneva: ILO, 2006); ILO/CRISIS, *The ILO-UNHCR Technical Cooperation Partnership*, Employment for Peace Briefing Note 4 (Geneva: ILO, 2007); UN High Commissioner for Refugees, *Global Report 2004* (Geneva: UNHCR, 2005), 74; UN High Commissioner for Refugees, "UNHCR Liberia," briefing note, 5 April 2005; UN High Commissioner for Refugees, *Global Report 2005* (Geneva: UNHCR, 2006), 62; UN High Commissioner for Refugees, *Global Report 2006* (Geneva: UNHCR, 2007), 46.

34 Eugenia Date-Bah, director, InFocus Programme on Crisis Response and Reconstruction, in Hall, *With an Eye to the Future*, iii. Further ILO publications on the work of the organization towards refugees in Central America and Asia were announced but never released.

35 ILO-UNHCR Partnership through Technical Cooperation, *Building Entrepreneurial Capacity.*

36 UN High Commissioner for Refugees, "UNHCR in Mozambique Gives Refugees the Skills to Be Self-Sufficient," news stories, 2 January 2007.

37 "ILO and UNHCR Partnership in Liberia," video interview, 16 May 2008, http://www.ilo.org/global/about-the-ilo/multimedia/video/video-interviews/WCMS_093419/lang--en/index.htm.

38 Ibid.

39 ILO/CRISIS, *ILO-UNHCR Technical Cooperation Partnership.*

40 ILO/UNHCR, *Livelihood Programmes for Refugees: Executive Summary* (Bangkok: UNHCR, n.d.); UN High



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Commissioner for Refugees, *SPCP Thailand* (Geneva: UNHCR, June 2008).

41 CCSDT-UNHCR, *CCSDPT-UNHCR Strategic Framework: 2013 Progress Matrix,* on file with author.

42 UN High Commissioner for Refugees, *Global Strategy for Livelihoods: A UNHCR Global Strategy 2014–2018* (Geneva: UNHCR, 2014), 25.

43 Astri Surkhe and Arve Ofstad, *"Filling the Gap": A Lesson Well-Learned by Multilateral Agencies*, CMI Working Paper (Bergen: Chr. Michelsen Institute, 2005).

44 UN High Commissioner for Refugees, *Summary Record of the 604th Meeting*, doc. A/AC.96/SR.604, Executive Committee, UNHCR, 10 January 2008.

45 Suhrke and Ofstad, *"Filling the Gap"*; Bryan Deschamp and Sebastian Lohse, *Still Minding the Gap? A Review of Efforts to Link Relief and Development in Situations of Human Displacement, 2001–2012*, Policy Development and Evaluation Services, Evaluation 2013/01 (Geneva: UNHCR, 2013): 33–9; Marjoleine Zieck, "Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited," *International Journal of Refugee Law* 21 (2009): 387–420.

46 Deschamp and Lohse, *Still Minding the Gap?*, 7, 46.

47 ILO-UNHCR Partnership through Technical Cooperation, *Final Report*; Meredith Hunter, "The Failure of Self-Reliance in Refugee Settlements," *POLIS* 2 (2009): 1–46.

48 "Mozambique: North Overwhelmed by Asylum-Seekers," IRINnews, 12 May 2011, http://www.irinnews.org/report/92690/mozambique-north-overwhelmed-by-asylum-seekers.

49 Adèle Garnier, "Migration Management and Humanitarian Protection: The UNHCR's 'Resettlement Expansionism' in the EU and Australia," *Journal of Ethnic and Migration Studies* 40 (2014): 942–59.

50 Robert E. B. Lucas, "Integrating Migration Issues into Development Planning," International Migration Programme, International Migration Working Papers 93 (Geneva: ILO, 2008).

51 Elizabeth Umlas, *Cash in Hand: Urban Refugees, the Right to Work and UNHCR's Advocacy Activities,* Policy and Evaluation Services and Operational Solutions and Transition Section, Evaluation Report 5/2011 (Geneva: UNHCR, 2011), 19–20.

52 Stefan Rother and Nicola Piper, "Let's Argue about Migration: Advancing a Right(s) Discourse via Communicative Opportunities," *Third World Quarterly* 33 (2011): 1735–50.

53 See Global Migration Group, http://www.globalmigrationgroup.org/gmg-documents.

54 UN System Chief Executive Board for Communication, *International Migration and Development: Contributions and Recommendations of the International System* (Geneva: United Nations System Chief Executive Board for Communication, 2013), chapters 5 and 21.

55 On the UNHCR, see Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: Minnesota University Press, 2000); Barb Wigley, *The State of UNHCR's Organization Culture*, Policy Evaluation and Analysis Unit, Evaluation Report EPAU/2005/08 (Geneva: UNHCR, 2005); on the ILO, Simpson, *Standard-Setting and Supervision*; Guy Standing, "The ILO: An Agency for Globalization?," *Development and Change* 39 (2008): 355–84.

56 Standing, "The ILO"; Simpson, *Standard-Setting and Supervision*.

57 ILO, *Reports of the Director-General to the International Labour Conference,* 89th and 92nd sessions (Geneva: ILO, 2001 and 2004).

58 Wigley, *State of UNHCR's Organization Culture*.

59 Ibid.

60 In October 2014, the ILO's International Training Centre presents the course "Decent Work for Domestic Workers," which targets trade unions representatives as much as state and international organizations officials working on the issue. See http://www.migration4development.org/content/decent-work-domestic-workers. If the UNHCR sends a delegate, that may increase the likelihood of future joint activities on the topic.

61 See http://www.ilo.org/migrant/lang--eng/index.htm.

62 See, for instance, Aderanti Adepoju, "The Challenge of Labour Migration Flows between West Africa and the Maghreb," International Migration Programme, International Migration Papers 84 (Geneva: ILO, 2006).

63 Val Colic-Peisker, *Bosnian Refugees in Australia: Identity, Community and Labour Market Integration*, Evaluation and Policy Analysis Unit, New Issues in Refugee Research 97 (Geneva: UNHCR, 2003); Eleanor Ott, *The Labour Market Integration of Resettled Refugees*, Policy Development and Evaluation Services, Evaluation Report PDES/2013/16 (Geneva: UNHCR, 2013); Katy Long, *Extending Protection? Labour Migration and Durable Solutions for Refugees*, Policy Development and Evaluation Services, New Issues in Refugee Research 176 (Geneva: UNHCR, 2009); Umlas, *Cash in Hand*.

64 Asylum Access, "Requesting Action: Appeal to UNHCR to Increase Funding for Implementation of Livelihoods Objectives," 1 October 2013, Refugee Work Rights, http://rtwasylumaccess.wordpress.com/2013/10/01/requesting-action-appeal-to-unhcr-to-increase-funding-for-implementation-of-livelihood-objectives/.

65 Scholarship is characterized by a debate over the greater openness of the ILO to grassroots migrant advocacy, which in the case of the UNHCR has been a vector of change. While Rother and Piper (*Let's Argue about Migration*) insist on the ILO's responsiveness to their concerns, arguing that this is due to its unique tripartite structure, Standing (*The ILO: An Agency for Globalization*) stresses the lack of representativeness of union staff elected within the ILO Governing Body as well as the wariness of unions towards non-union representation from civil society.

66 Roger Zetter, "Labelling Refugees: Forming and Transforming a Bureaucratic Identity," *Journal of Refugee*



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*Studies* 4 (1991): 39–62; Zetter, "More Labels, Fewer Refugees? Remaking the Refugee Label in an Era of Globalization," *Journal of Refugee Studies* 20 (2007): 172–92; Long, "When Refugees Stopped Being Migrants."

67 Raúl Delgado Wise, Humberto Márquez Covarrubias, and Ruben Puentes, "Reframing the Debate on Migration, Development and Human Rights," *Population, Space and Place* 19 (2013): 430–43.

68 Betts, "Regime Complexity"; Newland, "Governance of International Migration."

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# In the Wake of Irregular Arrivals: Changes to the Canadian Immigration Detention System

Stephanie Silverman


### *Abstract*

*This article seeks to address the policies, practices, and conditions of immigration detention in Canada. The article surveys detention worldwide, its promulgation in Canada, and changes ushered in via 2012 policy innovations. Focusing on mandatory detention and its relationship to the Designated Countries of Origin policy, the article also demonstrates the disproportionality of the Canadian government's response to recent arrivals of people migrating by boat. The article emphasizes the dangers of establishing mandatory detention provisions and questions the justifications provided by defenders of the policies.*

### *Résumé*

*Cet article examine les politiques, les pratiques et les conditions de détention liée à l'immigration au Canada. Après un survol des différentes pratiques de détention dans le monde, on y examine son établissement au Canada ainsi que ses transformations dans le cours du renouvellement des politiques en 2012. En se concentrant sur la détention obligatoire et ses liens avec la politique des Pays d'origine désignés (POD), l'article nous démontre le caractère disproportionné de la réponse du gouvernement canadien à l'arrivée récente d'immigrants par bateau. Cet article fait ressortir les dangers d'établir des dispositions de détention obligatoire, et remet en question les justifications développées par les tenants de ces politiques.*


### *Introduction*

In June 2009, minister of citizenship, immigration and multiculturalism Jason Kenney told the House of Commons that "living conditions at detention centres are like those at a two-star hotel with a bit of security."[1] Kenney's florid language was perhaps based on ignorance, or perhaps meant to mislead the press and the public at large over the conditions in detention. Either way, his comments obfuscated the reality of life inside a detention centre and downplayed the trauma of liberty deprivation based on non-citizenship status. This article seeks to correct such oversimplifications of detention practices and conditions in Canada. It aims to refocus attention on undoing the hysteria around people who migrate by boat. The article emphasizes the dangers of C-31, the Protecting Canada's Immigration System Act (an amendment to IRPA)'s mandatory detention provisions and the transparency of justifications provided by Kenney and other defenders of the policy based on deterrence.

This article begins by examining how the Canadian government instrumentalized hysteria encircling a small number of boat arrivals to expand and accelerate its detention powers. C-31's innovation of creating risk-based categorizations of large swaths of people through the creation of a list of Designated Countries of Origin (DCOs) is here highlighted in relation to mandatory detention. After reviewing how Canadian detention policy typically plays out, the article notes a number of criticisms of the detention system, including its effects on children and other vulnerable people. The article finds that the contradiction of mandatory detainees as being the most damaged by their experiences



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in detention but also the most likely to be released into Canadian society make this policy a confusing and incoherent course for Canada to be following.

### *Arrivals by Boat and the Advent of Mandatory Detention in Canada*

The history of asylum seekers and migrants using boats to reach Canada's shores is not long. In 1914, the government turned away more than 300 Sikh Indian nationals on board the *Komagata Maru*. When the ship eventually arrived back in Calcutta, 20 people were killed in a riot and others were detained and tortured. In 1939, 936 Jewish refugees were sent back to Europe after their ship, the SS *St. Louis*, was refused landing in Cuba, the United States, and eventually Canada. Many of the Jewish refugees were arrested upon landing and dispatched to death in concentration camps. While the Canadian government issued an informal apology in 2008 for what happened with (to?) the *Komagata Maru* passengers, it has yet to issue an official apology for rejecting the SS *St. Louis*, save for a memorial to the Jewish refugees erected at Pier 21 in Halifax in 2011.

In the modern period, eight ships have arrived collectively ferrying about 1,500 people: in 1986, 152 Tamils landed off the east coast of Newfoundland; in 1987, 174 Sikhs landed in Nova Scotia, prompting an emergency summer recall of Parliament; four ships carrying just under 600 Chinese migrants came to British Columbia's coast in 1999; and the two most recent cases—MV *Ocean Lady* and MV *Sun Sea*—which brought 575 Tamils to British Columbia in October 2009 and August 2010, respectively. Cumulatively, these eight vessels have conveyed 0.2 per cent of total refugee arrivals in Canada over the past 25 years.[2]

#### *C-31's Mandatory Detention Provision*

Canadian detention centres house a variety of de facto mandatory detainees. These people include migrants posing flight or security risks or who have not proven their identities and who could not find sureties in Canada; post-sentence, pre-removal offenders transferred directly to prison to await deportation; nationals from DCOs or other migrants with "manifestly unfounded" cases put on a "fast-track" process; and Security Certificate detainees. There are also people who are legally or effectively stateless, such as Baha'i practitioners from Iran and Palestinians in the first category, and North Korean and Somali nationals in the second. Yet it was partially in response to the recent landings of the MV *Ocean Lady* and MV *Sun Sea*, and partially to complement its deterrence of unwanted migration agenda, that the Canadian government moved to *formalize* its use of mandatory immigration detention. C-31, the Protecting Canada's Immigration System Act (an amendment to IRPA), was introduced in February 2012 and eventually passed that December.

Under C-31, the minister of public safety may designate two or more foreign nationals as a group of "irregular arrivals" on the basis that they cannot be examined in a timely manner or on suspicions of "smuggling." Such groups are given a two-week review of refugee admissibility. If the Designated Foreign Nationals (DFN) classification goes through, the group is liable for a one-year period of detention for all persons aged 16 or older; the minister will use discretionary power to decide whether to detain children under 16 or to forcibly separate them from accompanying parents for one year. The 9 May 2012 amendments to Bill C-31 introduced the possibility of conducting a review every 180 days.

DFN stigmatization continues after release from detention. Even if the Immigration and Refugee Board finds that they are persons in need of protection, there is a five-year bar on DFNs applying for permanent residence. DFNs face several consequences as a result of their designation during this five-year period: prohibition from family reunification; requirements to report regularly to immigration authorities for questioning and to produce unspecified documents on demand; and a ban from travelling outside Canada for any reason.[3]

Within six months of its becoming legislation, the minister of public safety has used the "irregular arrivals" designation once, in relation to a group of Romanian asylum seekers in December 2012. This group opted to return to Romania rather than press their cases to stay in Canada and endure the year in detention.

#### *The Designated Countries of Origin List*

After repeatedly imploring the overloading of the refugee determination system by "bogus claimants" and "fraudsters," particularly in relation to the Hungarian Roma or those fleeing the violence in Mexico, the government introduced the concept of Designated Countries of Origin into Canadian legislation through C-31. DCOs are presumed to be "safe" countries that "do not normally produce refugees, have a robust human rights record and offer strong state protection."[4] The minister of citizenship, immigration and multiculturalism designates countries as DCOs on the basis of quantitative factors (a rejection rate of at least 75 per cent (including withdrawn and abandoned cases), or a withdrawn and abandoned rate of at least 60 per cent), or on the basis of the minister's opinion that the country exhibits the hallmarks of a refugee-protecting country, including an independent judiciary, enjoyment of democratic rights, etc.[5]

How does a refugee claimant from a DCO apply for protection in Canada? The Canadian government expects to



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hold hearings on refugee claims of DCO nationals within 30–45 days after referral of the claim to the IRB, as opposed to the 60-day timeframe for other refugee claimants. Unlike regularly streamed claimants, failed DCO claimants will neither have access to the Refugee Appeal Division nor be permitted to apply for a work permit upon arrival in Canada.[6] Legal aid reductions announced by the Canadian government in April 2013 mean that asylum claimants in Ontario who originate from any of the DCO safe countries may no longer be entitled to legal aid and representation at their hearings.[7] Of course, a DCO claimant is not an automatic candidate for detention, but certain situations predispose such claimants to the possibility. In any event, the creation of a DCO list in C-31 and the new timelines make it "very difficult to file a claim" and ensure that "certain groups of asylum seekers will be excluded from the system and returned to their countries of origin."[8]

The original December 2012 list of 25 DCOs had been expanded to 37 countries as of June 2013. Included in this list are the United States, Mexico, and most countries in the European Union. Some of the choices of DCOs have been met with outcry from the legal and advocacy communities. The addition of Hungary to the list has been particularly protested. At a press conference on 14 December 2012, Minister Kenney defended this choice by arguing that "95% of claims in 2011 were fraudulent. They were either abandoned, withdrawn, or refused." The Canadian Association of Refugee Lawyers disputes this claim, suggesting instead that the 95 per cent number ignores both the fact that almost 3,000 of the 4,400 claims (68 per cent) had not been decided at the time of the press conference, and also the 18 per cent rate of acceptance for Hungarian claims heard at the IRB. Indeed, the mounting evidence that Hungary is not able to provide protection for vulnerable people from racist and anti-Semitic attacks within its borders[9] leads some refugee advocates to believe that the addition of Hungary to the DCO list was a specious effort to curb the influx of Roma into Canada.[10]

The level of discretionary decision-making afforded to the Minister of Citizenship, Immigration and Multiculturalism in crafting the DCO list is high. As mentioned, the minister sets both the quantitative and qualitative standards for inclusion. There is no public conversation to debate and justify the percentage of rejected cases or transparency of the judiciary that lead to a country being found not to produce refugees. Also worrying is the fact that the minister can add more countries to the DCO list at any time, also without public consultation. More generally, as Petra Diop points out, the DCO policy is "profoundly reductionist and allows for entire groups of refugee claimants to be labeled as 'frauds' on the basis of hailing from a Designated Country of Origin."[11]

### *Conditions in Immigration Detention Centres*

International law generally permits the detention of migrants, pending admissions or deportations, and considers it to be administrative, non-punitive, and ancillary to immigration control.[12] It is understood as a second-best product of immigration enforcement meant to safeguard other aspects of control, including deportation. International law sets limits on detention according to principles of proportionality, due diligence, and non-arbitrariness.[13] Detention should be used thoughtfully and as a last resort.[14] Individualized assessments should take into account the individual's personal history and risk of absconding before a detention decision is made. The detention of vulnerable people—including unaccompanied elderly persons, survivors of torture or trauma, persons with mental or physical disabilities, pregnant or nursing women, and minors—should be especially avoided. Before resorting to detention, states must ensure that a range of alternative, less restrictive, non-custodial measures are available; they must also demonstrate that these so-called alternatives to detention programs will not be effective.[15] It is unclear how these issues of concern can be addressed in the context of a mandatory detention provision.

Discretionary detention policy in Canada is targeted primarily at three groups of people: (1) "irregular migrants," or foreigners who have been found by a proper procedure to have either entered illegally without having had a preauthorized visa or who are otherwise by law obliged to depart; (2) asylum seekers prior to a final decision on their claims to protection under the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (Geneva Convention); and (3) asylum seekers whose applications for Geneva Convention protection have been rejected by the destination state.[16] The majority may be paroled or released on bond, but some are required to remain in detention until a decision can be reached on removal. This latter group is effectively subject to indefinite detention, and the "unknowingness" of this open-ended detention without time limits can present difficulties akin to mental torture.[17]

Detention is a civil procedure. Nevertheless, it often (intentionally) resembles criminal incarceration. Dora Schriro acknowledged as much in a report released shortly before the completion of her tenure as director of the Office of Detention Policy and Planning in the United States:

> As a matter of law, Immigration Detention is unlike Criminal Incarceration. Yet Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations at considerable distances from



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> counsel and/or their communities. With only a few exceptions, [detention] facilities … were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control. Likewise, [the United States] adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.[18]

In his 2008 report to the UN Human Rights Council, the UN special rapporteur on the human rights of migrants observed the escalation of what is referred to in the academic context as a "crimmigration crisis."[19] The special rapporteur specifically cited detention as evidence of this trend: "It is important that irregular migration be seen as an administrative offence and irregular migrants processes on an individual basis. Where possible, detention should be used only as a last resort and in general irregular migrants should not be treated as criminals. The often erratic and unlawful detention of migrants is contributing to the broader phenomenon of the criminalization of irregular migration."[20]

Detention centres throughout the Western world are characterized by conditions that jeopardize the dignity of detainees. Common problems include inadequate medical, psychological, and hygienic care; subcontracting of services to ill-equipped private firms; and guard misconduct.[21] Significantly, attention is rarely paid to rectifying the mental debilitation wrought by stays in immigration detention centres. Psychological distress indictors amongst detainees include "depression, suicidal ideation, posttraumatic stress, anxiety, panic, and physical symptoms," particularly when "compared with compatriot asylum seekers, refugees, and immigrants living in the community."[22]

There is a growing body of research and media reports concluding that long-term detention has adverse mental health outcomes for detainees.[23] Time in detention is positively associated with severity of the detainee's distress and a persistent negative impact on mental health after release.[24] This finding is particularly important in states such as Canada that do not have official maximum time limits prescribed by law. This finding should be further contextualized against the background of some states reporting that the majority of successful deportations are effected in the first weeks and months of detention; the longer detention lasts, the less likely the outcome will be deportation, the presumed chief purpose of detention.[25] Therefore, mandatory detainees are also probable candidates for eventual release into the community, a confusing and seemingly incoherent effect of the policy interacting with real world constraints.

Neglect or abuse by medical and other professionals employed in detention centres can lead to distressing situations and even death. For example, the guards, doctors, and nurses who encountered Czech asylum seeker Jan Szamko at the Toronto immigration holding centre in 2011 did not detect that his odd behaviour was due to a lethal fluid buildup that compressed his heart, lowered his blood pressure, and subsequently shut down his bodily functions. On 8 December 2011, Szamko became the first immigration detainee to die in a Canadian facility.[26] After accounting for former detainees who die after release from detention, the number of deaths caused by detention would continue to climb.[27]

### *The Canadian Immigration Detention System*

Upon contextualization within a worldwide comparison of detention regimes, Canada can be seen to be shifting from a relatively progressive, holistic approach to a more typically draconian, punitive one. The legislative grounds for immigration detention in Canada can be found in sections 54 to 61 of the Immigration and Refugee Protection Act (IRPA), and in sections 244 to 250 of the Immigration Refugee and Protection Regulations (IRPR). The Immigration Refugee and Protection Regulations as well as the Citizenship and Immigration Canada Policy Manual on Detention provide directions on how immigration detention is to be enacted. A member of the Immigration Division (ID) of the Immigration and Refugee Board (IRB) reviews detention after 48 hours, then within the next 7 days, and then every subsequent period of 30 days. While the IRB oversees detention reviews and rules on appeals, the Canadian Border Services Agency is the detaining authority that is responsible for ports of entry and enforcing the IRPA.

There are three immigration holding centres (IHCs) in Canada: Toronto IHC with a capacity of 125 beds; Laval (Quebec) IHC with a capacity of 150 beds; and British Columbia IHC at the Vancouver International Airport with a capacity of 24 beds (although this third facility detains people only for up to 72 hours). So-called low-risk detainees are held in IHCs and high-risk detainees—people with criminal backgrounds, potential for flight risk, and/or mental health or behavioural problems—are held in provincial correctional or remand facilities not operated by the Canadian Border Services Agency (CBSA). Private security companies provide the guards that staff the Canadian IHCs. The CBSA claims that 74 per cent of detainees, which in some cases include children, are released within 48 hours.[28]

The Canadian immigration detention system is financially costly. In fiscal year 2008–9, detention and removal programs cost approximately $92 million, of which detention costs amounted to $45.7 million, or an average of $3,185 per detained case. In 2008–09, the cost to Canadian taxpayers of detaining one person for one day in non-CBSA



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provincial facilities ranged from $120 to $207.[29] The cost now stands at around $239 per person per day.[30]

What happens to refugee claimants, children, and vulnerable people who become subject to detention in Canada? A small percentage of refugee claimants are detained on arrival. As a rule, children and youth (minors under 18 years of age) should not be held in immigration detention; if they are detained, it should be as a measure of last resort. Section 60 of the IRPA affirms "as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child."[31] In those exceptional cases where they are detained, international law requires governments to hold children in facilities and conditions appropriate to their age.[32] Nonetheless, children are detained even when they are not security risks or dangers to the public. In 2008, an average of 77 children per month were detained, with the monthly average dropping to 31 in the first six months of 2009.[33] Some children may be detained as "guests" or because they are "accompanying their detained parent." These children are not included in the official statistical record and so the true number of detained children is higher than the official one cited above.

As regards vulnerable people, there is no systematic screening to identify them in the Canadian detention estate, and CBSA facilities do not offer any type of counselling services.[34] If detainees are identified as exhibiting certain behavioural problems—such as aggressiveness—or mental illness—such as suicidal tendencies—then they are often transferred to prisons. For example, male asylum seekers in Ontario who exhibit behavioural or mental health problems are usually transferred to Central East Correctional Centre (the "Lindsay Super jail") if it is for a long period of time, and to the Toronto West Detention Centre, if it is for a shorter period of time or they have suicidal tendencies.[35] There is a related concern that immigration detainees are co-mingling with criminal inmates, and that two-tiered mental health care is being provided in prisons with Canadian-born people being prioritized over newcomers.[36]

*The Far-Flung Locations of Detention Centres*

Since the IHCs are relatively small in capacity, dispersal amongst facilities is often the only strategy available when a large-scale detention order is made or when a large group of new arrivals is detained. For example, after the arrival of the MV *Sun Sea*, nearly 200 male passengers and crew were housed in a makeshift detention area set up in the yard of the Fraser Regional Correctional Centre; women went to the Alouette Correctional Centre, and those with children went to the Burnaby Youth Custody Services Centre. These facilities are located in the district of Maple Ridge, over 40 kilometres away from Vancouver.

The paucity of detention space in Canada raises a related concern: the unfairness of the chance of detention being highly correlated to whether the migrant or asylum seeker is arrested in Toronto and Montreal versus anywhere else in the state. The Canadian Council for Refugees notes, "Asylum seekers in Toronto and Montreal appear to be more readily detained than asylum seekers in other areas, because of the convenient availability of a detention centre. Furthermore, there are indications that in those cities the decision to detain or not detain is significantly influenced by how full the detention centre is and whether there is money in the detention budget or not."[37] If true, this scenario amounts to an arbitrary deprivation of liberty, a contravention of international legal rules on practising detention.

Although the IHCs are located close to the top three destination cities for migrants coming to Canada, the provincial jails are more difficult to get to without a car. The far-flung locations of the jails complicate the abilities of detainees' networks to visit and to provide support. Compounding these issues of access are centres' limited hours of visitation, detainees' difficulties gathering case-relevant evidence from detention, and the growing use of videoconference technology that allows for an immigration judge (and interpreter) in one courtroom to hear the case of an immigration detainee located in another courtroom some distance away. Cultural and linguistic barriers also compromise the abilities of some detainees to proceed fruitfully through their asylum and immigration adjudication procedures.[38] Further, the mobility of detainees among the IHCs and the jails may also have an ancillary effect of presenting them as more transient and fleeting to actors that have an influence over their experiences, thereby leading to a reduction in care from figures such as guards, managers, and case workers.[39] The difficulties of the conditions in provincial jails are multiplied in the context of mandatory detention: the typically long periods of detention spent in a space of relative isolation but hyper-exposure to guards, fellow detainees, and insecurity can lead to long-term mental and physical health consequences, a situation that is particularly egregious in light of the fate of release into the community that awaits many of the people subject to mandatory detention.

## Conclusions and Recommendations

Although it has been used only once as of June 2014, the power of the C-31 "irregular arrivals" designation should not be underestimated. The designation signals a growth in reasons or justifications for mandatory detention in Canada. If recent legal challenges fail and C-31's detention of asylum



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seekers on the basis of their means of arrival is normalized into everyday Canadian immigration policy, the designation will work hand-in-hand with the DCO policy to create a system of more distrust and less protection for *all* new arrivals. The level of discretion in deciding the entries on the DCO list is out of proportion with the consequences for migrants from those countries. In light of the grave concerns highlighted by the public outcry over the DCO list, the minister of citizenship, immigration and multiculturalism should initiate a more robust conversation to justify the choices of countries included on the list and to validate the high level of public trust accorded to the minister via the discretionary decision-making powers.

Immigration detention systems expose an already vulnerable population to a potentially devastating situation in which their mental and physical health undoubtedly deteriorates. Instead of seeking measures to alleviate this burden, the Canadian government is using C-31 and other policy tools that effectively worsen it. Long-term detainees are both more psychologically and physically damaged from their experiences in IHCs and provincial jails, and more likely to remain in Canada after release. The policy of mandatorily detaining certain groups of non-citizens who are then expected to integrate and assimilate into Canadian society appears to be somewhat incoherent. Indeed, C-31 and the DCO policy are examples of a policy objective being effectively stymied by practical constraints, and the result may turn out to be antithetical to the original motivation for implementing the legislation.

It is also important to recognize that the damage from detention is not limited to those persons who are incarcerated: there is a ripple effect out from the IHCs and jails into the wider community, touching the detainee's networks but also ordinary residents who form negative impressions of detainees as criminals, deviants, and worse.[40] Xenophobia and prejudice directed at detainees—including but not to those hailing from a DCO—can loop back to feed in to the sorts of moral panics that turned the arrivals of eight ships over a period of 14 years into an apparently acceptable justification for mandatory detention for one year. Scholars are observing a growing cohort of developed states that are calling on and exploiting their detention systems to amplify minor events into full-blown crises, thus rendering massive changes to immigration and asylum policies virtually indisputable in the public domain.[41] In the wake of these eight ships and the subsequent creation of a DCO list and draconian detention provisions, it is possible that Canada should be added to this dubious group. The implications of this turn for the larger Canadian democratic polity should provide an interesting topic of research in another article.

## Notes

1. Bilbo Poynter, "Canada Accused of Treating Tamil Asylum Seekers like Prisoners: After 500 Men, Women and Children Arrived off Vancouver Island in 2010, Some Were Held for up to a Year in Prison Facilities," *Guardian*, 29 November 2012, http://www.guardian.co.uk/world/2012/nov/29/canada-accused-tamil-asylum-prisoners.
2. Alex Neve and Tiisetso Russell, "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive by Sea," *University of New Brunswick Law Journal* 62, no. 1 (2011): 37–46.
3. Stephanie J. Silverman, "Detention in Canada," Detention & Asylum Research Cluster, 2013, http://refugeeresearch.net/ms/detention/detention-asylum-in-countries/detention-in-canada/. For further discussion of C-31, see, e.g., Petra Molnar Diop, "The 'Bogus' Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's Bill C-31," *Refuge* 30, no. 1 (2014): 67–80; Canadian Council for Refugees, "Overview of C-31 Refugee Determination Process," 21 February 2013, http://ccrweb.ca/en/refugee-reform.
4. Citizenship and Immigration Canada, "Designated Countries of Origin," 30 May 2013, http://www.cic.gc.ca/english/refugees/reform-safe.asp.
5. Silverman, "Detention in Canada."
6. Citizenship and Immigration Canada, "Designated Countries of Origin."
7. Nicholas Keung, "Legal Aid Ontario Cutbacks Could Leave Desperate Refugees without Lawyers at Hearings," *Toronto Star*, 4 April 2013, http://www.thestar.com/news/immigration/2013/04/04/legal_aid_ontario_cutbacks_could_leave_desperate_refugees_without_lawyers_at_hearings.html. Cf. Legal Aid Ontario / Aide Juridique Ontario, "Response to Enquiry on Legal Aid Changes on Immigration/Refugee Cases," http://www.legalaid.on.ca/en/news/mediaenquiries/1304-05_torontostar.asp.
8. Diop, "'Bogus Refugee,'" 74.
9. Kristen Shane, "Critics Urge Rethink of Hungary's Safe-Country Label: 'Alarming' Election Results, Rising Anti-Semitism Seen as Concerns; Hungarian Government Says It's Trying to Quash Radicalism," *Embassy*, 23 April 2014, http://www.embassynews.ca/news/2014/04/22/critics-urge-rethink-of-hungaary's-safe-country-label/45444.
10. E. Arbel, J. Beaudoin, and E. Arbel, "Why Is There No Refuge for Roma Refugees?" *Huffington Post*, 21 December 2012, http://www.huffingtonpost.ca/stephanie-j-silverman/roma-refugees-canada-immigration_b_2346160.html.
11. Diop, "'Bogus Refugee,'" 73.
12. Daniel Wilsher, "The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives," *International and Comparative Law Quarterly* 53, no. 1 (2008): 897.
13. S. J. Silverman, "'Regrettable but Necessary'? A Historical Study of the UK Immigration Detention Estate and Its Opposition," *Politics & Policy* 40, no. 6 (2012): 1131–57.



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14 François Crépeau, *A/HRC/20/24: Report of the Special Rapporteur on the Human Rights of Migrants* (Geneva: United Nations General Assembly, 2012), para. 68; UNHCR: UN Refugee Agency, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Geneva: UNHCR: UN Refugee Agency, 2012): guideline 4.1. Since international law instructs governments to refrain from detaining vulnerable people—including unaccompanied elderly persons, survivors of torture or trauma, persons with mental or physical disabilities, pregnant or nursing women, and minors—detention of vulnerable people should only ever be a measure of last resort.

15 Amnesty International, *Irregular Migrants and Asylum-Seekers: Alternatives to Immigration Detention* (London: Amnesty International Publications, 2009).

16 Stephanie J. Silverman, "Detention and Asylum in Canada and Abroad," *Detention and Asylum Research Cluster*, ed. J. Hyndman and D. Nakache (Toronto: Refugee Research Network, 2013). International legal and advocacy circles do not generally consider the second group—pre-decision asylum seekers—as an acceptable target for detention, as such cases often seem to be arbitrary or punitive and, hence, in violation of legal norms and conventions. I thank the *Refuge* anonymous reviewer for urging this important clarification.

17 Alfred de Zayas, "Human Rights and Indefinite Detention," *International Review of the Red Cross* 87, no. 857 (2005): 20.

18 Dora Schriro, *Immigration Detention: Overview and Recommendations* (Washington, DC: U.S. Department of Homeland Security, 2009), 4.

19 In the U.S. context, Juliet Stumpf refers to the merger of criminal and immigration law as the "crimmigration crisis" and argues that the purposeful mergers of these two bodies "primarily serve to separate the individual from the rest of US society through physical exclusion and the creation of rules that establish lesser levels of citizenship." Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review* 56, no. 2 (2006): 381. Scholars argue that, throughout the Western world and in various ways, the "crimmigration crisis" has been augmented by the discourse of national security. This intermingling has led to the double or triple punishment of migrants. See, e.g., Ana Aliverti, "Making People Criminal: The Role of the Criminal Law in Immigration Enforcement," *Theoretical Criminology* 16, no. 4 (2012): 417–34; David Manuel Hernández, "Pursuant to Deportation: Latinos and Immigrant Detention," *Latino Studies* 6 (2008): 35–63; Anna Pratt, "Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border," *Social & Legal Studies* 19, no. 4 (2010): 461–80; Karla Mari McKanders, "Unforgiving of Those Who Trespass against U.S.: State Laws Criminalizing Immigration Status," *Loyola Journal of Public Interest Law* 12 (2011): 331–63.

20 UN Human Rights Council, "Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante," UN Doc. A/HRC/7/12, 25 February 2008, para. 50.

21 Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2010), 21; A. Nethery and S. J. Silverman (2014). "Overview of 'Immigration Detention: The Migration of a Policy and Its Human Impact,'" Coherence and Incoherence in Migration Management and Integration: Policies, Practices and Perspectives, 7th Annual Conference of the Canadian Association for Refugee and Forced Migration Studies, Centre de Recherche en Droit Public, Université de Montréal, 2014.

22 Derrick Silove, Zachary Steel, and Charles Watters, "Policies of Deterrence and the Mental Health of Asylum Seekers," *JAMA* 284, no. 5 (2000): 608.

23 Caroline Fleay and Linda Briskman. "Hidden Men: Bearing Witness to Mandatory Detention in Australia," *Refugee Survey Quarterly* 32, no. 3 (2013): 128.

24 Katy Robjant, Rita Hassan, and Cornelius Katona, "Mental Health Implications of Detaining Asylum Seekers: Systematic Review," *British Journal of Psychiatry* 194 (2009): 306–12; Janet Cleveland, Cécile Rousseau, and Rachel Kronick, "Bill C-4: The Impact of Detention and Temporary Status on Asylum Seekers' Mental Health," Brief for submission to the House of Commons Committee on Bill C-4, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act*, http://oppenheimer.mcgill.ca/IMG/pdf/Impact_of_Bill_C4_on_asylum_seeker_mental_health_full-2.pdf.

25 Dennis Broeders. "Return to Sender? Administrative Detention of Irregular Migrants in Germany and the Netherlands," *Punishment & Society* 12, no. 2 (2010): 182.

26 Nicholas Keung, "Not 'Good to Fly': The Tragic Death of a Roma Refugee," *Toronto Star*, 28 March 2011.

27 Alison Siskin, *CRS Report for Congress: Health Care for Noncitizens in Immigration Detention* (Washington DC: Congress, 2008), http://assets.opencrs.com/rpts/RL34556_20080627.pdf, 22.

28 N. Keung, "Hundreds Held in Canada's Immigration Cells," *Toronto Star*, 18 November 2013, http://www.thestar.com/news/canada/2013/11/18/hundreds_held_in_canadas_immigration_cells.html#.

29 D. Nakache, *The Human and Financial Cost of Detention of Asylum-Seekers in Canada* (Geneva: United Nations High Commissioner for Refugees, 2012), 104, 39, 38.

30 Keung, "Hundreds Held."

31 Canadian Council for Refugees, "Detention and Best Interests of the Child," November 2009, http://ccrweb.ca/documents/detentionchildren.pdf, 2.

32 Nakache, *Human and Financial Cost,* 4.

33 Canadian Council for Refugees, "Detention," 8, 7.

34 Nakache, *Human and Financial Cost*, 80.

35 Ibid., 82.

36 Ibid., 84.



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37 Canadian Council for Refugees, "Submission on the Occasion of the Visit to Canada of the UN Working Group on Arbitrary Detention," 8 June 2005, http://ccrweb.ca/en/submission-occasion-visit-canada-un-working-group-arbitrary-detention.

38 As well as knowing how to proceed through the asylum application and appeal processes, there is an assumption that detainees will abide by the rules of discourse. Materials are not always provided in translation. Further, some detainees who do speak English are not always able to engage meaningfully if there is no one available to explain the materials to them. Problems of comprehension are compounded if a detainee suffers from a mental impairment and/or cognitive disability. Further, the trauma of indefinite detention leads to significant deterioration in detainees' mental health. See, e.g., A. de Zayas, "Human Rights and Indefinite Detention," *International Review of the Red Cross* 87, no. 857 (2005): 15–38; Jane Herlihy, Kate Gleeson, and Stuart Turner, "What Assumptions about Human Behaviour Underlie Asylum Judgments?" *International Journal of Refugee Law* 22, no. 3 (2010): 351–66.

39 See Nicholas Gill, "Governmental Mobility: The Power Effects of the Movement of Detained Asylum Seekers around Britain's Detention Estate," *Political Geography* 28, no. 1 (2009): 186–96.

40 "Criminalizing migrants invokes a circular rationale that legitimizes detention: migrants *might* be criminals, necessitating detention; migrants *must* be criminals, because they are detained." Alison Mountz, Kate Coddington, R. Tina Catania, and Jenna Loyd, "Conceptualizing Detention: Mobility, Containment, Bordering, and Exclusion," *Progress in Human Geography* 37, no. 4 (2013): 527.

41 Cetta Mainwaring, "Constructing a Crisis: The Role of Immigration Detention in Malta," *Population, Space and Place* 18, no. 6 (2012): 687–700; Alison Mountz and Nancy Ann Hiemstra, "Chaos and Crisis: Dissecting the Spatiotemporal Logics of Contemporary Migrations and State Practices," *Annals of the Association of American Geographers* 104, no. 2 (2013): 382–90.

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# Temporariness, Rights, and Citizenship: The Latest Chapter in Canada's Exclusionary Migration and Refugee History

Amrita Hari


### Abstract

*Changes to Canada's immigration and refugee determination policies made since 2012 have increased the occurrence and persistence of temporariness in Canada, contributing to the systematic exclusion of a growing number of non-citizens, who live and work on the territory, from a wide range of rights. From the perspective of temporariness, I illustrate the striking similarities in the state's approach to two seemingly distinct groups of non-citizens (based on their rationale for admission): low-skilled temporary foreign workers and refugee claimants. Both groups occupy a low rung in the hierarchy of rights and entitlements to citizenship in Canada, inevitably affecting their social and economic outcomes in the host society. In conclusion, I argue that there is still much to be gained by viewing these distinct groups of temporary migrants as theoretically and experientially linked, in order to design effective policy and deter Canada from repeating its dark and exclusionary migratory past.*

### Résumé

*Les changements aux politiques canadiennes d'immigration et d'admission au statut de réfugié depuis 2012 ont augmenté le caractère temporaire des séjours au Canada, contribuant ainsi à l'exclusion systématique d'accès d'un nombre croissant d'étrangers vivant et travaillant sur le territoire canadien à une variété de droits. Du point de vue de la précarité, cet article montre les ressemblances importantes dans la façon que sont considérés deux groupes distincts d'étrangers du point de leur admission : les travailleurs étrangers non qualifiés, et les demandeurs d'asile. Ces deux groupes occupent des places inférieures dans la hiérarchie des droits et de l'accès à la citoyenneté canadienne, ce qui affecte invariablement leur place sociale et économique dans la société. En conclusion, on avance qu'il y a beaucoup d'avantages à considérer ensemble, sur les plans théoriques et pratiques, ces deux groupes de migrants temporaires, afin de concevoir des politiques plus efficaces et d'éviter que le Canada répète les erreurs de sa triste et discriminatoire histoire en matière de migration.*


### Introduction

Immigration has been recognized as a cornerstone of nation building in Canada since Confederation in 1867. The chapter of Canadian immigration history discussed in this article begins during the post-Confederation settler era but is focused on the changes to immigration and refugee determination policies made since 2012. Historically, rights and entitlements to membership in the Canadian state were premised on territorial presence and the granting of permanent status. Contemporary membership in Canada's socio-political community is the ascription of permanent resident status and/or citizenship by the state. Incorporation into the nation remains more subjective. *Nation* refers generally



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to a sentiment of solidarity based on cultural similarity, but more importantly mutual recognition.[1] Canadian nationality incorporates both of these elements and assigns an individual a place in the community and a say in the effective control of the state.

Canada, as an entity, can exercise sovereignty or control over its territory to some extent, epitomized by its immigration and refugee determination policies that are designed to reflect Canada's interests. By attaching specific rules and codes to each entry category, Canada effectively creates a hierarchy of rights to stay, access to the labour market, and entitlements to state membership for all non-citizens. Much like designating citizenship, designating "illegality" assigns an individual a political and juridical identity, as well as a specific social relation to the state. States perceive unwanted and/or illegal migration as an affront to national sovereignty. The "illegalization" and "criminalization" of some migrations, therefore, is intricately connected to a perceived "loss of control" by the government.[2]

Canada has responded to the wake of perceived threats to national security, heightened in the post-9/11 era, concerns over the perceived diminishment of control over its borders, and a dilution of national identity, by expanding its "security perimeter"—an ever-growing and ever-present discursive security blanket with a vague functional definition.[3] Despite the active expansion of this blanket, Canada continues to accept what it considers to be unwanted immigration of persons it does not actively solicit.

Gary Freeman explains this passive acceptance of unwanted immigration by disaggregating migration policy into four distinct policy arenas: (1) managing legal migration through migration planning and selecting migrants to meet specific nationally prescribed immigration objectives; (2) controlling illegal migration by implementing border controls, employer sanctions, and visa requirements; (3) administering temporary worker programs; and (4) refugee determination and processing of what the state considers to be genuine asylum claims. This disaggregation of migration policy suggests that sweeping assessments of state control over its borders, even within the contemporary securitization era, must be replaced with more limited and specific claims.[4]

Historically, Canada has always passively accepted unwanted immigration, particularly for humanitarian reasons, following the ratification of internationally legislated refugee protocols. Over time, it has also had to recognize individual rights, specifically for family reunification of labour migrants, invoked in the Canadian Charter of Rights and Freedoms, and the pragmatic challenges of controlling "illegal" migration.[5] As a post-9/11 securitized state, Canada has made concerted efforts to ensure that immigration and refugee determination, in tandem with citizenship laws, are associated with the essence of the nation, effectively transforming migration and refugee laws into the "last bastion of sovereignty."[6]

This article examines how Canada maximizes its limited sovereignty in administering migration and refugee claims, evident in the changes to the temporary worker programs and the processing of in-land asylum claims made since 2012. The argument is presented in two parts. First, I argue that these changes have increased the occurrence and persistence of temporariness for specific groups of migrants in Canada, contributing to the systematic exclusion of these growing numbers of non-citizens, who live and work in the territory, from a wide range of rights (including permanent status and/or citizenship, work, access to provincial workplace standards, and social assistance). Second, in adopting the perspective of temporariness, I argue that the recent changes illustrate striking similarities in the state's approach to two specific categories of non-citizens: low-skilled temporary foreign workers and refugee claimants.

Scholarly discussion on temporary foreign workers and refugee claimants often places them in analytical and political silos, in part as a result of the distinct rationales for admitting these two groups of migrants. This article is not intended to be a robust comparison by any account, but instead selects specific aspects of admission procedures, access to social assistance (with a focus on Ontario), provisions for family reunification, and entitlements to permanent status and citizenship, as they apply to these two groups. These seemingly distinct groups occupy a low rung in the hierarchy of rights and entitlements to citizenship in Canada, inevitably affecting their social and economic outcomes in the host society.

## *The Evolution of Temporariness in Canada*

Canadian immigration policy has many purported goals, including humanitarian, family reunification, and foreign policy; however, a primary historical and contemporary use of immigration policy is as a tool of economic policy to meet immediate shortages in the labour market. Temporary foreign worker programs have always played a key role in meeting this objective. The historical programs designed primarily to recruit foreign domestic help and farm labour first paved the pathways for temporariness in Canada.

The delegation of domestic work to foreign women is a longstanding practice in Canada. Young English and Scottish women served British-Canadian families from the 1890s to the 1920s, followed by Eastern European refugee women during the Second World War, who served one year as indentured domestics. The growing shortages of domestic help in the 1950s were met with special programs for



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German women to enter Canada to become permanent residents, later expanded to include Italian and Greek women. The Caribbean Domestic Scheme, characterized by the most restrictive and coercive practices, was the first program of its kind to recruit women of colour to work as domestic workers in Canada (as opposed to white women arriving through earlier programs), but these women were categorically denied the right to permanent residence.[7] Foreign farm workers were recruited through short-term permits, with no entitlements to permanent status, which emerged out of separate bilateral agreements with the Mexican and Caribbean governments.

The Non-Immigrant Employment Authorization Program (NIEAP), established in January 1973, replaced these dispersed and diverse temporary worker programs. NIEAP was intended to allow the Canadian government and employers to use immigration policy to meet short-term market interests more flexibly and effectively.[8] Temporary foreign workers (TFWs) were restricted to a specific job and employer. The NIEAP eventually evolved into a bifurcated program with two general streams: one targeted at high-skilled workers and the other at low-skilled workers. This bifurcation persists in the contemporary Temporary Foreign Worker Program (TFWP), which has "undergone seismic changes in its purpose, size and target populations."[9] The number of temporary foreign workers present in Canada (on 1 December) rose by 148 per cent between 2002 and 2008. Since 2008, the number of temporary foreign workers admitted annually overtook the number of permanent residents, in a trend that has continued since.[10]

Temporariness in Canada implies limited rights based on temporality (often limiting period of stay) and conditionality (rights conditional upon behaviour such as requirements to satisfy a specific employer to remain in the country).[11] The number of persons holding temporary status in Canada is diverse, demonstrating a multitude of forms of temporariness. Specific to economic and labour migrants, Rajkumar et al. (2012)[12] have conceptualized the forms of temporariness on the basis of a temporary-permanent divide: a permeable paper border for the transnational elite that is less permeable for the majority of temporary migrants. Canada offers privileged forms of temporariness and inclusive membership to those categorized as high-skilled while reserving restrictive and restricting forms of temporariness for those categorized as "low-skilled."

Rajkumar et al. (2012) identify three primary categories: (1) *temporarily temporary* (e.g., high-skilled temporary foreign workers who are eligible for expedited permanent residency through the Canadian Experience Class), (2) *permanently temporary* (e.g., seasonal agricultural workers), and (3) *temporarily permanent* (e.g., foreign-born permanent residents who could be deported upon violation of immigration and security laws). For the purposes of the discussion in this article, within the *temporarily temporary* category I would include asylum seekers awaiting a decision on their claim, which could result in permanent residence, if they are granted refugee status, or deportation if rejected. In the next two sections, I shall discuss the two distinct groups of non-citizens that demonstrate some striking similarities.

### *Low-Skilled Temporary Foreign Workers*

The hallmark of the contemporary Temporary Foreign Worker Program is a formalized distinction between high-skilled and low-skilled work, in accordance with the National Occupational Classification, which the Canadian government uses to describe all work performed in the labour market. High-skilled temporary foreign workers (HTFWs) fall within Skill Level 0 (management occupations), A (occupations that require university education), or B (occupations that usually require college or vocational education or apprenticeship training). Low-skilled temporary foreign workers (LTFWs) fall within Skill Level C (occupations that usually require secondary school and/or occupation-specific training) and D (occupations with no specific formal educational requirements and that provide on-the-job training).[13]

Demand for TFWs has only grown since the establishment of historical programs to recruit domestic and farm labour to meet shortages in the Canadian labour market. Canada's Economic Action Plan 2014 states that Canada continues to experience significant skills shortages in many sectors and regions, and the TFWP helps to fill genuine and acute labour needs in order to create more opportunities for Canadians, but not at the cost of displacing Canadian workers.[14] In the midst of aggressive immigration and refugee policy reform in 2012, the hiring of more than 200 temporary workers from China in northeastern British Columbia[15] and outsourcing arrangements made by the Royal Bank of Canada (RBC)[16] sparked outrage from both the labour unions and the public, and garnered significant media attention. The Canadian government was pressured to introduce relevant legislative, regulatory, and administrative changes, announced under Canada's Economic Plan 2013, which were intended to reform the TFWP to respond to specific criticisms raised against it.

Despite the introduction of these changes, the numbers of temporary foreign workers are rising in all provinces; the increase is most pronounced in Alberta, where the largest percentage of work permits is issued to workers entering low-skilled occupations.[17] The growing demand for workers in low-skilled occupations across all provinces prompted the government to introduce the Pilot Project for Hiring



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Foreign Workers in Occupations that Require Lower Levels of Formal Training (also known as the Low-Skill Pilot Project) in 2002. The program was further modified in 2007, allowing employers to hire persons for occupations requiring at most a high school diploma or a maximum of two years of job-specific training. In the 2012 and 2013 fiscal years, the government used the high and persistent demand for low-skilled temporary foreign workers as their rationale to make the pilot project a permanent fixture of the Canadian immigration system, now called the Stream for Lower-Skilled Occupations.

The flagship domestic worker and farm labour schemes remained in place but with some semantic and cosmetic changes being introduced and implemented. From 1973 to 1991, all foreign domestic workers were denied citizenship. Despite the introduction of the Points System in 1967, the low wages of foreign domestic workers prevented them from applying as independent-class immigrants. Concerns over the harsh reality of the working and living conditions of domestic workers led to the creation of the 1991 Task Force on Immigration Practices and Procedures. The Foreign Domestic Movement was implemented in that same year and reformulated in 1992 as the Live-In Caregiver Program (LCP), permitting foreign domestic workers to apply for permanent residence, after completing two years of live-in domestic service in a private household. The main controversial features of the program remained in place: the live-in requirement and dependence on a single employer,[18] notorious for exposing workers to long and undefined work hours as a result of the inseparability of work and home and a higher potential for abuse and exploitation, since reliance on a single employer would mean LCPs would be unlikely to file complaints for fear of terminated work permits (forgoing a the opportunity to transition to permanent status in Canada) and/or deportation.

The Seasonal Agricultural Worker Program (SAWP) replaced NIEAP in 1974 as a government-to-government program of managed migration exclusively between Canada and Mexico. The day-to-day administration of the program is carried out by a non-profit private sector organization, Foreign Agricultural Resource Management Services, federally incorporated in 1988. Work visas are valid for a specific job, employer, and time period. Workers live in employer-provided housing, and employers are required to cover certain costs, including transportation and health insurance.[19] Workers arriving under SAWP and the Agricultural Stream within the Stream for Lower-Skilled Occupations are unaffected by the recent reforms to the TFWP, since the Canadian government asserts that there continues to be labour shortages in this particular industry and that unfilled jobs are "truly temporary."[20]

### *Refugee Claimants*

Although the manipulation of temporary foreign worker programs to meet short-term labour shortages is a way for the state to exercise sovereign control over immigration, the exigencies of state interdependence in a globalized world, and international law that requires states to respect an emergent "law of migrants," requires all liberal-democratic states to respect the rights of persons and not just citizens (what Christian Joppke calls a novelty of the postwar era).[21] Canada is no exception. In fact, Canada has a history of grand gestures of humanitarianism, allowing it to be seen as a "refugee haven," despite horrific historical instances of racist exclusion. The volume of historical refugee flows to Canada included the influx of United Empire Loyalists fleeing the American Revolution, and French Protestants as well as fugitive slaves from the United States after the abolition of slavery in Canada in 1834.[22] Canada's humanitarian image was marred, however, by its refusing asylum to Jewish refugees in the 1930s, epitomized by the infamous statement that "none is too many."[23]

Prior to the Second World War, Canadian nationhood incorporated ideas of desirable non-citizens as white (primarily Anglo-Saxon) "British subjects," and restricted the work, residency, and family reunification rights of all other non-citizens who did not fit these criteria. In the immediate aftermath of the war, Canada accepted a significant number of "desirable" refugees from Western Europe, Hungary, and Czechoslovakia, and limited "undesirable" immigration from Asia and the Caribbean. The development of international legal instruments and basic structures of legal protection for refugees significantly altered the demographic composition of Canadian refugees that arrived following the postwar period. After the United Nations Convention Relating to the Status of Refugees in 1951 in Geneva, and the 1967 United Nations Protocol Relating to the Status of Refugees were put in place, Canada began accepting refugees from outside the traditional European states, including thousands of Asians expelled from East Africa and refugee claimants arriving on boats from Southeast Asia.

The rationale for Canada's racist exclusion incorporated myriad tropes of the foreign Other, as vector of disease, agent of subversion, corrupter or the moral order, and debaser of national identity, requiring the exteriorization of threat, epitomized in the curious case of the public and policy reactions to arrivals by ship throughout Canadian history. Such arrivals account for approximately 0.2 per cent of total refugee arrivals over the past twenty-five years. Eight vessels carrying approximately 1,500 people brought as many refugee claimants as might arrive in just three weeks in any one of those twenty-five years.[24] Yet, despite



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the statistically insignificant number of refugee claimants, arrivals by ship garner disproportionate political attention.

The first recorded arrival of the modern period is the Japanese ship *Komagata Maru*, which arrived in May 1914 carrying 376 South Asians who were marooned just off the Vancouver harbour. Following a two-month legal battle, the undesirable British subjects aboard the ship were refused the right to disembark and forced to return to India, where the passengers were imprisoned upon arrival and some killed.[25] Once set, this precedent was maintained when the ship SS *St Louis* arrived in 1939 carrying just over 900 Jewish refugees escaping the Holocaust. Upon its return to Europe, the asylum seekers faced arrest and death in concentration camps.[26]

The next set of ships that fuelled similar public outrage and legislative retaliation did not arrive until forty years later, after Canada had removed explicit racist references from its immigration policy, acceded to the 1951 Convention Relations to the Status of Refugees and the 1967 Protocol, and established its first refugee determination process of inland claims in the 1976 Immigration Act. In 1986, a ship carrying 152 Tamils landed off the east coast of Newfoundland followed by a separate arrival of 174 Sikhs off the coast of Nova Scotia. These unauthorized arrivals sparked public and policy concerns of illegality, fraud, deceit, and accusations of exploiting the generosity of Canadians. Prime Minister Brian Mulroney issued an emergency recall of Parliament to table Bill C-84, the Refugee Deterrents and Detention Bill, giving new powers to immigration officers to turn back ships in international waters if they were suspected of carrying claimants and made provisions for new fines to be imposed on carriers as well as new powers of search, seizure, and detention.[27] In the year that Bill C-84 took to be passed and implemented, Canada also ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In 1999, four ships from China carrying fewer than 600 passengers appeared off the coast of British Columbia evoking similar public and political indignation and put the deterrence effect of these earlier measures into question.

The racist responses to historical arrivals by ship in Canada strike a chord with contemporary political reactions. The two most recent incidents of designated irregular arrivals and asylum seekers to Canada are the Ocean Lady in October 2009 and the MV *Sun Sea* in August 2010. The majority of the 500 Tamil passengers who arrived off the coast of British Columbia were detained immediately on the grounds that they were at "risk of flight."[28] The controversy engendered by these recent arrivals contributed to further legislative changes, adding to Canada's already complex and lengthy refugee determination process.

Protecting Canada's Immigration System Act (Bill C-31), originally named the Immigration and Refugee Protection Act, had its first reading in the House of Commons on 6 April 2011. The bill died when an election was called later that year. The controversial Bill C-31 resurfaced as Protecting Canada's Immigration System Act, carrying over modifications from Bill C-4, Preventing Human Smugglers from Abusing Canada's Immigration System Act, and Bill C-11, Designated Countries of Origin. Bill C-11 would empower the minister to designate countries for which nationals would not have access to appeal decisions about their refugee claims. Passed in June 2012 and brought into effect in December 2012, the act is intended to deal with the "refugee crisis" but has been criticized across the board by human rights advocates and scholars for gross violations of human rights.

At present, Canada accepts refugees through two streams: the Refugee and Humanitarian Resettlement Program and the In-Canada Asylum Program.[29] Refugees arriving through the first program and the Private Sponsorship of Refugee Program arrive as permanent residents. The In-Canada Asylum Program allows people to make a claim at a port of entry or at a Citizenship and Immigration Canada office. If a claim is deemed eligible, it is sent to the Immigration and Refugee Board for a decision on refugee status.[30] This program is often the most controversial because Canada is unable to select persons who apply for asylum under this program, which it perceives as a threat to sovereignty, security, and national identity.

The Canadian state employs several measures to intercept potential refugee claimants before arriving at a Canadian port of entry in order to make a claim. These measures include detention and removal, diplomacy, prosecution and punitive measures, particularly against smugglers, transnational enforcement practices, and harmonization of border policies such as the Canada–U.S. Safe Third Country Agreement, part of the Canadian federal Perimeter Strategy implemented in 2003.[31] It is the persons who arrive and make a refugee claim under the In-Canada Asylum Program (refugee claimants) who hold temporary status in Canada.

### *Some Striking Similarities, Despite Distinctive Rationales for Admission*

It would be too ambitious, given time and space constraints, to describe this article as comparative. Rather, the intention is to make a unique contribution to the much-needed discussion and debate on temporariness, and invite scholars to establish a research agenda that views Canada's diverse temporary migrant groups as potentially theoretically and experientially linked. For my contribution, I draw on the



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Protecting Canada's Immigration Act and amendments to the Temporary Foreign Worker Program under Canada's Economic Action Plan 2014, to reveal the ways in which the treatment of low-skilled temporary foreign workers and refugee claimants are the same or differ, and ideally some reflections on why.

The system of admission for both groups, based on the recent legislative changes noted above, is lengthier, complicated, more onerous (albeit in different ways for temporary foreign worker and refugee claimants), and, in the case of the TFWP, more expensive. The implementation of Bill C-31 significantly altered the claims process for asylum seekers who fall under the Safe Third Country Agreement or for those who are perceived to present security or criminality risks. It is interesting to note that the criteria to determine inadmissibility based on criminality both inside and outside of Canada has been significantly expanded.

One of the most important and controversial features of the bill is the creation of two streams of claimants: Designated Countries of Origin (DCO) and Designated Foreign Nationals (DFNs). The minister of citizenship and immigration now has the authority to designate countries whose nationals have reduced judicial, legal, and other rights in the refugee process. Designation is based on the minister's opinion that the country may have independent judiciary or democratic rights or quantitative factors such as a rejection rate of claims of at least 75 per cent (including withdrawn and abandoned applications), or a withdrawn and abandoned rate of claims of at least 60 per cent. DFNs are groups of people that the minister of public safety designates as irregular arrivals or those who are suspected to have been smuggled for profit, and therefore their claims cannot be processed in a timely manner.[32]

As part of creating a fast and flexible streamlined refugee determination process, nationals of DCO countries face shorter timelines for refugee hearings (30 to 45 days as opposed to 60 days for other claimants). The burden of proof rests with the claimant and with an increasing standard of proof required, the shorter timelines make it extremely challenging for claimants to acquire all documents and information to establish a successful claim in a timely manner. If unsuccessful in their claim, they cannot appeal to the Refugee Appeal Division. They are permitted to seek judicial review at the Federal Court but do not have an automatic stay of removal and have to wait 36 months before they can apply for a Pre-Removal Risk Assessment, all of which increases the potential for fast deportation. The designation of groups of people as "irregular arrivals" (DFN) subjects all persons over 16 years of age to mandatory detention. There is a growing body of evidence to suggest that detention puts an asylum seeker in the position of disempowerment, uncertainty, isolation, and humiliation, increasing the likelihood of depression and suicide.[33] Even if they are accepted as persons in need of protection, they still face reduced rights and different treatment during the refugee status determination, including regular reporting to immigration authorities as well as a ban from travelling outside Canada for any reason.[34]

In the midst of the ongoing reform under Bill C-31, the Canadian government faced significant public, media, and trade union outrage, sparking significant changes to the TFWP. The administration of the TFWP is a jurisdictional conundrum, as the federal government has jurisdiction over the entry and stay of workers; however, the protection of workplace rights is a provincial responsibility, with the exception of Employment Insurance (a federal responsibility). A key requirement under the TFWP is the Labour Market Opinion (LMO) process, which must be approved by Employment and Social Development Canada (ESDC, formerly known as Human Resources and Skills Development Canada, HRSDC).

Canada's Economic Action Plan 2014 incorporated four changes to the LMO process, specifically in response to controversial hiring of temporary foreign workers in BC and by RBC: (1) it suspended the accelerated LMO process previously applicable for prolonged or extensive (large numbers of workers) recruitment;[35] (2) introduced a $275 user fee to eliminate the use of taxpayer money to facilitate the process; (3) added questions to restrict the outsourcing of Canadian jobs and ensure that employers have a firm plan in place to transition to a Canadian workforce over time; and (4) increased the government's authority to suspend and revoke work permits and LMOs if they suspect that the program is being misused.[36]

Although programs for low-skilled TFWs import people who temporarily fill permanent vacancies, the LMO process is more onerous for employers wanting to hire workers filling low-skilled positions in the Canadian labour market, as well as for the selected worker. Employers of prospective low-skilled workers are required to advertise on an ongoing basis and for a longer period of time and in more venues, targeting specific underemployed communities, and post specific wages. Employers must provide accommodation and accept responsibility for workers' transportation costs to and from Canada, as well as their health-care costs for the first three months of their contract.[37] Other critical changes were the removal of the wage flexibility that allowed employers to pay TFWs up to 15 per cent less than the prevailing wage, and changes to the language requirements identifying English and French as the only languages



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that can be used for recruitment (a particular response to the outcry from BC with regard to the specific recruitment of Mandarin-speaking workers).[38]

Most refugee claimants across all provinces can apply to Citizenship and Immigration Canada (CIC) for a work permit once their claims have been referred to the Immigration and Refugee Board (IRB). Not all refugee claimants who apply for a work permit get one. Unsurprisingly, a different set of rules applies to DCO claimants. They cannot apply for work permits until their refugee claims are accepted or 180 days have passed since their claims were referred to the IRB.[39] Refugee claimants who are unable to acquire a work permit must demonstrate that they cannot support themselves without work and that their only alternative is to go on social assistance. They must also have completed their medical examinations. For those refugee claimants who are already receiving social assistance, they should include proof of this when submitting their applications to CIC. Social assistance available to refugee claimants varies by province.[40]

The rights to social assistance extended to persons admitted for humanitarian reasons in Canada does not extend to persons arriving as labour migrants, despite the fact that it is now recognized under international law and codified in the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which Canada has yet to ratify. Low-skilled TFWs are not entitled to social assistance anywhere in Canada; however, they make payments to the federal Employment Insurance program. An ESDC-approved employment contract provides workers with some protection, but ESDC has no regulatory authority to monitor employer compliance.[41] Legal protections in the workplace are dictated by province-wide employment standards, but these do not transfer well into practice for temporary foreign workers.

TFWs are unlikely to file a complaint against employers, and most workers have little or no experience with Canada's legal and social systems, face language barriers, and are more likely to concede to self-censorship and to be influenced by misleading information provided by employers. If and when a TFW does choose to contest a contractual violation through legal proceedings, the time constraints on a work visa present a practical barrier to successful litigation. The threat of possible detention, deportation, or repatriation provides employers with an additional measure of control to exact over TFWs. Moreover, employers increasingly practise "country surfing": fuelling competition between sending countries and threatening to switch supply countries if they are dissatisfied.[42] Workers who wish to apply for a work permit with a new employer in the same industry are not authorized to work unless they undergo the LMO process once again, and the federal and the provincial government make little effort to match workers with employers who already possess an approved LMO.[43]

Despite the greater access to social assistance available for refugee claimants in comparison to low-skilled TFWs, the most recent reforms limit refugee claimants' access to necessary and appropriate health care. The Interim Federal Health Program (IFHP) was established in 1957, delivered by Health Canada. Since 1995, CIC took over responsibility for providing eligible persons with immunizations, other preventative medical care, essential prescription medications, vision tests, some elective surgery, as well as prenatal and obstetrical care if they are not yet covered by a provincial and territorial health insurance plan.[44]

Pan-Canadian health organizations and professionals have voiced serious concerns about the Order Respecting the Interim Federal Health Program 2012. This order announced the ending of "health care coverage" for most pharmacy benefits and all vision, dental, and other supplemental benefits. The order also established ambiguous criteria for what constitutes "basic coverage";[45] that is, products and services "of an urgent or essential nature." For all others, including rejected refugee claimants as well as DCO and DFN claimants, coverage for physician and hospital services is limited to services and products "needed to diagnose, prevent or treat diseases that pose a risk to public health, or conditions of a public safety concern," therefore categorically excluding them from previous IFHP provisions.

Access to appropriate and necessary health care has always been and continues to be a point of concern for migrant workers in Canada. The focus has been on the potential risk associated with disease importation by migrant workers; however, critical scholars have made the argument that this undermines the potential for adverse effects on migrant workers' health. The majority of low-skilled TFWs live in employer-provided accommodation, which in the case of farm workers can be dilapidated and overcrowded quarters with poor sanitation, poor ventilation, inadequate means to refrigerate or heat food, and insufficient hygiene facilities. Migrant workers can also be found in occupations with elevated workplace health and safety risks, and farm workers in particular experience common health problems with chemical exposure, as well as single-event or long-term musculoskeletal injuries. In an attempt to protect their jobs and in fear of deportation, migrant workers may be more likely to work longer hours or dangerous shifts, accept unsafe work when injured or ill, and less likely to request safety equipment or report workplace accidents.

Migrant workers holding legal employment authorizations are not eligible for publicly funded health care until three months following their arrival, during which they are eligible



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to apply for private insurance. There are three potential barriers to migrants purchasing private insurance: (1) an economic barrier in that some may not possess the funds needed to buy insurance; (2) a geographical barrier, in that many migrants work in remote or rural areas where clinics may not recognize private insurance or have the necessary diagnostic equipment to cater to specific workplace injuries and health concerns; and (3) time barrier, in that many migrants work long hours and may not have the time to seek health care if their off-work hours do not coincide with clinic hours.[46]

All these risks are elevated for non-status migrant workers who do not hold legal employment authorizations. Common barriers for both groups are linguistic and cultural differences, which may make persons within these groups less willing to seek treatment. Furthermore, medical professionals may not be trained to recognize the social context of migrant worker[47] or refugee claimant health, resulting in a failure to acknowledge, address, and treat their health concerns adequately.

Scholars have long contested the exploitation of low-skilled TFWs, arguing that it has in fact become normalized and concealed, and is being continually reproduced using the notion that permanent residents and citizens can expect certain rights and entitlements that are not available to non-citizens with temporary status. Numbers of temporary foreign workers who are granted permanent status has grown from 11.7 per cent in 2001 to 32.1 per cent in 2010 of all persons.[48] It is integral to note, however, that this right is effectively denied to both groups: low-skilled temporary foreign workers as well as disadvantaged streams of refugee claimants (DCO and DFN). The majority of low-skilled workers, including workers in the SAWP, are ineligible for permanent residence in Canada.

A dire consequence of the lack of a pathway to permanent residence is consequent restrictions placed on family (re)unification. Joseph H. Carens notes that states intend to prevent permanent settlement by often requiring potential migrants to forgo their fundamental rights to family (re) unification, as a condition of entry.[49] In the past, Canada strategically restricted family reunification of Chinese and South Asian migrants in order to discourage the permanent settlement of these undesirable non-citizens. Contemporary examples include Designated Foreign Nationals who are barred from applying for permanent residence in Canada for five years, so family reunification is deferred. Moreover, the ban on travelling outside of Canada, if accepted as persons in need of protection, also prolongs family separation. Although the TFWP has no regulatory bar to family members accompanying workers to Canada, there is a double standard created by the differences in the accompanying spouse's access to the labour market based on the skill level of the TFW. The spouse of a high-skilled TFW is eligible for an open work permit, and the couple's children are entitled to study permits. In contrast, the spouse of a low-skilled worker must obtain an individual LMO, and the worker is required to cover the travel costs of his spouse and accompanying children, presenting an added economic barrier to family reunification and eventually settlement.

### *Conclusion*

Albeit a brief discussion, this article reveals the latest chapter in Canada's exclusionary migration history by tracking the trajectories of two specific categories of non-citizens—low-skilled temporary foreign workers and refugee claimants—who, despite being admitted to Canada on the basis of different rationales, share some similarities and differences in their treatment by the host country. I show how the recent legislative changes including Protecting Canada's Immigration Act and the amendments to the Temporary Foreign Worker Program announced under Canada's Economic Action Plan 2014, have increased the occurrence and persistence of temporariness for a growing number of non-citizens who live and work on the territory, but are systematically excluded from a wide range of rights, including access to work and provincial workplace standards, social assistance, family (re) unification, permanent status, and entitlements to citizenship. Although I did not present a robust comparison, in this concluding section, I highlight key arguments and provide future policy and research directions.

The system of admission for both groups is lengthier, more complicated, more onerous for the migrants, more expensive in the case of the TFWP, and provides for increased chances of rejection and deportation. Since admitted under a different set of rules, refugee claimants have access to social assistance but reduced rights to work, while low-skilled temporary foreign workers face a more restrictive labour market opinion (work permit) process and are admitted with a right to work but without rights to social assistance anywhere in Canada. A set of barriers common to both groups are linguistic and cultural differences, which may make persons within these groups less willing to seek help or even treatment from medical professionals, who may also lack the training necessary to recognize the social context of the migrant worker and/or refugee claimant. The recent changes to the Interim Federal Health Program limits refugee claimants' access to necessary and appropriate health care, which has always been a point of concern for migrant workers. Both groups face policies that restrict family (re)unification and entitlements to permanent status and citizenship.

There are some advantages available to one group that the other does not have access to; therefore, it would be



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difficult to suggest any blanket policy solutions, since the specific needs of both groups do differ. It is also important to recognize that both groups differ significantly in the sheer numbers admitted to Canada at any specific time. Common to both groups, however, is a need for increased access to social assistance, especially for low-skilled temporary foreign workers. There is a greater need for better monitoring of employer compliance of ESDC-approved labour market contracts and adherence to provincial workplace standards. Both groups also require increased access to necessary and appropriate health care. There are drastic improvements required for low-skilled TFWs, and simultaneously an urgent need for serious reconsideration of changes to the IFHP affecting refugee claimants. Most importantly, perhaps, is the need for increased opportunities to gain permanent status in Canada, which for lower-skilled TFWs is truly an unjust paradox, since their high-skilled counterparts are automatically entitled to this privilege.

Finally, I would like to acknowledge that there has been a profusion of scholarship on temporariness as a theoretical framework, its consequences on the lived experience of migrants themselves,[50] as well as changing public consciousness and understandings of nationality in Canada.[51] This body of research has acknowledged the need to fully understand who enters temporary categories and what happens to them after they arrive in Canada. There is still, however, as I have stressed before,[52] a tendency to consider temporariness in analytical and political silos, primarily on the basis of migrants' category of and rationale for admission. I shall push once more for a systematic comparative and longitudinal account of who is temporary and, moreover, who is able to transition from temporary to permanent status, as this can better inform policy design and stop the Canadian state from reverting to its dark exclusionary past.

## Notes

1. Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1983).
2. Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31 (2002): 419–47.
3. Audrey Macklin, "Borderline Security," *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, ed. Ronald Daniels, Patrick Macklem, and Kent Roach, 383–404 (Toronto: University of Toronto Press, 2001).
4. Gary Freeman, "Can Liberal States Control Unwanted Migration?" *Annals of the American Academy of Political and Social Science* 534 (1994): 17–30.
5. Christian Joppke, "Why Liberal States Accept Unwanted Immigration," *World Politics* 50 (1998): 266–93.
6. Catherine Dauvergne, *Making People Illegal* (New York: Cambridge University Press, 2008).
7. Abigail B. Bakan and Daiva K. Stasiulis, "Foreign Domestic Worker Policy in Canada and the Social Boundaries of Modern Citizenship," *Science and Society* 58 (1994): 7–33
8. Ibid. 23.
9. Delphine Nakache and Paula J. Kinoshita, *The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?* (Montreal: Institute for Research on Public Policy, 2010), http://irpp.org/research-studies/study-no5/, 4.
10. Ibid., 1.
11. A. Hari, S. McGrath, and V. Preston, "Temporariness in Canada: Establishing a Research Agenda," CERIS Working Paper Series 99 (2013), http://www.ceris.metropolis.net/wp-content/uploads/2013/04/CWP_99_Hari_McGrath_Preston.pdf.
12. Deepa Rajkumar, Laurel Berkowitz, Leah F. Vosko, Valerie Preston, and Robert Latham, "At the Temporary-Permanent Divide: How Canada Produces Temporariness and Makes Citizens through Its Security, Work, and Settlement Policies," *Citizenship Studies* 16 (2012): 483–510.
13. Human Resources and Skills Development Canada, "National Occupational Classification Tutorial" (Gatineau: Skills and Labour Market Information Division), http://www30.hrsdc.gc.ca/NOC/English/NOC/2006/Tutorial.aspx#6.
14. Government of Canada, "Canada's Economic Action Plan 2014: Temporary Foreign Worker Program," http://www.actioplan.gc.ca/en/initiative/temporary-foreign-worker-program.
15. "B.C. Mine's Temporary Foreign Workers Case Dismissed," *CBC News,* 21 May 2013, http://www.cbc.ca/news/canada/british-columbia/story/2013/05/21/bc-temporary-workers-hd-mining.html.
16. Sunny Freeman, "RBC Foreign Workers Controversy a Sign of an Increasingly Anxious Middle Class," *Huffington Post,* 12 April 2013, http://www.huffingtonpost.ca/2013/04/12/rbc-foreign-workers-middle-class_n_3065554.html.
17. Nakache and Kinoshita, *Canadian Temporary Foreign Worker Program,* 4.
18. Bakan and Stasiulis, "Foreign Domestic Worker Policy," 10.
19. Kerry Preibisch and Jenna Hennebry, "Temporary Migration, Chronic Effects: The Health of International Migrant Workers in Canada," *Canadian Medical Association Journal* 183 (2011): 1033–8.
20. Government of Canada, "Canada's Economic Action Plan 2014."
21. Joppke, "Why Liberal States Accept Unwanted Immigration," 268.
22. Mary Liston and Joseph Carens, "Immigration and Integration Canada," in *Migration and Globalization: Comparing Immigration Policy in Developed Countries,* ed. A. Kondo and A. Shoten, 207–27 (Rochester, NY: Social



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Science Research Network, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808981.
23 Irving Abella and Harold Troper, *None Is Too Many: Canada and the Jews of Europe, 1933–1948* (New York: Random House, 1983).
24 Alex Neve and Tiisetso Russell, "Hysteria and Discrimination: Canada's Harsh Response to Refugees and Migrants Who Arrive by Sea," *University of New Brunswick Law Journal* 62 (2011): 37–46.
25 David Goutor, *Guarding the Gates: The Canadian Labour Movement and Immigration, 1872–1934* (Vancouver: University of British Columbia Press, 2007).
26 Alison Mountz, "Embodying the Nation-State: Canada's Response to Human Smuggling," *Political Geography* 23 (2003): 323–45.
27 Gillian Creese, "The Politics of Refugees in Canada," in *Deconstructing a Nation: Immigration, Multiculturalism, and Racism in 90s Canada,* ed. V. Satzewich, 123–45 (Halifax: Fernwood, 1992).
28 Ashley Bradimore and Harald Bauder, "Mystery Ships and Risky Boat People: Tamil Refugee Migration in the Newsprint Media," *Canadian Journal of Communication* 36 (2011): 637–61.
29 Citizenship and Immigration Canada, "The Refugee System in Canada," http://www.cic.gc.ca/english/refugees/canada.asp
30 Ibid.
31 Sharryn Aiken, "Manufacturing 'Terrorists': Refugee, National Security, and Canadian Law," *Refuge* 19 (2001): 54–73.
32 Canadian Council for Refugees, "Overview of Bill C-31 Refugee Determination Process," rev. 21 February 2013, http://ccrweb.ca/en/refugee-reform.
33 Janet Cleveland, Cécile Rosseau, and Rachel Kronick, "The Harmful Effects of Detention and Family Separation on Asylum Seekers' Mental Health in the Context of Bill C-31." Brief submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, 2012.
34 Canadian Council for Refugees, "Overview of Bill C-31 Refugee Determination Process."
35 The Expedited Labour Market Opinion (e-LMO) Pilot Project was introduced in September 2007 to accelerate the application process in 12 "occupations under pressure" in Alberta and British Columbia. Completed applications from employers who qualify to participate are processed within about five business days of Service Canada's receiving them. In 2008, 21 new occupations were added to the e-LMO Pilot Project, including low-skill positions in construction, hospitality, food and beverage services, and residential cleaning. Nakache and Kinoshita, *Canadian Temporary Foreign Worker Program*, 5.
36 Government of Canada, *Canada's Economic Action Plan 2014.*
37 Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada," *Osgoode Hall Law Journal* 49 (2011): 39–70.
38 Government of Canada, *Canada's Economic Action Plan 2014.*
39 Community Legal Education Ontario, "Social Assistance for Refugee Claimants," http://refugee.cleo.on.ca/en/refugee-steps/social-assistance-refugee-claimants.
40 Community Legal Education Ontario, "Work Permits for Refugee Claimants," http://refugee.cleo.on.ca/en/work-permits-refugee-claimants.
41 Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor," *Comparative Labor Law and Policy Journal* 31 (2009): 5–46.
42 Kerry Preibisch and Leigh Binford, "Interrogating Racialized Global Labour Supply: An Exploration of the Racial/National Replacement of Foreign Agricultural Workers in Canada," *Canadian Review of Sociology* 44 (2007): 5–36.
43 Nakache and Kinoshita, *Canadian Temporary Foreign Worker Program,* 21.
44 Canadian Healthcare Association, *Changes to the Interim Federal Health Program: Position Statement*, 2012, http://www.cha.ca/wp-content/uploads/2012/11/IFHP-reform-policy-statement-November-2012.pdf.
45 Ibid., 4.
46 Preibisch and Hennebry, "Temporary Migration, Chronic Effects," 1036.
47 Ibid.
48 Government of Canada, "Immigration Overview: Permanent and Temporary Residents," 2011, http://www.cic.gc.ca/english/resources/statistics/facts2010/temporary/32.asp.
49 Joseph Carens, "Live-In Domestics, Seasonal Workers and Others Hard to Locate on the Map of Democracy," *Journal of Political Philosophy* 16 (2008): 419–45.
50 Patti T. Lenard and Christine Straehle, *Legislating Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012).
51 Luin Goldring and Patricia Landolt, eds., *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013).
52 Hari, McGrath, and Preston, "Temporariness in Canada," 25.

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# "What happens there … follows us here": Resettled but Still at Risk: Refugee Women and Girls in Australia

Linda Bartolomei, Rebecca Eckert, and Eileen Pittaway

**Abstract**

*UNHCR's Women at Risk Program is designed to identify and respond to refugee women at extreme risk in countries of asylum who are in desperate need of resettlement. Many women who have been resettled under this program have been raped or faced forced engagement in survival sex, forced marriage, pregnancy, and childbirth as a result of rape. Drawing on a decade of research undertaken by the authors across 18 international sites, this article explores the experience of refugee women at risk resettled to Australia. It discusses the impacts of sexual violence on their settlement, including those of shame and stigma. It identifies that, while for some women at risk, resettlement offers hoped for safety and protection, for others the abuses they faced prior to resettlement resurface and are compounded by new risks and violations of their rights. It introduces a risk assessment tool designed to assist service providers to identify and respond to these risks.*

**Résumé**

*Le programme d'aide aux femmes dans les situations à risque du Haut Commissariat des Nations Unies pour les Réfugiés identifie et répond aux besoins des femmes réfugiées qui courent de sérieux risques dans leur pays d'accueil, et qui ont un urgent besoin d'être réinstallées ailleurs. Plusieurs femmes qui ont profité de ce programme, ont été des victimes de viol ou ont été obligé d'avoir recours à des rapports sexuels de survie, à des mariages forcés, à des grossesses et à des accouchements suite d'un viol. En se basant sur une décennie de recherches menées par les auteurs dans dix-huit sites à travers le monde, cet article explore les expériences de femmes à risque qui ont été réinstallées en Australie. On y considère l'impact des violences sexuelles subies avant le déplacement sur leur nouvelle installation, incluant le sentiment de honte et la stigmatisation. Alors que pour certaines femmes à risque, le déplacement offre une bonne sécurité et une bonne protection, l'étude démontre que pour d'autres les violences sexuelles subies refont surface après le déplacement et s'ajoutent à de nouveaux risques et à de nouvelles négations de leurs droits. Cet article propose donc une méthode pour évaluer les risques dans le but d'aider les différents fournisseurs de services à identifier et à répondre à ce type de risques.*

## Introduction

> Men are affected in the war because men get killed, but women and children, they [rape] the women, they rape the little girls and mistreat the children. Do you understand?
>
> —Resettled refugee woman (2008)[1]

The many risks and human rights abuses experienced by refugee and displaced women and girls in conflict, during flight and in camps and urban refugee sites are now widely acknowledged. These include rape and other forms of sexual violence, beatings, forced marriage and relationships, forced engagement in survival sex, and pregnancy and childbirth as a result of rape.[2] However, there has been significantly less focus on and exploration of the risks and human rights abuses that refugee women and girls might



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face within countries of resettlement. Resettlement as a durable solution is predicated on the notion that the rights of those resettled will be restored and that, through effective settlement and integration support, the protection needs of refugees, including women and girls, will be addressed.[3] Research in Australia, conducted over a number of years, has shown that some women and girls continue to be at risk of ongoing violence, human rights abuses, and threats to their safety and well-being during their settlement. Many of these experiences are directly related to and compounded by their previous experiences of sexual and gender-based violence that first identified them as women at risk. They include high risks of rape, forced relationships and marriage, survival sex, social exclusion, loss of confidence and self-esteem, and severe trauma.[4]

The United Nations High Commissioner for Refugees (UNHCR) Women at Risk (WaR) Program was created to provide resettlement to refugee women who had been identified by UNHCR as at extreme risk and in desperate need of resettlement. They were women "who, either due to their refugee status or to the social mores within the country of first asylum, as women find themselves seriously at risk."[5] In 1988 UNHCR commenced the program in partnership with non-governmental organizations (NGOs) for joint sponsorship of up to eighty "vulnerable" women in this new category.[6] By 1992 two additional countries, Australia and New Zealand, had established WaR Programs. Each offered a modest number of places within their overall resettlement programs, with New Zealand offering twenty places and Australia sixty. Several other countries also started to accept women-at-risk cases within their resettlement programs.[7]

However, from its inception, the program struggled to achieve its aim, quotas were never filled, and many of the most at-risk women and girls were not resettled. Research undertaken by the authors over the past twenty-five years in Australia, and in refugee camps and urban settings in eighteen countries has identified some of the key barriers the program faces. These include difficulties in identification of at-risk cases, the dismissive attitudes of some NGO and UNHCR staff towards sexual and gender-based violence, and the low visibility of the program. The research documented not only the multiple risks and human rights abuses experienced by refugee women and girls, but also explored the challenges facing UNHCR and NGO staff in identifying WaR in situations where the vast majority of refugee women have experienced rape and sexual violence.[8]

One outcome of this research was the adoption of a new UNHCR Conclusion on the protection of women and girls at risk, first drafted by authors Pittaway and Bartolomei and adopted by member states at the Executive Committee Meeting of UNHCR Geneva in 2006.[9] A Conclusion is "soft" international law designed to assist governments in their interpretation and implementation of the Refugee Convention. At the request of UNHCR and NGO field staff, they also developed a Women and Girls at Risk Identification Tool to assist in the identification of and response to at-risk women and girls.[10] In 2007, Pittaway and Bartolomei worked with UNHCR Geneva and staff from Foundation House, Melbourne, to expand the tool to include other vulnerable refugee groups. The final tool was published by UNHCR as the Heightened Risk Identification Tool (HRIT) and adopted as a UNHCR standard operating procedure. It includes a comprehensive list of prevention and response mechanisms.[11]

Following the adoption of the Conclusion, UNHCR increased its focus on the identification and protection of refugee women and girls at risk.[12] Although there is now stronger attention given to the identification and resettlement of WaR globally, there has been a limited focus on their settlement experiences. In particular, little is known about how previous incidents of risk and human rights abuses might affect women in settlement.[13]

This article examines the compounding impact that these experiences have on some women's abilities to find safety and security in countries of resettlement. Protection is an assumed and critical aspect of settlement and integration. Recognizing that specific definitions of protection vary in the context of forced migration and displacement, this article draws on those of UNHCR and the Office for the Coordination of Humanitarian Affairs.[14] It argues that protection in the context of the settlement of refugee women at risk can be considered to focus on the reduction of risk and on the restoration, maintenance, and promotion of rights. However, services provided to newly arrived refugees often focus exclusively on the more practical aspects of settlement, such as the provision of housing, income assistance, and support for resettled refugees to build social connections and networks within their own community and with the wider community.[15] It is clear from the research discussed below that before this can occur, the compounding impacts of the multiple risks, human rights abuses, and protection failures experienced by WaR prior to their resettlement have to be addressed.

The term *women at risk* is used extensively in program and policy documentation by both UNHCR and resettlement countries, including Australia.[16] However, our research with refugee women in Australia[17] suggests that this term is a misnomer. Rather than being "at risk," the majority of refugee women and girls have in fact already experienced significant and often multiple human rights abuses, directly linked to their gender. In this article the term *women at risk* refers to women who have experienced extensive abuses of



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their rights prior to settlement, who may have experienced further abuse once resettled, and who have an increased likelihood of experiencing further violations of their rights in the future.

This article draws on the findings from a number of linked research studies undertaken by the Centre for Refugee Research between 2003 and 2013, including a three-year Australian Research Council–funded project Refugee Women at Risk: Protection and Integration in Australia. The aims of this research were to identify the extent and nature of risk experienced by WaR in Australia, and if appropriate, to develop a Heightened Risk Identification Tool for use in settlement. An evaluation was also undertaken of the capacity of settlement service-providers to meet the needs of WaR. Over 500 women and more than 100 service-providers participated in the research, which was conducted in three urban and four regional sites in New South Wales, Queensland, and Victoria.

In 2011, as part of the commemorations of the sixtieth anniversary of the Refugee Convention, the Centre for Refugee Research was commissioned by UNHCR to undertake a series of dialogues (community consultations) with over 1000 refugee and other displaced women in India, Colombia, Jordan, Uganda, Zambia, Thailand, and Finland.[18] In each dialogue, participants identified significant risks and protection failures affecting the safety and security of women and girls.[19] An eighth dialogue was also initiated with refugee women in Australia, and over 200 women participated. Sadly, the experiences of many women in settlement reported in this dialogue mirrored those shared by refugee women in the dialogues held overseas. In 2012, the research team was commissioned by a settlement organization in Australia to undertake an evaluation of services provided to refugee WaR. This research identified gaps in settlement responses to refugee women and again confirmed that women continued to be exposed to ongoing abuses of their rights once resettled.

## Research Methodology

The qualitative methods employed in each of these studies included the participatory action research model named Reciprocal Research.[20] It was developed by Pittaway and Bartolomei as part of their work examining the occurrence and impact of systematic rape and sexual abuse on refugee women and girls in camps and refugee sites overseas, and subsequently was adapted for work in Australia. The focus of the method is the collection of information in a way that is empowering, not harmful or exploitative, and has the potential to bring about social change.[21] Both resettled refugee women and settlement service-providers participated in a series of community consultation workshops. The process involves using a human rights framework to set a context and to identify problems. Then situational analysis and possible response mechanisms are identified by the participants through the use of story circles[22] and storyboards.[23] The outcomes include a rich source of data, an identification of issues of concern based on the theme of the research project, a situational analysis, identification of appropriate and realistic solutions, and a strategic plan drawn up with the communities involved.[24] Throughout this work, the data collected through the Reciprocal Research consultation was supported by individual in-depth qualitative interviews with refugee women and service-providers. In Australia, women who arrived under the Woman at Risk Visa Program, as well as other women who had suffered from sexual abuse and trauma as part of their refugee experience, participated in the research.

## The Women at Risk Program in Australia

Australia is one of the few countries in the world to allocate a specific resettlement quota for women identified as being at risk and in urgent need of protection. In a strong show of commitment to this program, in 2009, the Australian government increased the quota to allocate 12 per cent of its refugee program intake to places for women at risk and their families.[25] Each year since, approximately 780 women and their children have been resettled under the 204 WaR visa program. In 2014, 1000 visa places are allocated for women at risk and their families as part of Australia's resettlement intake.[26]

Although the formal Women at Risk program is a crucial measure in meeting the needs of refugee women, our research has also identified that women resettled to Australia under other programs have often survived similar pre-arrival experiences, and that both groups encounter risks upon resettlement.[27]

UNHCR plays a critical role in the promotion of durable solutions, including facilitating the resettlement of the most at-risk refugees. However, once resettled, refugees no longer fall within UNHCR's protection mandate. Instead, the responsibility for the ongoing protection of refugee women rests with the government of the resettlement country. UNHCR provides considerable guidance to countries of resettlement on the provision of settlement services.[28] In particular, they recognize that women resettled under the Women at Risk program will have experienced compounded protection risks and may face particular challenges in their settlement. UNHCR policy guidance states WaR will often require intensive specialized support to address traumatic experiences they have survived. Specifically it points to the absence of the critical support structures of family and community as key factors increasing the vulnerability of women



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in settlement to further abuses of their rights.[29] UNHCR emphasizes the importance of gender-sensitive settlement planning, including health, education, employment, and housing services.[30]

There is increased recognition that women who have experienced sexual and gender-based violence will require specialized psychosocial support. Most resettlement programs do emphasize appropriate psychosocial interventions, usually in the form of access to torture and trauma counselling.[31] The Conclusion on Women and Girls at Risk[32] highlights the importance of psychosocial support for women at risk in resettlement. However, to date there has been limited discussion of how a woman's pre-arrival experiences of sexual and gender-based violence might intersect with the risks and protection challenges she may encounter in the settlement environment.

WaR often require intensive and specialized torture and trauma counselling and other forms of psychosocial support to assist them in their settlement. However, the strong and often primary focus on mental health can limit the ability of resettlement countries to acknowledge and consider how women's experiences may affect other areas of settlement. In Australia, women at risk are able to access a range of on-arrival and short-term settlement services. Under the Humanitarian Settlement Services (HSS), orientation, case management and on-arrival accommodation services are provided. Women are also supported to access torture and trauma counselling and English classes. Between six and twelve months after arrival, women are "exited" from these on arrival services and encouraged to seek support through more generalist, long-term settlement services such as migrant resource centres.[33] Although these services provide key support to many resettling women, this same assistance is available to the majority of refugees, with no specific services funded to respond to women at risk.

Settlement responses operate in silos, with specific services funded to respond to particular aspects of women's settlement needs. For example, a case worker will be assigned to assist with day-to-day needs; a separate housing-provider will take responsibility for on-arrival and longer-term accommodation; English classes are offered by another organization; and torture and trauma support are provided through a separate counselling service. Often there is limited communication between the services, resulting in challenges for women to receive the intensive, focused support needed. In addition the emerging emphasis on models of integration, such as that developed for the U.K. Home Office, focus on access to education, health services, employment, language skills, and the building of bridges between the newcomer and host communities.[34] They have little emphasis on the sequelae of pre-arrival experiences such rape, and sexual and gender-based violence on the ability of women to settle in a new country. They also do not recognize the vulnerability of resettled women at risk and the stigma that can isolate them, even within their own communities. This leads to a heightened need for family reunification, and yet this is not acknowledged as a critical part of their integration. The failure to understand the complex interplay of pre- and post-arrival experiences often places women at further risk.

Whilst committed to encouraging countries to both actively resettle and implement appropriate responses to support refugee women at risk, it is only recently that UNHCR has formally acknowledged that "after resettlement, refugee women often remain exposed to protection risks such as domestic violence, which can actually become worse in the new resettlement environment."[35] This recognition is critical. Although UNHCR correctly identifies domestic violence, this research has shown that there are many other risk and abuse factors that women and girls are exposed to during their displacement, which not only continue once they are resettled, but which intensify as they intersect with and are compounded by settlement challenges.

Recent research with resettled refugees examines the gender differences in access to employment and education and has demonstrated that men and women experience resettlement differently. However, few works have examined the compounding impact of women's exposure to protection risks at all stages of the refugee life cycle—from country of origin through to resettlement, and its relationship to integration.[36] The compounding effect of multiple abuses can—and as this research has shown, does—make women more vulnerable to future violence and its impact on resilience and well-being.[37]

## *Risk Factors for Refugee Women in Countries of Origin and Asylum*

> They kill women in their own way.
>
> —Resettled refugee woman (2010)

Women consulted for this research reported experiencing high levels of torture and trauma prior to arrival in Australia. This included systematic rape; sexual torture; forced witness of the rape of family members including their children; forced engagement in survival sex; birth of one or more children of rape; and rejection, violence, and isolation from their own communities.

> They can come in your house, they can kill your husband, or your brother—all the men they can be killed. But they can't kill the women. But if there are twenty, all of them, they are going to pass



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> to you [all rape you]. The rebel are going to do that, they don't care. And then the kids are just going to seeing what is happen.
>
> —Resettled refugee woman (2009)

Participants reported that men and boys would sometimes be forced to witness the rape of their families before being killed. Women and girls suffered severe physical and emotional trauma from violence. Some committed suicide. Many became pregnant.

Violence and rights abuses continue in countries of asylum. Seeking refuge within camps and urban areas, women faced further risks, human rights abuses, and protection failures. Those without family or community support were particularly vulnerable. Some reported they were raped within days of arriving in a country of asylum. Often without shelter and with little or no food to feed their families, many were forced into survival sex to buy food, medicine, or shelter for themselves and their families.

> Sometimes girls sell themselves, getting money to raise her brothers and she get pregnant … In the camps it happens a lot. You don't have anything and there are men there who have money. What will you do?
>
> —Resettled refugee woman (2011)

Women spoke frequently about the shame and risks associated with being a single mother or widow. They reported facing frequent harassment and abuse and were often targeted for rape and forced marriage. Survivors of sexual violence faced further shame, with many ostracized from their families and communities. Fear of such repercussions and an absence of effective law and justice systems meant many women did not even report the rapes. Those who did were often accused of lying, or their experiences were not taken seriously by protection agencies.

> You will be shamed to tell people that this is going on. And people in the community will not understand: they will start to stigmatize you and reject you.
>
> —Resettled refugee woman (2010)

Living with such fear and insecurity, some women were forced into relationships for protection, believing they would be less at risk than if they were alone. A number of women married men against their will after they had been raped or their families killed. Many of these relationships were violent and abusive, with women reporting frequent beatings and rape by their husbands or partners.

## *Resettled but Still at Risk: The Experiences of Refugee Women in Australia*

All refugees, including refugee WaR, experience challenges in resettlement, including finding safe, affordable, and adequate housing, employment, and education. Many also experience racism and discrimination. Despite these obstacles, many WaR adapt quickly to their new homeland and settle successfully. However, others experience further risks and ongoing human rights abuses, including gender-related violence. Women shared the fracturing impact of the shame associated with past and current experiences of human rights violations, on their relationships with family and communities. They explained how the risks they thought they had left behind have instead continued to affect them in Australia. These dangers then intersected with and compounded the new and emerging risks they faced in settlement. This was a major barrier to their ability to feel safe and secure and to settle successfully into their new country. As one resettled woman explained, "What happens there follows us here."

A major outcome from the research with WaR resettled in Australia was a framework to assist service-providers and policy-makers to identify and explore the particular characteristics and contexts that made some women more exposed to ongoing risk and human rights abuses in settlement.

### *Women and Girls Who Are Single, Pregnant, and without Family or Community Support*

The stigma of being single causes many women to be isolated from their communities. Women and girls who become pregnant outside of marriage are often made to feel ashamed and ostracized. Without the support of family and community, women and girls are vulnerable to sexual abuse, harassment, and forced relationships.

> What about single women? They are so much at risk. They struggle every day to resist rape. People know you are alone, and men try sexual abuse.
>
> —Resettled refugee woman (2008)

### *Women and Girls with a Child or Children Conceived from Rape*

Many women and girls are resettled with a child or children who have been conceived from rape. Some are pregnant through rape when they arrive. Others are raped and become pregnant here in Australia. These experiences are considered to be extremely stigmatizing for the women, and for their communities. Some women struggle to bond with their children because of the trauma and stigma associated with their conception and birth. This is sometimes



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so serious that it leads to interventions by child protection authorities. Women are often so shamed by these experiences they isolate themselves or are ostracized from their communities. This can make them vulnerable to further sexual abuse.

> Rape is very much shamed in particular for the single mums. They usually have at least one child is a child of rape … this means that sexual assault for single women is a huge, huge issue, particularly in terms of being [seen to be] available for married men to go to.
>
> —Settlement service provider (2011)

*Women and Girls Who Are in a Forced Marriage, or Being Coerced into a Forced Marriage in Australia*

The shame and stigma of being single and widowed often forces women into relationships in a bid to gain protection. They believe that if they are in a relationship it will make them less vulnerable to outside abuse and harassment and more accepted within their communities. At times, however, these relationships turn violent and women become trapped in unsafe partnerships.

> Because the women who come here single are viewed as being inferior to those women who have come here with their husbands, there is still that sense that if they are in a relationship with someone, then they have the protection and giving their children a father figure, however appropriate or inappropriate, and it makes them feel like they are more respected in their communities.
>
> —Settlement service-provider (2011)

*Women and Girls Who Are Experiencing Rejection or Victimization by Their Own Community in Australia and Isolated from Their Own and Host Communities Because of Shame Factors*

Single or widowed women who are known to have survived sexual violence or engaged in survival sex, those who are pregnant outside of marriage or who have left a relationship because of domestic violence—all report experiencing isolation. The shame and stigma of such experiences causes relationships within families and communities to fracture, leaving women without support. Women are also frequently isolated because of fears for their own safety. Isolation is worsened for women who do not speak the language and who cannot access support services. This is exacerbated when they suffer from mental health problems, which in turn increase the isolation.

> And some of them … being a woman under a 204 visa [are] ostracized from the community … they know that you have been raped, … and some people blame her, … they have that bad image of her.
>
> —Settlement service-provider (2012)

*Women and Girls Who Are Suffering from Misunderstandings and Conflict over Women's and Children's Rights*

The challenges of negotiating the different roles and expectations of women and girls has led to misunderstandings and misinterpretations of the meanings of rights and the ways in which they are reflected in the culture and legal frameworks of Australia. This confusion is reflected in refugee communities and among some service-providers. In all research sites, reports of family breakdown, intergenerational conflict, and the removal of children by child protection agencies have all been blamed on "human rights." This is putting extreme pressure on service-providers often not trained to deal with this level of complexity.

> You can't just say you have your rights, you just say, "Rights, rights, rights." More education for women and children. That would help stop the culture shock … The rights they have destroyed them.
>
> —Resettled refugee woman (2009)

Such challenges to the key support and protection structures of family and community render many women and girls vulnerable to exploitation, stigmatization, and isolation and can act as additional barriers to their accessing much-needed services.

*Women and Girls Who Are Experiencing Increased Vulnerability Due to Separation from Family Members*

Without family support, many women struggle to achieve successful settlement. They are often responsible for sending remittances back home to support loved ones who remain in danger. Traumatized by separation from their families, they experience enormous guilt for having been resettled. Many try to sponsor their families to come to Australia; however, the waiting list is long and the process expensive. Often their families are unaware that life in Australia is difficult and cannot understand why the women are not working harder for them to be reunited. Women described going without meals and engaging in exploitative employment, and survival sex, in order to earn money to send back to their families.

> I can't sleep at night worrying about them, I can't concentrate in my English classes—I think about it every second of every day
>
> —Resettled refugee woman (2012)



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*Women and Girls Who Are Living in Situations of Family and Domestic Violence*

The stresses of settlement and the challenges of negotiating new gender roles for men and women contribute to and exacerbate domestic violence within refugee families. Women are often fearful of leaving these relationships because of the shame and stigma of divorce and of being a single woman. Many remain out of a sense that they will be better protected within the relationship than alone. Some are unaware they can leave. Others are fearful that if they do try to leave, the violence will worsen and they will have nowhere to go with their children. Refuges are often ill equipped to respond to the needs of refugee women with large numbers of children. Services and refugee communities are seeking culturally responsive models to support families experiencing domestic violence.

> It's a challenge for the men too … they don't get employment immediately, even for the skilled ones. [It] makes them feel like they're losing their power and they change, their roles are changing and they get frustrated. When they get frustrated, their family breakdown come, some of the things you people call family violence … So the family violence because of the changing gender roles is there.
>
> —Settlement service-provider (2010)

*Women and Girls Who Are Suffering Impairment in Daily Functioning Due to Severe Psychological Trauma*

The endemic violence endured by many WaR can cause severe psychological trauma. Although many refugees experience trauma, the compounding impact of the multiple traumas women have endured, compounded by an absence of support networks and the ongoing risk of further violence in countries of resettlement, exacerbates their trauma. Many find it difficult to take care of themselves and their families. They sometimes distance themselves from loved ones, including their children, and act unpredictably. The effects of this trauma make it difficult for women to trust people and to feel safe. They can prevent women from accessing essential support services. They frequently refuse counselling support services because they are fearful of disclosing their experiences, feeling that they will be shamed or not believed. Others are afraid of being labelled "mad" or "cursed." In some cases, counsellors have been so traumatized by the women's experiences the women have refused to return to the service.

> We always remember. It's not easy to forget … You find lot of happiness in Australia but you are injured in the heart and you can not fix it. Trauma is still in your heart … I may be smiling on the outside but I am crying on the inside.
>
> —Resettled refugee woman (2009)

*Women and Girls Who Are Forced to Engage in Survival Sex*

Women who are known to have engaged in survival sex before arriving in Australia reported being targeted for abuse and harassment. They disclosed that men come to their homes demanding sex and rape them if they refuse. Once this becomes known in their communities, the women are ostracized. Other women reported being forced into survival sex because they were struggling to feed their families and pay the rent on their limited welfare payments. Often these women were also supporting family members still overseas.

> The issue of sexual and gender-based violence, survival sex, rape in marriage, and so on … : It doesn't stop when you arrive here in Australia.
>
> —Resettled refugee woman (2011)

*Compounded Risk in Settlement: The Intersectionality of Protection Challenges in Settlement*

> After honeymoon phase, many services is not enough. The challenges begin … language barrier, financial hardship … Time of resettling is full of stress … Financial independence is a big, big one. Education, plus language barrier makes a problem—don't understand Australian system. Isolation is another problem. Finding a good stable job. Becoming more depressed.
>
> —Resettled refugee woman (2012)

*Intersectionality* is a sociological theory that suggests and seeks to examine how various socially and culturally constructed categories, such as gender, race, class, disability, and other axes of identity, interact on multiple and often simultaneous levels and contribute to systematic social inequality. It has its theoretical origins in the work of African American and Third World feminists of the 1980s and 1990s.[38] It is an analytical approach that explores the manner in which multiple oppressions and discriminations can interlock to compound the disadvantage and exclusion of marginalized peoples.[39] The concept is drawn upon to aid in exploring and understanding the range of risks and oppressions that intersect in the lives of refugee women to compound their disadvantage and social exclusion in settlement.

Both women and services spoke often about the multiple protection risks and abuses women faced during settlement.



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Each risk and issue of concern was seen as intrinsically connected to another, serving to mutually compound and intensify the overall level of risk experienced by the women. As their level of risk heightened, their ability to access critical support services was lowered. The failure by some services to identify and respond to these risks in the early stages of settlement led to women being exposed to ongoing risks at later stages. For women at risk, settlement challenges that were perceived to be a normal part of the refugee settlement experience placed women at heightened risk, as they were unable to achieve these fundamental steps in settlement and integration. These include obstacles in gaining access to appropriate and affordable housing, language barriers, racism, and difficulties in accessing education and employment. Protection failures, where women are not able to access appropriate or effective service responses, further compound the level of risk experienced by women. As is discussed below, each protection problem and settlement challenge increases the vulnerability of refugee women and girls, leaving them open to further abuse.

Women are often unfamiliar with their rights and how the legal system works in Australia. Often their abusers in countries of asylum have been authorities, including police. Women are therefore fearful of reporting the rape because they are unsure where they can find protection and if they will be believed. As a result, women are frequently prevented from socializing or accessing employment or education opportunities. Women who are unable to learn English quickly as a result of the traumas they have experienced, are less likely to be able to be employed and therefore find it difficult to find safe and affordable housing for themselves and their children. This forces them to rent housing in unsafe neighbourhoods where they experience racism and discrimination and are isolated from community and services. It is difficult for services to reach them and for them to reach out to services.

Women who have been stigmatized as being "mad" by their communities because of severe mental health issues will frequently shy away from formal torture and trauma services. They may be fearful of engaging in social support networks because of past experiences of ostracism and shame. This makes them further isolated and exacerbates the mental trauma they are experiencing. Women are then alone and vulnerable to further sexual and gender-based violence. Stress causes family breakdown, and child protection authorities become involved. Women with children are fearful their children could be taken away because they have done something wrong.

Women resettled without their families struggle without this family support. They are often unable to attend English classes because they have no family support to look after their children, and even where child care may be provided, they may feel uncomfortable leaving them there because of past experiences of abuse and kidnap. Without English, the women cannot find a well-paying job. Women who are single parents may struggle with parenting and intergenerational conflict.

Women with a child or children conceived from rape struggle to trust and find acceptance within communities. As has been discussed above, the stigma of their previous experiences of sexual abuse also makes them less likely to trust and find support in services. As single parents, they may struggle to connect with their child. Discipline issues occur and child protection authorities become involved. The woman is labelled a bad mother and is viewed with suspicion by both her community and settlement services. The shame and stigma associated with sexual violence mean that neither the women nor the services working with them acknowledge these violations are happening. In situations where the abuse continues, women are further isolated and their physical and psychological trauma worsens.

### *Notions of Shame*

Common to the finding of the research both in overseas sites and with refugee women in Australia, was the use of the word *shame* to describe a woman's, her family's, and her community's response to rape and sexual violence. It is perhaps the most common word in the discourse with refugee women who are raped and sexually abused, and for those who have been forced to undertake survival sex.[40]

It is so pervasive that it often is used both to explain the silence about these issues and also to silence women and communities. It is freely used in translation from a number of different languages and yet seldom explored.[41] In this research over 500 refugee women were interviewed, and these participants freely discussed the rape and sexual abuse that they and their communities had suffered. Most commented that many service-providers "stopped" them from talking about their experiences. In every site, women thanked the researchers, many commenting that this was the first time they had been listened to or given the opportunity to share their experiences.

This indicated the need for much deeper research and enquiry into the discourse on sexual and gender-based violence in refugee settings, and an exploration of the impact of form of these discussions has on the provision of effective protection. Preliminary analysis by the research team suggests that the word stigma would often be more appropriate than shame. The issue is complex. The shame assigned to the individual women is part of the collective consciousness of many communities, and they are often unable to cope with the horror of the events. Service-providers struggling



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to cope with the continuing stories of torture and extremely traumatized clients retreat and use the notion of "shame." At best they often silence women. At worst they accuse them of fabricating stories they themselves cannot cope with and the realities in which they are struggling to provide protection.

Until we can devise ways in which to effectively discuss and respond to these issues in countries of asylum as well as in countries of resettlement we are not going to be able to adequately respond to the needs of women at risk.

### *Responses to Women at Risk*

Although it is acknowledged that all refugees require some form of assistance to settle well, in the case of WaR, it is obvious that more targeted specific responses are required.

Many service-providers are not equipped to deal with the multiple risks and abuses experienced by resettling refugee women. They are often unaware of the pre-arrival experiences and are not trained to develop complex case management plans that are crucial to address the intersecting problems with which they are faced. In developing effective responses to WaR, workers must first recognize and acknowledge the impact of women's pre-arrival experiences. Despite the stigma that is often associated with this trauma, throughout this research it is the women themselves who have most actively sought recognition of these experiences. Recognizing the horror women have lived through, but also the considerable strength it takes to survive, is critical in helping women to build trust with their workers, and to feel safe and secure in their settlement.

> If we acknowledge this part of their life [pre-arrival], they feel loved, safe, at beginning. These women will shine. It is so easy to ignore. To be honest, it's devastating. We know your background, we help you, we have your back, you have all our support, you are safe.
>
> —Resettled refugee woman (2013)

Given these experiences, women reported that it took considerable time for them to trust they would be safe and to cope with rebuilding their lives in Australia. It is important therefore that services proceed slowly and take their time to identify and respond to the needs of women. Many women require long-term intensive support for at least two years after arrival. On arrival, services must be flexible, with opportunities for women to access extended support as required. This includes having access to long-term, safe, affordable housing, consistency in caseworkers, and a tailored approach to case management that incorporates opportunities for regular home visits as required. Women must be active participants in contributing to their case management plans. They may require support from a number of different organizations at the same time. It is essential that case managers coordinate these responses effectively. This will often require workers to have strong links with other agencies and to advocate on behalf of women. Effective and regular communication between services is key.

In the absence of family and community-support structures, settlement workers fill a considerable gap in women's lives. Women often look to their workers not simply for information and guidance, but also protection. They see workers as someone who will help restore their rights and who will keep them safe and well. It is therefore critical that workers are well trained and supported to respond. This includes targeted training on the impacts of trauma, and on the pre- and post-arrival experiences of women and girls from refugee backgrounds. The demands on such workers are often immense. They require access to regular debriefing and supervision to assist them to continue to provide the most effective support possible.[42]

Refugee women also provide invaluable support to each other. The women spoke of the importance of sharing their experiences with other women from similar backgrounds. Women's support groups that could, with the support of local services, be led by refugee women were suggested as a way of providing a safe space for women to meet. Such groups would help women to cope with their trauma, to build trusted relationships, to break down isolation, and also to share their considerable strengths, skills, and knowledge with each other.

Services in Australia are strongly committed to supporting the settlement of women at risk. A number of successful models of response are emerging. The most effective are directly informed and led by the experiences of refugee women. Services that have employed resettled refugee WaR to act as "guides," to assist women in their settlement, have provided much-needed support. Organizations have also established specialist WaR committees whose membership includes resettled refugee women. The role of these committees is to provide advice on how services can best incorporate a gender lens in their work, to keep the needs of WaR visible, and to ensure that responses that are developed are effective and reflect the voices of the women.

Other services have incorporated specialist WaR workers into their case-management teams. They are female, are allocated only to WaR cases, and are trained in working with and responding to trauma and the specific needs of refugee women at risk. The knowledge and attitude of such workers are critical to helping women to settle well. In particular, it is important they understand and are open to discussing and responding to the impacts of sexual and gender-based



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violence and other forms of torture and trauma women may have experienced or continue to be experiencing once resettled.

It is also essential that mechanisms are in place to assist workers to identify and respond to the many and varied risks and abuses that women may be exposed to in the settlement environment. An important outcome from this research has been the development of a risk assessment and response tool for use in settlement.

*Risk Assessment and Response Tool*

Based on the Heightened Risk Identification Tool (HRIT) for use with at-risk populations in situations of displacement, this new identification and response tool is designed to assist service providers in countries of resettlement to identify those most at risk and in need of additional or alternative support, and to provide assistance in developing effective responses.[43] It incorporates a more detailed listing of some of the potential risks for women in settlement. A key aspect of the tool is its recognition of the impact of multiple risks experienced by resettling women and girls and its links to pre-arrival experiences of rights violations. It provides detailed guidance to assist workers in preparing a comprehensive case management plan and includes suggested response pathways. The use of the tool depends on an understanding of the compounding nature of the risks faced by refugee women in resettlement, and on the power of the notions of "shame" which as highlighted earlier is so often used in the discourse surrounding women at risk. The risk assessment and response tool is currently being implemented with a number of settlement organisations.

It is clear that whilst considerable progress has been made in terms of recognising the needs of WaR in Australia, more work is needed to develop both policy and practice responses to ensure their ongoing protection. The authors are working closely with resettled refugee women and a number of settlement services in the design and development of a range of strengths based response models for working with WaR. These will build on the risk assessment and response tool outlined above, and the positive initiatives already taking place across the settlement sector in Australia.

## Conclusion

> We are happy and we hope that there will be no war in Australia and we hope that God will make our lives better … we run from country to country to Australia and where else can we go? Better to die … we hope that such a thing like that will not happen again.
>
> —Resettled refugee woman (2009)

Women at risk from refugee backgrounds are survivors and bring to countries of resettlement not only hope for a safe and peaceful existence but knowledge, strengths, skills, and resilience. Resettlement is a key protection for many at-risk women and girls; however, recognition must also be made that some continue to experience and be exposed to risks and abuses once resettled. Old and new risks merge and frequently compound to destabilize and challenge the safety of resettled women and girls. Failure to acknowledge these risks and a lack of effective response to their concerns significantly affects their ability to settle well in countries of resettlement. In spite of this adversity, WaR remain determined to rebuild their lives and to attain the rights to which they and their families are entitled. To achieve this end, many will require intensive specialized settlement support that respects and acknowledges their strengths while also recognizing and responding to the potential risks that threaten their well-being. In this regard, the recent and particular efforts of Australia's Department of Social Services[44] to focus on the settlement needs of WaR are acknowledged. This includes increased training for staff, a focus on resettling women without family connections to specific locations that have a strong history of supporting WaR, and providing funding for research into employment programs for WaR.[45] It is hoped that such targeted efforts will indeed contribute to providing refugee women at risk and their children with the safety, security, and rights to which they are entitled upon resettlement to Australia.

### Notes

1. Some participants from refugee backgrounds continue to remain at risk in Australia. Where necessary, identifying details have been amended to preserve their confidentiality.
2. Eileen Pittaway, Linda Bartolomei, and United Nations High Commissioner for Refugees, *Survivors Protectors Providers: Refugee Women Speak Out,* UNHCR, 2011, http://www.unhcr.org/refworld/docid/4f310baa2.html; Susan F. Martin, "Introduction," in *Women, Migration, and Conflict: Breaking the Deadly Cycle,* ed. S. F. Martin and J. Tirman, 1–22 (London: Springer, 2009); Dale Buscher, "Refugee Women Twenty Years On," *Refugee Survey Quarterly* 29, no. 2 (2010): 4–20; Women's Commission for Refugee Women and Children, *Displaced Women and Girls at Risk: Risk Factors, Protection Solutions and Resource Tools* (New York: Women's Commission for Refugee Women and Children, 2006); Zermarie Deacon and Cris Sullivan, "Responding to the Complex and Gendered Needs of Refugee Women," *Affilia* 24 (2009): 272–84.
3. United Nations High Commissioner for Refugees (UNHCR), *Resettlement Handbook* (Geneva: UNHCR, 2011), http://www.unhcr.org/4a2ccf4c6.html.



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4 Centre for Refugee Research (CRR), *Hear Our Calls for Action: Dialogues with Women from Refugee Backgrounds in Australia* (Sydney: ANCORW and Centre for Refugee Research UNSW, Australia, 2011); UNHCR, *Resettlement and Women-at-Risk: Can the Risk Be Reduced?* (Geneva: UNHCR, 2013), http://www.unhcr.org/51de6e929.html; UNHCR, *Handbook for the Protection of Women and Girls* (Geneva: UNHCR, 2008), http://www.unhcr.org/protect/PROTECTION/47cfae612.html; Eileen Pittaway, *Refugee Women: Still at Risk in Australia* (Canberra: Bureau of Immigration Research / Australian Government Publishing Service, 1991); Lenore Manderson, Margaret Kelaher, Milica Markovic, and Kerrie McManus, "A Woman without a Man Is a Woman at Risk: Women at Risk in Australian Humanitarian Programs," *Journal of Refugee Studies* 11, no. 3 (1998): 267–83.

5 Angela Gibbs Peart, "UNHCR and Refugee Women," *Canadian Woman Studies* 10, no. 1 (1989): 103.

6 Ibid.

7 Susan F. Martin, *Refugee Women* (London: Zed Books, 1992).

8 Eileen Pittaway and Linda Bartolomei, "Refugees, Race and Gender: The Multiple Discrimination against Refugee Women," *Refuge* 19, no. 6 (2001): 21–32; Eileen Pittaway and Linda Bartolomei, *The Case for a Conclusion on Refugee Women at Risk,* background document (Geneva: UNHCR, 2005); Pittaway, Bartolomei, and UNHCR, *Survivors Protectors Providers.*

9 UNHCR, "Conclusion on Women and Girls at Risk" UNHCR Executive Conclusions No. 105 (LVII), (Geneva: UNHCR, 2006).

10 Eileen Pittaway and Linda Bartolomei, *Refugee Women at Risk Assessment Tool and Response Mechanism* (Sydney: Centre for Refugee Research and ANCORW, 2005), http://www.crr.unsw.edu.au/research-projects/completed-research/#Women%20at%20Risk.

11 UNHCR, *Heightened Risk Identification Tool,* 2nd ed. (Geneva: UNHCR, 2010), http://www.unhcr.org/refworld/docid/4c46c6860.html.

12 UNHCR, *Resettlement Handbook.*

13 UNHCR, *Handbook for the Protection of Women and Girls;* UNHCR, *Resettlement and Women-at-Risk: Can the Risk Be Reduced?* (USA: UNHCR, 2013), http://www.unhcr.org/51de6e929.html

14 Ibid.; UNHCR, *Resettlement Handbook.*

15 Alastair Ager and Alison Strang, "Understanding Integration: A Conceptual Framework," *Journal of Refugee Studies* 21, no. 2 (2008): 166–91; Department of Immigration and Citizenship (DIAC), *Fact Sheet 66: Humanitarian Settlement Services Program* (Canberra: Commonwealth of Australia, 2013).

16 UNHCR, *Resettlement Handbook;* DIAC, *UNHCR Resettlement Handbook: Country Chapter—Australia* (Canberra: DIAC, 2011), http://www.unhcr.org/3c5e542d4.html; DIAC, *Getting Settled: Women Refugees in Australia* (Canberra: Commonwealth of Australia, 2013).

17 Eileen Pittaway, Linda Bartolomei, and Rebecca Eckert, *Refugee Women at Risk in Australia: An Assessment Tool and Response Mechanism for Settlement Services* (Sydney: Centre for Refugee Research and ANCORW, 2014), http://www.crr.unsw.edu.au/research-projects/completed-research/#Women%20at%20Risk.

18 Pittaway, Bartolomei, and UNHCR, *Survivors Protectors Providers.*

19 Centre for Refugee Research, *Hear Our Calls for Action: Dialogues with Women from Refugee Backgrounds in Australia* (Sydney: Centre for Refugee Research and ANCORW, 2011), http://www.crr.unsw.edu.au/media/File/2011_Womens_Dialogue_Report.pdf.

20 Eileen Pittaway, Linda Bartolomei, and Richard Hugman, "When "Do No Harm' Is Not Enough: The Ethics of Research with Refugees and Other Vulnerable Groups," *British Journal of Social Work* 41, no. 7 (2011): 1271–87.

21 Peter Reason and Hilary Bradbury, *Handbook of Action Research* (London: Sage, 2006).

22 Using this technique, participants are invited to share stories of particular issues of concern they have identified that are then positioned within the human rights framework.

23 This technique involves participants creating a series of drawings to conduct situational analyses, including proposals for action, response, and interventions. Working in small groups, participants are invited to focus on a key issue of concern that has arisen from the stories circles, and to prepare a series of six pictures that analyze the issue.

24 Eileen Pittaway and Linda Bartolomei, "Research as an Advocacy Tool: Whose Problem Is It?," in *Researching Refugees and Asylum Seekers: Ethical Considerations, ed.* K Block, E. Riggs, and N. Haslam, 151–70 (Queensland: Australian Academic, 2013).

25 DIAC, "Getting Settled: Women Refugees in Australia," January 2014, https://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/publications/getting-settled-women-refugees-in-australia.

26 Ibid.

27 Rebecca Eckert, Eileen Pittaway, and Linda Bartolomei, *Resettled But Still at Risk: Women at Risk and Resettlement,* ARRA Submission to UNHCR Geneva (Sydney: Centre for Refugee Research, 2008); Pittaway, Bartolomei, and Eckert, "Women at Risk Assessment Tool."

28 See UNHCR, *Conclusion on Women and Girls at Risk;* UNHCR, *Refugee Resettlement: An International Handbook to Guide Reception and Integration* (Geneva: UNHCR, 2002); UNHCR, *The Integration of Resettled Refugees: Essentials for Establishing a Resettlement Programme and Fundamentals for Sustainable Resettlement Programmes* (Geneva: UNHCR, 2013), http://www.refworld.org/docid/51b81d9f4.html.

29 Ibid.

30 Ibid.

31 Ibid.

32 UNHCR, *Conclusion on Women and Girls at Risk.*

33 DIAC, *Fact Sheet 66.*



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34 Alison Strang and Alastair Ager, "Refugee Integration: Emerging Trends and Remaining Agendas," *Journal of Refugee Studies* 23, no. 4 (2010): 589–607; Ager and Strang, "Understanding Integration."

35 UNHCR, *Handbook for the Protection of Women and Girls,* 11.

36 See Susan F. Martin, *Refugee Women,* 2nd ed. (London: Zed Books, 2004); Celia McMichael, "Sadness, Displacement and Resettlement: Somali Refugee Women in Melbourne,"" in *Asylum Seekers and Refugees in Australia: Issues of Mental Health and Wellbeing,* ed. D. Barnes, 135–47 (Parramatta: Transcultural Mental Health Centre, 2003).

37 See Linda Bartolomei, Eileen Pittaway, and Emma Pittaway, "An Examination of the Role of Identity and Citizenship in the Experiences of Women in Kakuma Refugee Camp in Northern Kenya," *Development* 46, no. 3 (2003): 87–93; Pittaway and Bartolomei, "Refugees, Race and Gender," 21–32; Pittaway, Bartolomei, and Eckert, *Refugee Women at Risk in Australia.*

38 bell hooks, *Feminist Theory from Margin to Center* (Boston: South End, 1984); Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (London: Unwin Hyman, 1991); Kimberley Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,"" in *The Public Nature of Private Violence,* ed. M. A. Fineman and R. Mykitiuk, 93–118 (New York: Routledge, 1994); Chandra Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham: Duke University Press, 2003).

39 Eileen Pittaway and Susan Rees, "Multiple Jeopardy: Domestic Violence and the Notion of Cumulative Risk for Women in Refugee Camps," *Women against Violence* 18 (2006): 18–25; Susan Rees and Bob Pease, *Refugee Settlement, Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities* (Melbourne: Immigrant Women's Domestic Violence Service, 2006).

40 Karen Women's Organisation (KWO), *Shattering the Silences: Karen Women Speak Out about the Burmese Military Regime's Use of Rape* (Thailand: KWO: 2004); Lana Zannettino, "Refugees, Sexual and Domestic Violence and Prior Experiences of Trauma: Introduction and Context," in *Improving Responses to Refugees with Multiple Trauma: Pointers for Practitioners in Domestic and Family Violence, Sexual Assault and Settlement Service*, Practice Monograph 1, 5–9 (Sydney: Australian Domestic and Family Violence Clearing House, 2013), http://www.adfv.unsw.edu.au/documents/PracticeMonograph_1.pdf.

41 Eileen Pittaway and Rebecca Eckert, "Domestic Violence, Refugees and Prior Experiences of Sexual Violence: Factors Affecting Therapeutic and Support Service Provision," in *Improving Responses to Refugees with Multiple Trauma*, 10–13.

42 Kim Robinson, "Voices from the Front Line: Social Work with Refugees and Asylum Seekers in Australia and the UK," *British Journal of Social Work* 44, no. 6 (March 2013): 1–19.

43 The tool can be obtained from the University of New South Wales, Centre for Refugee Research, at http://www.crr.unsw.edu.au/research-projects/completed-research/#Women%20at%20Risk; Pittaway, Bartolomei, and Eckert, *Refugee Women at Risk in Australia.*

44 In 2013, responsibility to provide settlement support for resettled refugees shifted from what was known as the Department of Immigration and Citizenship (DIAC), to the Department of Social Services (DSS).

45 DIAC, *Getting Settled.*

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# Gendered Perspectives on Refugee Determination in Canada

Tanya Aberman


### Abstract

*This article discusses refugee determination from an intersectional perspective to unpack the impacts of gender on the refugee determination hearing in Canada. The article highlights the importance of dominant discourses in a legal context, focusing particularly on how discursive constructions of subjectivity affect refugee determination where claimants' trustworthiness depends not only upon their abilities to describe their past experiences, but also how well their story corresponds with dominant discourses about refugees. It also discusses how these dominant discourses are racialized, gendered, and hetero-normative, and how feminist theories of intersectionality could be of use to deconstruct the ways they affect different groups of refugee claimants. The article concludes by considering the implications of the newly shortened timelines in refugee adjudication.*

### Résumé

*Cet article traite de la détermination du statut de réfugié de façon à évaluer l'impact de l'appartenance sexuelle dans les audiences d'admission au statut de réfugié au Canada. On y souligne l'importance des discours dominants dans le contexte légal ; plus particulièrement, on y examine comment les récits subjectifs affectent l'admission au statut de réfugié lorsque la fiabilité des témoignages des demandeurs repose non seulement sur leur capacité à décrire leurs expériences passées, mais également sur l'adéquation de leurs témoignages avec ces discours dominants sur les réfugiés. On y examine comment ces discours dominants contiennent des éléments de racisme, de sexisme et d'hétéronormativité, et comment les théories féministes d'intersectionnalité pourraient contribuer à déconstruire leur influence sur les divers groupes de demandeurs d'asile. Cet article conclut en considérant l'impact du raccourcissement des délais des processus de demande d'asile au Canada.*


### Introduction

Refugee determination has become an increasingly debated and contested process in Canada within the last few years, culminating with the implementation in December 2012 of Bill C-31, Protecting Canada's Immigration System Act. Questions have circulated over who is a "genuine" refugee, who is not, who is a "bogus" claimant, and how that determination should be reached. New procedures are supposed to offer a progression towards answering these questions, yet many refugee advocates have significant doubts.

One aspect of the old system that has been maintained within the implementation of the new one is the oral hearing. As a result of the 1985 Supreme Court Singh decision, all refugee claimants should have access to a full oral hearing to explain their claim, and adjudicators should assess their case on the basis of knowledge of conditions in the country of origin, as well as a recognition of the claimant's subjective fear of persecution. Within this hearing process, it has been argued that claimants must "produce a successful refugee image"[1] in the recounting of their experience of persecution, an image that is based on intersecting essentialized ideas of gender, race, sexuality, and ability, among others. The Western-centric preconceived ideas about the racialized and orientalized ways refugee claimants should perform their gender and their fear within their narratives of persecution can have significant impacts on the adjudication of their claim. While the new determination process has been implemented, this article will focus on adjudication prior



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to December 2012, since little research is available on the impact of the changes. However, it will be argued that the findings can have implications for the new processes and subsequent related research.

Looking at the identity categories constructed to frame "refugeeness" in the Canadian determination system prior to Bill C-31 from an intersectional analytical framework, this article will draw on what McCall identifies as the intra-categorical complexity approach, where "the point is not to deny the importance—both materially and discursive—of categories but to focus on the process by which they are produced, experienced, reproduced, and resisted in everyday life."[2] Categories such as gender, race, sexuality, and ability will be deconstructed to allow for a broader theoretical and analytical understanding of how interactions and power relations contribute to the production and reproduction of these categories. This will also allow for the recognition of a greater diversity of experiences beyond those expected from reified identity constructs,[3] while at the same time recognizing the material implications of categories within people's lived realities. Refugee subjectivity is constituted and reconstituted at different moments, from the point of fleeing a country of origin, to the experiences of migration, to the refugee determination process, based on complex and contradictory discourses, interactions, and embodied experiences. While refugee claimants interact with numerous and diverse actors and institutions throughout their forced migration, state policies and government agencies play a specific role in imposing this refugee subjectivity on claimants,[4] a "damaged" subjectivity that the claimant may or may not adopt for a multitude of reasons.[5] These designated identities may or may not subsequently affect their determination as "genuine" refugees.

This article reviews the relevant theoretical and empirical literature from diverse disciplinary approaches primarily spanning the last twelve years, since the implementation of the Immigration and Refugee Protection Act in 2002. While the majority of the research relied upon was based within the Canadian context, a few articles were selected that focused on refugee determination in other locations as a result of their unique analysis and relevant explanatory value within the Canadian system. The literature discussed focused primarily on specific identity constructs, frequently including certain intersectionalities to further nuance the discussions. By bringing them all into conversation in this article, the possibility of a more robust understanding of the ways intersecting identities affect refugee determination is offered. While not all intersectionalities could be analyzed to the same extent, there is room for further research, particularly as the new refugee processes include different markers, such as country of origin and means of migration.

### *Intersectionality*

Intersectionality was introduced as a concept and framework that would challenge a dominant form of feminist analysis that was seen to essentialize women's experiences, ignoring and rendering invisible certain other knowledges and realities. Coined and elaborated by Kimberlé Crenshaw in 1989, intersectionality enabled an analysis of a multitude of experiences without necessarily conceptualizing specific identities as inherent or static. As an analytical perspective, it has enabled a more nuanced approach to conceptualizing the ways inequality, discrimination, and oppression intersect and overlap. It also allows for a recognition of the limitations of any single analytical category or lens. Instead, intersectionality highlighted "the relationships among multiple dimensions and modalities of social relations and subject formations."[6] Therefore, within a feminist intersectional framework, identity categories are understood as relational. They are based on historical contexts, social constructs, and power relations, with no one category carrying more importance at all times, though individual categories may be focused on at different moments, for different purposes. This type of approach allows for an emphasis on the "constructedness" of social identity categories and the processes that produce and reproduce them.[7] As such, it is possible to avoid constructing lived experiences as homogeneous and to "remain sensitive to possible new admissions, de-namings and exclusions,"[8] while these categories change and evolve as people "cooperate or struggle with each other, with their pasts, and with the structures of changing economic, political and social worlds."[9]

The deconstruction of identity categories, along with a theoretical analysis of how the categories intersect in the conceptualization of subjectivities, is part of understanding how inequalities are continuously reproduced. Since symbolic and material violence is tied to relational identity categories, understanding how they are constituted recognizes the power relations that are maintained through these processes, and therefore deconstructing them can open possibilities for social change.[10] This change becomes possible at different moments and on different operational scales, since identity is constituted at the micro, meso and macro level. It is argued that an intersectional approach can offer a historically and socially contextualized analysis at the level of the body, the household, the regional, the national, and the supra-national,[11] and that social change is subsequently possible on all those levels.

McCall offers three types of intersectional analysis, suggesting that methodological approaches used thus far have fallen into one of the three, labelled as anti-categorical complexity, inter-categorical complexity, and intra-categorical complexity. She elaborates these in terms of their approach



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to categories, how they interpret and analyze categories to explore and explain social life. Anti-categorical complexity considers social interactions and lived experiences, subjects and structures, as too complex to enable any fixed categories to describe them in any realistic way. At the other end of the continuum is the inter-categorical complexity approach, which requires the strategic use of categories to highlight inequalities between social groups and the evolution and reproduction of these inequalities. Finally, intra-categorical complexity deconstructs naturalized boundaries and the processes that produce these boundaries, as in the first approach, but acknowledges the "stable and even durable relationships that social categories represent at any given point in time."[12] Therefore, it offers the tools to critically analyze identity constructs, their production and reproduction, while at the same time recognizing their ongoing relevance within social structures and their material implications. It is this last approach that I shall draw on throughout this article.

Academic research and writing on migration have historically framed migrants as disembodied, rational actors, reacting to social, economic, and political conditions. These approaches have been widely critiqued, and intersectional approaches have increasingly gained prominence. The recognition that migration is a complex process, influenced and affected by competing forces, expectations, and power relations, allowed for more nuanced approaches, enabling a representation of the heterogeneity of migrants while taking seriously migrants' divergent experiences. The introduction of migrants' diverse identities was an influential and critiqued shift in migration studies. The early move to study dichotomous gender relations was an important step to highlighting the divergent experiences of women and men, while enabling an easy shift within quantitative research. However, it has been argued that this approach was limited in the scope of its analysis of the power relations involved.[13] Migration is a gendered, racialized, and classed process, which requires an analysis that conceptualizes the complexity, malleability, and rigidity of these categories. It is an embodied process,[14] which is experienced beyond the inflexible categorizations of race and class and the dichotomous and hetero-normative conceptualizations of gender. Migrants are categorized in different ways throughout their movements, as certain rigid constructs stick to some bodies in certain contexts and others shift and change. As a result, the migrants' subjectivities become constituted and reconstituted through the processes, interactions, and acts of migration.

Asylum seekers, refugees, and others who have been displaced as a result of forced migration may experience the process and the articulation of identity and subjectivity in ways that may or may not differ from other migrants at various points. Frequently, in order to be understood socially, politically, and economically as forced migrants, their subjectivity must reflect and reaffirm a predefined experience in which distinct expectations regarding gender, race, sexuality, and ability are central. These constructed categorizations fall into a particular representation of "helplessness" and victimhood intrinsic in Western ideas of refugeeness. While under international law the definition of a refugee has remained constant, refugeeness has changed quite significantly. As Judge argues, with the end of the Cold War, the political-legal approach to the conceptualization of refugeeness shifted from protecting a political actor to managing a helpless victim.[15] Yuval-Davis also emphasizes this point, explaining that the formal refugee convention was developed heavily in the West to accept political dissidents from the Eastern Bloc, while post-9/11 state policies define actors resisting their governments as potential terrorists.[16] Therefore, not only did forced migration become depoliticized, criminalized, and de-historicized at the point of fleeing and arriving, this shift to victimization also individualized refugee subjectivity, which facilitated Othering and paternalistic "protection."[17] These shifts in the construction of refugee subjectivity had important intersectional implications based on "who" could be a victim, in what ways, and who became a criminalized "bogus" claimant.

### *Canadian Policy*

Political systems and civil society in destination countries play important roles in constituting migrant subjectivity through discourses, power relations, and embodied interactions. While Canadian government officials purport the country's immigration policy to be efficient, fair, and compassionate,[18] and Canadians are lauded as welcoming and hospitable, the system has historically and contemporarily proven to be highly exclusionary, based on racialized, classed, and gendered admission criteria. From racist policies that have directly excluded Chinese, Japanese, South Asian, and Indigenous populations from full citizenship, to the "Women's Division" created within the immigration department to "care" for immigrant women who could be deported if found to have engaged in sexual relations outside of marriage, the policies have historically contained and excluded particular gendered and racialized bodies.[19] These policies have shifted and changed through the last century, with differing communities tolerated or targeted at different moments. Therefore, while "exclusions of the past were explicitly racist and were justified by discourses of racial purity and biological degeneration, present day racist constructions heighten the dominance of classifications … and are mediated more by cultural stereotypes than by biological typologies."[20] Though current policies may be more subtle in their exclusionary tactics, the intersections



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of gender, race, and class are still predominant factors in determining which migrants experience efficient and compassionate immigration as promoted, and which do not. Richmond exposes the more recent, predominantly subtle exclusionary tactics, such as imposing visas for the travel of certain nationals, limiting the number of visas to citizens of certain countries, and establishing few offices able to process these visas or other applications (as opposed to the large number able to process American and European applications).[21] As a result of these policies, migrants are conceptualized in specific ways that generalize their experiences and desires, marking some as "desirable" new society members and the rest as "Other," to be limited, controlled, and contained. These conceptualizations allow for "cardboard cut-out characterizations," which Lewis argues "is one key strand that runs across the struggles over citizenship between those who govern and those who are governed," reifying the differences and hierarchies between citizen and non-citizen, those who can become citizens and those who cannot.[22]

As a signatory to the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol, Canada has internationally recognized obligations towards refugee protection. These obligations include recognizing the international definition of who qualifies as a refugee, the rights that must be accorded to those who qualify, and not returning individuals to states where their lives or freedom are threatened. Despite the provisions of the convention and protocol, refugees attempting to reach Canada for protection are subject to the same subtle, yet powerful exclusionary practices described above. While some are able to claim asylum from outside Canada's borders, the persecution faced by others obliges them to flee to Canada as a first step, and subsequently make a refugee claim. For those who are able to travel to Canada and then make their claim, either at the border or inland, the refugee determination process establishes whether or not they are able to receive Canadian protection and citizenship rights. Though this process is mandated under the international convention, specific policies are under the auspices of state sovereignty and have been progressively designed to decrease the number of refugee claimants through administrative means.[23] Consequently, the process has become increasingly complex and difficult to navigate in order to exclude many applicants. As a result, refugee claimants who are unable or unwilling to complete the process for any reason are largely portrayed as "bogus" or "undeserving," and rather than recognizing the multitude of reasons people are unable to achieve Canadian protection, they are criminalized and demonized.

The Canadian refugee determination process involves a complex and intricate series of appointments to make and attend, forms to fill out and file, and the final hearing to prepare for, where claimants are expected to freely and fully tell their story of persecution without fear or intimidation. Failure to complete any aspect appropriately, or within the precisely defined timeline, can lead to the rejection of the claim. This process has become increasingly stringent with the implementation of Bill C-31, where the timelines have been severally shortened and claimants have been categorized in ways to specifically disadvantage certain individuals and groups. While many of these changes are relevant to the analyses developed in this article, detailed explanations of the new system are beyond the scope. However, links will be made at the end of the article, along with suggestions for future research.

Though each stage of the refugee determination process has its own complications and complexities, the hearing itself is where all of the information provided at each stage, as well as an oral description of the claimant's experience of persecution, are supposed to come together and the final decision is made. Therefore, the Immigration and Refugee Board (IRB) members who make the final decisions have enormous power to grant protection, or to maintain narrow definitions of "refugeeness" and subsequent low acceptance rates. These are necessarily complex decisions to make, since, as Rouseau et al. point out, "The decision-maker [must] have a sufficient knowledge of the cultural, social and political environment of the country of origin, a capacity to bear the psychological weight of hearings where victims recount horror stories, and of consequent decisions which may prove fatal."[24]

The hearing itself is declared to be a non-adversarial process, where officials are trying to uncover the truth of the claimants' situations, and asylum seekers are supposed to unreservedly share the narratives of their experiences. However, this is often a contradictory approach, since content and style of questions are at the discretion of the board member,[25] and the methods and rhetoric of these officials range from generous protection to an implied understanding of the claimant as a "liar" and a "criminal."[26] Claimants are thus left unsure of how to approach the hearing and how to represent their experiences, and the choice has important consequences for adjudication.

Adjudicators are supposed to grant claimants the benefit of the doubt where documentation is lacking or unavailable as the result of the ambiguities and subjectivities involved in the description of fear.[27] Within the "well-founded fear of persecution," there are requirements for both subjective and objective fear.[28] Therefore, not only do claimants need to appear genuinely fearful of their situation, there must also be documentation to support this fear. Despite the low burden of proof mandated and the benefit of the doubt



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that is supposed to side with the claimant, many claims are excluded for lack of credibility or an implausibility as determined by often Western-centric conceptualizations of gendered and racialized fear.

### *Identity, Subjectivity, and the Refugee Determination System*

Refugee determination has been criticized as a male-centred process, as questions were widely raised regarding the male dominance in refugee claims and the masculinized construction of the refugee/persecuted dissident. Following the signing of the Refugee Convention and subsequent protocol, the initially recognized forms of persecution were conceptualized in the West within what has been identified as more masculine experiences. Adjudication was therefore determined on related expectations, thus ignoring other forms of persecution. In order to address these issues and biases, the Canadian government was the first to develop and implement the Gender-Based Persecution guide in 1993, with many other states following suit. The resulting guidelines constituted a significant advancement in recognizing different forms of persecution and providing board members new contexts for adjudication. Consideration was extended to persecution related to kinship, gender discrimination, and violence by public authorities or individuals where the state is unable or unwilling to provide protection (including domestic violence), or discrimination or violence based on perceived transgression of legal, religious, or social expectations of the way gender should be enacted.[29] However, these guidelines also build on certain constructs of gender that may exclude claimants who do not conform. Moreover, despite the important addition of domestic violence as a recognized form of persecution, Sadoway argues, in cases where the same forms of violence are common in the destination country, refugee designation may be harder to achieve, as it may simply be considered a larger societal problem.[30]

Significant effort has been devoted to acknowledging and mainstreaming the recognition of gender-based violence and persecution in Canadian refugee determination procedures. While this has been lauded by many and recognized as a best practice by other governments and institutions, others have critiqued the essentializing and cultural relativism that has occurred as a result of the guidelines. Therefore, conforming to narrowly defined constructs has been crucial in order to be recognized within the guidelines. For example, cases where women fear female genital mutilation, forced marriage, or bride burning may be more acceptable, building on colonial tropes and constructing the female-identified claimant as a victim in need of saving, while demonizing her country of origin. This consolidates an "us" and "them" discourse, which constructs "bad patriarchies" as dominant in distant countries and on foreign bodies,[31] disavowing the inherent local patriarchal structures and violence. It also positions the adjudicator as the chivalrous protector, able to save such claimants from their violent culture.

This accepted narrative of victimhood constitutes claimants' subjectivities through specific intersections of race, gender, religion, and sexuality, narrowing the spectrum of claimants who can meet the necessary expectations. Throughout there are dominant and intersecting constructs of a particular form of hetero-normative femininity, with its associated vulnerability, and a "cultural" racialization based on demonizing specific cultures and religions as different and violent. This diminishes and falsifies women's real claims, obfuscating their political opposition to oppressive norms by framing their positionality as victims of their society.[32] It nearly eliminates women's ability to claim asylum on grounds of resistance[33] and if the claimant shows too much strength, beyond what is conceptualized as appropriate within these constructs, she may be refused on the grounds that she should be able to protect herself.[34]

Moreover, the intersectional construction of women's vulnerability within this paradigm becomes almost inseparable from hetero-normative motherhood. This construct creates *women and children* as "virtually one word,"[35] a "hybridized figure of vulnerability," which not only infantilizes women and their encounters, but once again acts to depoliticize women's experiences.[36]

Also included within the Canadian Gender Guidelines is persecution based on sexual identity and orientation. Sexual orientation and gender identity involve a diverse spectrum of perspectives, constructs, and self-articulations. Within these categories of claims, the intersecting constructions of gender, sexuality, race, age, and class also have important implications for adjudication. Western-based stereotypes about how sexuality should be experienced and performed by different people in various locations can affect the success of these claims.[37] This erases more complex subject positions and ignores differing realities,[38] delegitimizing the experiences of those who are unable to negotiate the "culturally proscribed identity narratives … associated with a normative Euro-American sexual identity formation."[39] Those who do not, or cannot, conform to gendered constructs and the related experiences that are expected have their identity and orientation questioned and challenged. These stereotypical understandings of how sexuality should be performed involve the frequenting of gay bars and clubs, and embodiment of specific gendered characteristics, such as the adoption of masculine traits by female-identified claimants and the effeminacy of male-identified claimants.[40] Thus the intersections of class, age, and ability become particularly



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evident in the expectations regarding claimants' lifestyles. While claimants from urban areas with access to Western media may be aware of others who identify in similar ways, but look, speak, and behave differently, others without such resources may be confronted with these stereotypes only after arrival in Canada, if at all.[41] This puts claimants from more rural areas, or without access or ability to utilize technology, at a possible disadvantage.

This process often also involves the demonization of the country of origin, casting other locations and populations as homophobic and violent. Claimants from states in which LGBTQ communities are publicly criminalized often receive the most sympathy from board members,[42] further reinforcing "Us" versus "Other" dichotomies. Therefore claimants' citizenship must intersect with their other identity constructs in the articulation of their experience of persecution.

LaViolette illustrates how the IRB's handling of sexual orientation and gender-identity claims has evolved over the last two decades, concluding that LGBTQ claimants are still at a disadvantage with regards to objective evidence of persecution.[43] She outlines how the lack of human rights documentation on issues of sexual orientation and gender identity has hindered claimants, with adjudicators citing the lack of documentation as an absence of persecution. However, she also highlights the contradictory fact that documenting violence and persecution of LGBTQ individuals may be particularly dangerous or even impossible in situations and locations where homophobic violence is widespread. On an individual level, this may also disadvantage claimants, where social stigma and violence may have prevented them from reporting particular incidents, leaving them with little or no proof of assaults or attempts to seek state protection. LaViolette also points to the fact that the agents of persecution may be individuals, whether family or community members, leaving the possibility of state protection in question. Moreover, as Murray explains, the credibility of a sexual orientation claim is often also based on internal, "unspoken or unspeakable qualities, desires and practices," which claimants must now freely discuss.[44]

Building on the understanding that sexual orientation is "flexible and fluid," Rehaag investigates the outcomes of refugee claims based on bisexuality.[45] He argues that bisexual claimants are further disadvantaged within the refugee determination process that misidentifies and misinterprets their lived experiences. While sexual-minority refugee claimants on average have success rates similar to those of other claimants, people seeking asylum from persecution based on bisexuality have much lower acceptance rates.[46] These transgressions of gender norms are read by IRB adjudicators as shifting and changeable, which is then interpreted as a fraudulent way to claim asylum. Rehaag found that in a majority of cases claimants were not believed, and female-identified claimants were refused much more frequently than male-identified bisexual claimants. Dichotomous constructions of gender and sexuality thus affect refugee adjudication; experiences outside of these binaries are misinterpreted in order to fit them within specific Western categories that do not represent people's different realities. Compartmentalizing identities and lived experiences may simplify adjudication based on precedents set and experiences expected, as board members work to differentiate "genuine" refugees from other claimants. However, this may put the lives of people at risk as they fail to conform to expectations of a "genuine" refugee.

Since the end of the Cold War, the shift from the construction of refugees as political dissidents actively contesting their government, to helpless "victims" unable to defend themselves, has had important implications for male-identified refugee claimants as well. Those who "may not fit comfortably into the confines of these discourses of the ideal refugee, with exceptional talent, or displays of gendered notions of trauma and vulnerability as markers of their authenticity,"[47] are at a particular disadvantage. Thus, the male refugee claimants who cannot or will not conform to the expected notions of victimhood and the subsequent need for paternal protection may be excluded from refugee determination. Taking on this constructed subjectivity may be particularly difficult for male-identified claimants, since the dominant gendered expectations of appropriate masculinities often clash with the conceptualization of the traumatized and vulnerable victim. As Judge goes on to argue, those who cannot demonstrate the loss of agency necessary for these constructs risk being vilified and criminalized.[48] Since the mid-1990s, the Canadian government has actively instilled the metonymic association between the "bogus" refugee and the "foreign violent criminal."[49] The discourses propagating these associations are often extremely gendered and racialized, disproportionately affecting men of colour, who consequently need to be disciplined or excluded. Therefore, male-identified refugee claimants who are unable or unwilling to embody the appropriate victim narrative are constructed as fraudulent criminals who migrate to exploit social services or to commit violent acts against the state and its population. These perceived threats are then used to justify increased detention and ever-more-restrictive policies.

Pointing to another limitation, LaViolette analyzes the lack of consideration within the gender guidelines for all types of gender-based violence. Applying a socially constructed understanding of gender, she emphasizes that while women are the main victims of gender-based persecution,



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men and transgendered people can also experience persecution for challenging socially prescribed gender norms. She demonstrates how violence targeted towards people's sexual orientation could actually be more about their unwillingness to uphold social roles and norms than their sexual orientations.[50] She also points to specific cases in which transgendered individuals were not considered within gender-based analyses during their refugee claim, despite facing persecution precisely because of their gender identity. Finally, she examines two different situations where male refugee claimants could be considered within gender-based guidelines—compulsory military service and crimes of honour—and argues that men can be victims of many forms of gender and sexual violence in different contexts. Therefore, not only does gender need to be deconstructed to understand the social constructions and power relations involved, but the gender guidelines considered within a refugee determination hearing need to be understood as applicable in any case that involves gender-based persecution.

Another obstacle faced by refugee claimants in the recounting of their experiences of persecution are the preconceived ideas board members may have of the manner in which fear should be articulated. Though adjudicators profess to be neutral and objective, even these concepts are socially constructed and may be antithetical to cultural understanding of fear and vulnerability.[51] Claimants must prove to IRB members that they are not only in danger, but also genuinely afraid. While the proof of danger may come in documented evidence, the subjective fear may be harder to identify. Evans Cameron suggests that board members have refused claims where the refugee claimant "acted in a manner inconsistent with a subjective fear of persecution."[52] In these cases claimants may have stayed in their country longer than expected in the hope the threat would go away, travelled back to ease the pain of separation from loved ones, or delayed making a refugee claim after their arrival in Canada for whatever reason, yet board members may not accept these "naïve" explanations.[53]

Moreover, as Rousseau et al. argue, the post-traumatic psychological effects that claimants may experience can also have significant impacts on the manner of recounting their narrative as well as on the content.[54] During the hearing, these effects may lead to avoidance, inconsistencies or mistakes, omissions, or late disclosures, which may be interpreted as a lack of credibility or genuine fear.[55] Therefore, not only is the psychological ability of claimants overlooked in the demands of the hearing, but the limitations of claimants based on shame or humiliation experienced are ignored in the expectation that they will freely speak of their fear. Having reviewed Rousseau et al.'s findings, Steel, Frommer, and Silove also found that traumatized claimants often have great difficulty presenting a coherent account of the experience of traumatization with the expected affect, which may be interpreted by decision makers as not credible.[56] While guidelines do exist for the identification and accommodation of vulnerable claimants, Cleveland argues that their application tends to be limited.[57] Within these guidelines, vulnerable persons are defined as "individuals whose ability to present their case before the IRB is severely impaired," and adjudicators are advised to take specific considerations to ensure that these claimants are not disadvantaged.[58] Cleveland goes on to explain that these vulnerabilities in refugee claimants are often a result of intersecting experiential factors and personal characteristics such as age, illness, or ability.[59] While many claimants may have experiences and intersecting identities that make them vulnerable, only the most severe cases are identified within the guidelines for consideration. Cleveland points out that while many claimants are not designated as severe cases, and may be able to articulate their experiences, this is not without a significant personal cost.[60] Therefore, ideas of ability/disability must also be deconstructed and considered more broadly in the determination of claims.

In addition, culturally based presentations of fear and understandings of how it should be managed may differ and thus be difficult to decipher by an IRB adjudicator.[61] At the same time, claimants' articulations of their fear may not meet the gendered ways fear is expected to be experienced, managed, and performed. As a result, gender, race, and ability constructs play a role not only in what types of persecution can be experienced, but how those experiences of persecution are revealed to determining institutions. This process may, however, be subtle and even invisible in terms of the cultural clashes and misinterpretations, leaving both claimants and adjudicators unaware of the social constructs that delineated the hearing.[62]

The biases and preconceived ideas of adjudicators are particularly significant since the implementation of the Immigration and Refugee Protection Act in 2002, which reduced the number of board members determining each claim from two to one. With two adjudicators, so long as one believed the claim being made, the refugee claimant would generally be accepted. However, with only one person determining the credibility of a claimant's story, biases about how claimants should understand their situation, embody their identity, and represent their experiences can have significant impacts on their chances of regularizing their status.

According to Rehaag's preliminary research on the gender of the adjudicator and acceptance rates in Canada, male adjudicators had higher grant rates than females. These findings were even more pronounced when the



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principal claimants were women and the claims were based on gender-based persecution. While Rehaag's earlier research found that acceptance rates varied significantly between adjudicators, the initial incorporation of gender into the analysis adds a component for seeking patterns of correlations in outcomes.[63] While Rehaag clearly outlines the limitations of the study and acknowledges the lack of intersectional analysis based on adjudicators' other identity constructs, his findings do leave interesting questions about the gender of applicants, board members, and corresponding acceptance rates.

### *Protecting Canada's Immigration System Act*

The recent changes to the Canadian Refugee Determination System have significantly affected the processes navigated by refugee claimants. Timelines have been shortened dramatically, demanding that the refugee hearing take place between forty-five and sixty days from the time when the initial claim was made, as opposed to the previous one- to two-year wait. Specific determinations have also been made regarding Designated Countries of Origin (DCOs) or "safe countries," which are parliamentary democracies supposedly able to protect their populations, and Designated Foreign Nationals, whose travel to Canada is deemed inappropriate, including the use of smugglers and the crossing of borders in groups. These two designations restrict claimants in several ways, including additionally shortened timelines and lack of access to the newly instituted Refugee Appeal Division. Moreover, civil servants have replaced nominated board members. Refugee advocates, lawyers, and others have expressed their concern over these changes. The Canadian Council for Refugees outlined reservations about the changes, stating, "Consideration must be given to the need for claimants to properly understand and prepare for the process, to obtain necessary documents to support their claims, and to overcome fears they may have in regards to telling their stories of persecution to government authorities. Women, LGBTQ refugees, and others who have suffered torture and other forms of cruel and degrading treatment need time to properly prepare for the process."[64]

The shortened timelines also make it more difficult to find and confirm experienced counsel, as lawyers are being asked to do more with less time and resources available; committed counsel can often identify the obstacles related to the identity constructs outlined and develop strategies to overcome them. Moreover, not only is it more difficult to obtain evidence of persecution from the country the claimant is fleeing in time for the hearing, but so too is the evidence necessary in Canada, including psychological or medical assessments, and documentary supports proving violence or persecution against specific individuals or groups. Finally, with less time to become aware of and prepare the "appropriate" performance of gender, race, sexuality, ability, and importantly, fear, based on specific Western constructs, this new adjudication could have significant implications for claimants seeking Canadian protection who cannot, will not, or do not know to conform. While few empirical studies have been published thus far on the impacts of the changes, I argue that many of the intersecting constructs outlined will continue to affect adjudication, with new identities potentially also having important implications. Further research is required to determine how these shifting intersectionalities will affect the process as well as the hearing itself.

### Conclusion

As the related discourses continue to circulate, policies shift, and the immigration process becomes increasingly restrictive, it is important to understand the ways essentialized constructions of claimant subjectivities based on intersecting ideas of gender, race, ability, and sexuality limit people's possibilities for self-determination and increase the precariousness of their status. While the refugee hearing purportedly gives claimants the crucially important time and space to recount their narrative of persecution, the social constructs relied upon by adjudicators limit the experiences that are deemed acceptable and genuine. This article utilized an intra-categorical complexity approach to intersectionality to deconstruct the social constructs and power relations associated with different identity categories. While an attempt was made to challenge the "naturalness" of any particular identity category, the material implications of these categorizations were outlined to demonstrate their perceived importance within the refugee determination hearing. Broader understandings of identity are required in order to recognize the spectrum of claimants' experiences and avoid simplifying, de-politicizing, and criminalizing forced migration in all its contexts.

### Notes

1 Cecile Rousseau, François Crépeau, Patricia Foxen, and France Houle, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decisions-Making Process of the Canadian Immigration and Refugee Board," *Journal of Refugee Studies* 15, no. 1 (2002): 43–70.

2 Leslie McCall, "The Complexity of Intersectionality," *Signs: Journal of Women in Culture and Society* 30, no. 3 (2005): 1783.

3 Marta Gimenez, "Marxism and Class, Gender and Race: Rethinking the Trilogy," *Race, Gender & Class* 8, no. 2 (2001): 23–33; please also see Helma Lutz, Maria Teresa Herrera Vivar, and Linda Supik, eds., *Framing*



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*Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Farnham: Ashgate, 2011).
4 Marie Lacroix, "Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeness," *Journal of Refugee Studies* 17, no. 2 (2004): 147–66.
5 Ruth Judge, "Refugee Advocacy and the Biopolitics of Asylum in Britain: The Precarious Position of Young Male Asylum Seekers and Refugees." RSC Working Paper Series no. 60 (2010), 20.
6 McCall, "Complexity of Intersectionality," 1771.
7 Rachel Silvey, "Power, Difference and Mobility: Feminist Advances in Migration Studies," *Progress In Human Geography* 28, no. 4 (2004): 490–506.
8 Lutz, Herrera Vivar, and Supik, *Framing Intersectionality*, 4.
9 Katharine M. Donato, Donna Gabaccia, Jennifer Holdaway, Martin Manalansan IV, and Patricia R. Pessar, "A Glass Half Full? Gender in Migration Studies," *International Migration Review* 40, no. 1 (2006): 6.
10 Lutz, Herrera Vivar, and Supik, *Framing Intersectionality.*
11 Silvey, "Power, Difference and Mobility," 492.
12 McCall, "Complexity of Intersectionality," 1773.
13 Donato et al., "Glass Half Full?," 4.
14 Silvey, "Power, Difference and Mobility," 501.
15 Judge, "Refugee Advocacy," 11.
16 Nira Yuval-Davis, *The Politics of Belonging: Intersectional Contestations* (London: Sage Publications, 2011), 37.
17 Judge, "Refugee Advocacy," 11.
18 Citizenship and Immigration Canada, "CIC's Mandate, Mission and Vision," http://www.cic.gc.ca/english/department/mission.asp..
19 R. Bhuyan and T. Smith-Carrier, "Constructions of Migrant Rights in Canada: Subnational Citizenship Possible?" *Citizenship Studies* 16, no. 2 (2012): 203–21; please also see Canadian Council for Refugees, "Gender-Based Analysis of Settlement, Research Report" (2006), http://www.ccrweb.ca/eng/issues/library.htm#gender.
20 Anna Pratt and Mariana Valverde, "From Deserving Victims to 'Masters of Confusion': Redefining Refugees in the 1990s," *Canadian Journal of Sociology* 27, no. 2 (2002): 138.
21 Anthony H. Richmond, "Refugees and Racism in Canada," *Refuge* 19, no. 6 (2001): 12–20.
22 Gail Lewis, "Welcome to the Margins: Diversity, Tolerance, and Policies of Exclusion," *Ethnic and Racial Studies* 28, no. 3 (2005): 538.
23 Marie Lacroix, "Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeness," *Journal of Refugee Studies* 17, no. 2 (2004): 149.
24 Rousseau et al., "Complexity of Determining Refugeehood," 43.
25 Canadian Council for Refugees, "The Experience of Refugee Claimants at Refugee Hearings at the Immigration and Refugee Board," *Research Project* (2012): 1–55.
26 Ibid., 66.
27 Ibid., 47.
28 Nicole LaViolette, "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process," *International Journal of Human Rights* 13, nos. 2–3 (2010): 437–76.
29 Monica Boyd, "Gender Aspects of International Migration to Canada and the United States" (paper presented at the International Symposium on International Migration and Development, Population Division, Department of Economic and Social Affairs, Turin, Italy, 28–30 June 2006), 2.
30 Geraldine Sadoway, "The Gender Factor in Refugee Determination and the Effect of Gender Guidelines," in *Not Born a Refugee Woman: Contesting Identities, Rethinking Practices,* ed. Maroussia Hajdukowski-Ahmed, Nazilla Khanlou, and Helene Moussa (New York: Berghahan Books, 2008), 245.
31 Diana Mulinari, "Women Friendly? Understanding Gendered Racism in Sweden," in *Gender Equality and Welfare Politics in Scandinavia: The Limits of Political Ambition?*, ed. Kari Melby, Anna-Birte Ravn, and Christina Carlsson Wetterberg (Bristol: Policy, 2007), 169.
32 Susan Musarrat Akram, "Orientalism Revisited in Asylum and Refugee Claims," *International Journal of Refugee Law* 12, no. 1 (2000): 7–40.
33 Boyd, "Gender Aspects of International Migration," 23.
34 Carmela Murdocca, "Pursuing National Responsibility in a Post-9/11 World: Seeking Asylum in Canada from Gender Persecution," in Hajdukowski-Ahmed, Khanlou, and Moussa, *Not Born a Refugee Woman*, 258.
35 Jacqueline Bhabha, "Demography and Rights: Women, Children and Access to Asylum," *International Journal of Refugee Law* 16, no. 2 (2004): 227.
36 Judge, "Refugee Advocacy," 24.
37 Sadoway, "Gender Factor," 245; please also see Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada," *McGill Law Journal* 53 (2008): 59–102.
38 Rehaag, "Patrolling the Borders of Sexual Orientation."
39 David A. B. Murray, "Becoming Queer Here: Integration and Adaptation Experiences of Sexual Minority Refugees in Toronto," *Refuge* 28, no. 2 (2013): 130–2.
40 Sean Rehaag, "Patrolling the Borders of Sexual Orientation," 72.
41 Murray, "Becoming Queer Here," 129.
42 LaViolette, "Independent Human Rights Documentation," 451.
43 Ibid.
44 Murray, "Becoming Queer Here," 130.
45 Rehaag, "Patrolling the Borders of Sexual Orientation," 59.
46 Ibid.
47 Judge, "Refugee Advocacy," 8.
48 Ibid., 12.



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49 Pratt and Valverde, "From Deserving Victims to 'Masters of Confusion," 144.
50 Nicole Laviolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines," *International Journal of Refugee Law* 19, no. 2 (2007): 169– 214.
51 Rousseau et al., "Complexity of Determining Refugeehood," 50.
52 Hilary Evans Cameron, "Risk Theory and 'Subjective Fear': The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations," *International Journal of Refugee Law* 20, no. 4 (2008): 567.
53 Ibid., 574.
54 Rousseau et al., "Complexity of Determining Refugeehood," 48.
55 Janet Cleveland, "The Guideline on Procedures with Respect to Vulnerable Persons Appearing before the Immigration and Refugee Board of Canada: A Critical Overview," *Refuge* 25, no. 2 (2009): 119.
56 Zachary Steel, Naomi Frommer, and Derrick Silove, "Part I—The Mental Health Impacts of Migration: The Law and Its Effects. Failing to Understand: Refugee Determination and the Traumatized Applicant," *International Journal of Law and Psychiatry* 27 (2004): 517.
57 Cleveland, "Guideline on Procedures."
58 Ibid., 120.
59 Ibid.
60 Ibid.
61 Evans Cameron, "Risk Theory," 584.
62 Rousseau et al., "Complexity of Determining Refugeehood," 51.
63 Sean Rehaag, "Do Women Judges Really Make a Difference?: An Empirical Analysis of Gender and Outcomes in Refugee Determinations," *Canadian Journal of Women and the Law* 23, no. 2 (2011): 628.
64 Canadian Council for Refugees, "Bill C31: Diminishing Refugee Protection," submission to Standing Committee on Citizenship and Immigration, Montreal, 2012): 9.

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# (En)Gendering Vulnerability: Immigrant Service Providers' Perceptions of Needs, Policies, and Practices Related to Gender and Women Refugee Claimants in Atlantic Canada

Evangelia Tastsoglou, Catherine Baillie Abidi, Susan M. Brigham, and Elizabeth A. Lange

**Abstract**

*As part of a multi-phased study exploring the experiences of refugee claimants in Atlantic Canada, this article focuses on the experiences and perceptions of immigrant service providers in relation to gender and women refugee claimants. Given the paucity of research on refugees in Atlantic Canada and on the particular perspectives of service providers, we have located this part of our research in the intersection of state policies and civil society practices, in particular service providers' and NGO practices vis-à-vis refugees and refugee claimants. To contextualize our study we briefly trace global and national trends in migration and refugee issues, specifically increasing refugee deterrence policies that restrict claimants' access to protection and settlement services. Findings highlight the recognition of gender-specific needs but also the lack of a gendered analysis of women refugee claimants, uneven accessibility to support services across the Atlantic region, challenges in navigating services, low cultural competence of institutional social and health service providers, and the rise of a punitive deterrence culture.*

**Résumé**

*Dans le cadre d'une étude en plusieurs phases explorant les expériences des demandeurs d'asile dans les provinces maritimes du Canada, cet article se penche sur les expériences et les perceptions des employés des services de l'immigration en relation avec l'appartenance sexuelle et les femmes demandeuses d'asile. Étant donné la pauvreté des recherches sur les réfugiés dans ces régions, et sur les perceptions de ces employés, cette étape de la recherche se concentre sur l'interaction entre les politiques d'État et les pratiques de la société civile, particulièrement les pratiques de ces employés et des ONG à l'égard des réfugiés et des demandeurs d'asile. Afin de mettre la question en contexte, on considère les tendances nationales et internationales dans le domaine de la migration et de l'asile, et plus particulièrement des stratégies croissantes visant à restreindre l'accès des demandeurs d'asile aux services de protection et d'établissement. Les résultats mettent en lumière les besoins spécifiques liés à l'appartenance sexuelle, mais également le manque d'études sur les besoins particuliers des femmes demandeuses d'asile, l'inégalité de l'accès aux services de soutien dans la région atlantique, les difficultés de s'orienter dans les différents services, le manque de*



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*compétences culturelles des employés des différents services sociaux et de santé, ainsi que l'essor d'une culture de dissuasion punitive.*

## *Introduction*

Migration is not gender-neutral,[1] yet little focus has historically been placed on the gendered aspects of migration,[2] particularly in relation to refugee claimants' experiences.[3] As part of a multi-phased project on the experiences of refugee claimants, this facet of our study analyzes immigrant service-providers' experiences and perceptions related to gender and women refugee claimants. We locate our research in the intersection of state policies and civil society, in particular, service providers' and NGO practices vis-à-vis refugees and refugee claimants. Our research participants are service providers from Atlantic Canada, who shared their learning experiences as well as their perspectives on refugee claimant needs and the policies in which their practices are embedded. Most specifically, they described their struggles to meet refugee claimant needs and ensure their human rights in an increasingly exclusionary neo-liberal political context, which is steadily exacerbating the vulnerability of refugee claimants. We begin by briefly tracing global and national trends in migration issues, with a focus on increased deterrence policies that restrict refugee claimants' access to protection and settlement services. We conclude by offering policy recommendations toward improving the experiences of refugee claimants, with particular attention to gendered needs.

## *Migration Trends and Refugee Issues*

### *Global and National Context*

The numbers of refugees, internally displaced, stateless persons, and those being trafficked are on the increase. In fact, 2013 is estimated to be one of the worst years for forced migration in over twenty years.[4] By the end of 2012, over forty-three million people were forcibly displaced.[5] Among this population, over fifteen million were refugees and almost one million were people seeking asylum.[6] The 2013 UNHCR report on forced migration suggests that 46 per cent of refugees are women and girls and that this number has been consistent for the past ten years.

In relation to refugees, Canada has an ambivalent history. While Canada turned away Jewish refugees during the Second World War—which, for most of them, led to their death—the country became exemplary in receiving refugees from the 1970s to the 1990s. During this time, refugees made up 15–21 per cent of the annual inflow of immigrants to Canada.[7] Since the 1980s, the flow of refugees and protected persons to Canada has been steadily sliding, while that of economic immigrants has been climbing: from 23.2 per cent in 1986 (and 37.9 per cent economic immigrants in the same year),[8] to 20 per cent in 1988 (and 51.4 per cent economic immigrants in the same year),[9] to 9.1 per cent in 2012 (and 65.4 per cent economic immigrants in the same year).[10] Since the early 2000s and the entrenchment of neo-liberal ideology in Canada, this represents a significant shift toward "designer immigrants" selected for their economic potential.[11] The majority of immigrants continue to fall within the "economic class"[12] whose principal applicants were 51 per cent male and 49 per cent female in 2012.[13] In addition, the escalating securitization of migration stemming from the events of 9/11 resulted in harsh impacts on refugee claimants.[14]

While the literature exploring refugees in Canada is growing, there is not always a distinction made between refugee classifications, contributing to an invisibility of refugee claimants.[15] The term *refugee* is a highly complex one that masks the heterogeneity of this grouping. Indeed, "the refugee label contributes to a portrait of refugees that is far too simplistic and therefore problematic."[16] Szczepanikova suggests that the word *refugee* is a politicized label, often associated with dependency on others for assistance, which "is not only stigmatising but also easily convertible into refugeeness being perceived as potentially threatening 'otherness' and uncomfortable neediness."[17] This construction of refugee is often used by governments when enacting restrictive policies. Furthermore, the literature on refugees often relies on a state-centric migration framework of refugeehood. In this frame, forced migration or refugeehood is an exceptional problem and an aberration from a state-based conception of citizenship, in which refugees are persons deprived of their state's protection.

An alternative framework that has given rise to a vibrant and growing body of literature is the human rights approach. By contrast to the state-centredness of the migration framework, human rights derive from the human being, and protection of the human being is our obligation to humanity, which is greater than our obligation to a sovereign state. Refugee rights are a subset of human rights. Nyers[18] proposes a different conception of "refugee" than the Cold War–based concept. In his conception, all people are considered in a state of being or becoming refugees and the latter are not speechless and passive recipients of the benevolent kindness of states, but active agents of their own destinies, negotiating challenging circumstances. Service providers and NGOs, in this approach, are typically trying to ensure refugees' human rights are being met.

From a legal and policy point of view, refugees in Canada are typically considered in two categories: (1) overseas refugees, who have been determined by the UNHCR to be convention refugees (with their claims processed outside of Canada) and who may be government assisted or privately



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sponsored; and (2) in-land refugees. In-land refugees are termed asylum seekers or refugee claimants. They arrive in Canada seeking protection and then submit their claim for determination.[19] Increasingly, Canada is punitive toward refugee claimants, penalizing them for "illegal entry."[20] Once in Canada, refugee claimants share common experiences with refugees and other immigrants, yet their lack of status and lack of access to funded services create distinct vulnerabilities.[21] While the experience may vary, based on culture, race, gender, education, religion, and marital status,[22] this study explores their gendered realities, as understood by service providers in Atlantic Canada.

*Regional Context*

Atlantic Canada consists of four eastern provinces: Prince Edward Island, New Brunswick, Nova Scotia, and Newfoundland and Labrador, which are largely rural, with small urban areas. Outmigration, high unemployment, particularly in rural areas, minimal economic growth, an aging population, and low birth rates have led to provincial government efforts to increase immigration, although numbers remain low overall.[23] While 20.6 per cent of all Canadians were immigrants in 2011—the highest proportion among the G8 countries,[24]—a much smaller percentage of the population in Atlantic Canada are immigrants—only 3.5 per cent.[25] Refugee claimant applications are also spread unevenly. Ontario receives 60 per cent of refugee claimant applications and British Columbia receives 5 per cent, with the remaining spread throughout Canada.[26] The annual number of refugee claimants in Atlantic Canada over the last ten years has ranged from 91 to 168.[27] In 2012, there were 134 refugee claimants in Atlantic Canada (67 in Nova Scotia, 42 in New Brunswick, 24 in Newfoundland, and 1 in Prince Edward Island).[28] This study will show that these relatively small numbers affect the infrastructure, practices, and perceptions of policy by service providers.

## *Gender, Vulnerability, and Refugeehood*

Gender is a social institution that is created, maintained, and enforced through daily interpersonal interactions.[29] A gender analysis in migration takes into account how gender organizes migration patterns and how it "facilitate[s] and constrain[s]" migration and settlement experiences.[30] It accounts for the diversity of experiences, the differences in social and cultural capital, as well as the responses of state and civil society.[31] At the same time, the reality of gender diversity erodes binary oppositional categories of male/female. In everyday discourse, gender is a process "wherein gender identities, relations, and ideologies are fluid, not fixed."[32]

Women are overrepresented in refugee and internally displaced communities as well as disproportionately bearing the familial and communal care responsibilities during disasters and war.[33] Given a global context where women have less social and legal status, they often have less access to capital, social goods, and legal means to protect themselves. In general, "unauthorized migrants and immigrants face a wide array of interrelated health vulnerabilities—some tangible and other intangible; some structural and other experiential—whose accumulation yields powerful biological and subjective effects."[34] Furthermore, in crises, hyper-masculinity can become a compensatory function for the social and economic losses of men that intensifies women's insecurity. Further, in addition to economic, educational, labour, social, and geographic vulnerability, there are physical vulnerabilities from the loss of community protection, sexual violence, domestic abuse, police targeting, and sexual manipulation as they flee and seek refugee status. These vulnerabilities often become embodied in the search for asylum.

Nevertheless, we resist an essentialist concept of vulnerability—and women—that suggests the latter are weak, passive, and unable to protect themselves from violence, particularly the violence of men. Rather, women have the right to be free from assault. They do defend and provide for themselves and their families, are resilient and resourceful, and resist gendered oppression in multiple ways. Vulnerability is part of the human condition [35] and, as a consequence, part of social and state responsibility. Yet, at the same time, vulnerability is gendered. The broader context of structural patterns of global gender inequality and discrimination must be considered and state responses should not exacerbate vulnerability, but facilitate recovery from trauma.

The victimization and silencing of refugees is a recognized political trope.[36] This is more exaggerated for female refugees and ties in with gender stereotyping. Canadian immigration and refugee policies devalue women, create dependency, and promote gendered power imbalances.[37] For example, female refugees are required to meet the same requirements as men in order to enter Canada for resettlement (convention refugee status in addition to the general criteria of admissibility). But since women in general receive fewer educational opportunities as a result of gender stratification in many countries, they are less likely to be accepted in Canada. Female refugees and claimants are also typically stereotyped as a vulnerable population at risk of prostitution and trafficking, further reducing acceptability.[38] Immigrant and refugee women often experience a loss of voice due to trauma, loss of financial capacity, or social status.[39]

In 1993, Canada was the first country to implement a gender policy for refugee claimants through the Women Refugee Claimants Fearing Gender-Related Persecution guidelines.[40] The guidelines state, "Although gender is not specifically enumerated as one of the grounds for



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establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds."[41] The guidelines name forms of persecution that are most likely perpetrated toward women, including "sexual abuse, forcible abortion, female genital mutilation, and forced marriage … and compulsory sterilization."[42] These guidelines were progressive and necessary, but according to LaViolette,[43] still failed to adequately define gender from a social constructivist perspective, considering a range of "gender-specific factors" in the context of persecution.

There are no implementation standards for the Gender-Related Persecution guidelines. For example, women-only hearings were considered but they were never implemented.[44] Additionally, the onus is on the claimant to prove a well-founded fear of persecution. Considering that "physical and sexual violence against women tends to be under-reported at all levels"[45] and that access to corroborating information from the country of origin can be challenging, the existence of gender-based policy does not guarantee actualization.

The case of rape illustrates the gaps and problems in the interpretation of gender-based persecution in assessing refugee claims. Rape is a power relation emanating from patriarchy. It is often framed as "private" violence rather than recognized as sex- and gender-based systemic sexual violence.[46] Macklin,[47] a former member of the Immigrant and Refugee Board of Canada (IRB), describes a particular U.S.A. case where sexual harassment and threats of rape were not considered forms of persecution but rather elements of sexual attraction. Macklin argues that this outcome "demonstrates an ignorance of the power dynamics of sexual harassment, and the ways in which sex is deliberately used as a weapon of domination, abuse and humiliation,"[48] underlining the importance of a gender analysis.

Gender-based persecution is a human rights violation against women, according to the Convention on the Elimination of All Forms of Discrimination against Women,[49] the 1979 treaty that is considered the international bill of rights for women, which Canada has both signed and ratified. However, even though law and policy exist, implementation may neither occur nor be effective. One reason for the uneven impact of global norms for gender-specific persecutions has often been a frame representing women refugees as vulnerable victims and a respective failure to take into account the underlying gendered relations of power.[50]

## *Service Providers and Civil Society*

Our research explores an under-examined area in the refugee literature, which is the perspective of people who work on the front lines as service providers with non-government organizations (NGOs) and community and civic immigrant settlement agencies. This sector is part of civil society—a term that is used generally to refer to a "third system" of self-organized groups of citizens, as opposed to government or profit-seeking organizations.[51] Service providers function as part of a "shadow state," which involves "relational interaction" between government agencies and non-profit organizations extending and consolidating state influence.[52] In Canada, decreased financial sustainability and short-sighted policies are incompatible with the ability of service providers to ensure that the rights of refugees and immigrants are being respected.[53] Given the increased competition among NGOs and community agencies for funding, the federal government's discourse that associates refugees with criminality and advocacy with a lack of patriotism, opportunities for immigrant serving organizations to inform public policy on migration and settlement issues are shrinking.

## *Research Design: A Critical Feminist Framework*

Our research methodology is grounded in a critical and feminist intersectional framework. Employing a critical perspective, we interrogate the idea that all refugee claimants have similar migration experiences and frame the research by challenging dominant ideologies with the intent to make positive societal changes. Our feminist analysis enables us to identify the complexity and embeddedness of patriarchy in society.[54] A critical feminist framework considers how gender "is saturated with meanings and is evident in relations that are not static nor by any means universal."[55] A gender-based analysis considers policy-making as not gender-neutral and examines how socially constructed gendered norms are reflected in policies and practices. A gender-based analysis examines the assumptions of socially acceptable roles for men, women, and transgendered people, inherent in policies, practices, and institutions.[56]

Research began with a literature review on refugees and refugee claimants, followed by in-depth individual and focus group interviews with fourteen participants who work for immigrant service organizations in Atlantic Canada. This research project explores the experiences of refugee claimants in Atlantic Canada. Service providers were selected as the participants for the first stage of this project because they had front-line experience with changing policies and practices.

In-depth interviews and focus groups were selected to allow for insight into the perceptions, experiences, and meaning-making processes[57] of service providers as well as their understanding of the vulnerabilities, challenges, and needs of refugee claimants; the specific services and policies that affect claimants; and a special emphasis on



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gender-based experiences. All interviews were recorded and transcribed. A transcript analysis was conducted using the software NUDIST, which helped to identify themes, including commonalities and variations.

All immigration and settlement organizations in each of the four provinces were invited to participate by letter and by phone. The participants had been working in migration and settlement services for three and a half to thirty years, with an average of eleven years. Participant jobs ranged from settlement and legal support to senior leadership in NGOs. Three participants were male and eleven were female. Two participants worked in Prince Edward Island, four in Newfoundland and Labrador, two in New Brunswick, and six in Nova Scotia.

## *Research Findings and Discussion*

### *Uneven Accessibility and Challenges in the Navigation of Services: The Gender Dimension*

Across provinces, all participants identified the greatest need of claimants as basic settlement services. Common priority needs included housing, access to language courses, and navigation of services. Other needs included access to income, legal representation, and community orientation.

Participants discussed refugee claimants' limited eligibility for services. They reflected how past funding policies allowed organizations to offer services to claimants, but now with increased federal restrictions and funding cuts, claimants are eligible for fewer services. They also noted how numbers of claimants are decreasing as a result of policy changes such as the Safe Third Country policy[58] (as seen in Newfoundland and Labrador). One participant works in an organization that offers "officially nothing because they are not eligible" for funded services, although claimants could participate in volunteer-driven services such as language support.

A comparison of government services across the Atlantic region reveals uneven accessibility. For instance, free legal support is provided to claimants in Newfoundland and Labrador through Legal Aid, and provincial health care is provided to claimants in PEI once they secure a work permit, which usually takes three months, but these services are not available in other provinces. Yet all claimants have access to support from each provincial Department of Community Services to support basic living needs. One participant discussed how small numbers of claimants can be a strength as services can be tailored, but it can also be a weakness because "we don't have a critical mass to make changes.… there is a big difference in the services provided in Ontario for refugees and immigrants in general."

In most regions of Atlantic Canada, only basic legal support is provided, and often it is legal counsel with limited knowledge or experience in refugee law. Furthermore, claimants typically receive insufficient legal support to properly prepare for hearings, whether the support is provided by government staff or volunteers. The Halifax Refugee Clinic is an exception in relation to insufficient legal support. Legal support is the primary mandate of the non-profit organization, and preparation for hearings, for example, are built into the structure of support.

Services for women refugee claimants, especially for special categories of women, are particularly scant. Participants highlighted the gendered nature of accessing housing: "There are special needs for women who come with children, because there's very little shelter, if any, in Halifax that will accept women and children if they don't have money for an apartment. And they usually end up in somewhere like Adsum House for abused partners, because there isn't anywhere else for women and children. There are at least shelters for men to go to."[59]

Thus, the intersection between shelter needs and care responsibilities is especially difficult for women refugee claimants to navigate, as are dominant stereotypes.

> So trying to find a place to live, trying to get a job, there's not a lot of day-care availability. And that whole issue of, which comes first, the job or the day care? Can't afford the day care without the job, can't get the job because you don't have the day care. So I think that's a big issue.[60]
>
> It actually can be quite difficult for families or women with children. I find a lot of landlords will … make excuses and we know it's about the kids really, because—well actually I've heard very direct comments that, you know, these people don't really know how to control their children, they'll be running around and creating a lot of noise. And so off the bat, we've had clients with kids just rejected because of the composition of the family, not for any other reason. So that's a barrier for families or for single moms with kids.[61]

Apart from the availability of services, there are the issues of mobility. Here, again, women have greater difficulty in accessing appropriate services related to gendered cultural factors, such as sense of voice and language ability, as well as their mobility restrictions due to gender-based family care.

> The most vulnerable is women, and of course … minors. Basically because they don't have the same ability to go out and reach out, and get access to information, and network with other refugees and service agencies. There's a big constraint due to cultural considerations that prevent most of them to be able to freely go around asking questions and developing a network so they can have all the support that they need—as opposed to the male counterpart that is more mobile and has more access to places and government buildings, and so on. For women, that's even harder.[62]



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> I would say probably about 90 per cent of out of maybe fifty clients would have been men. So … I don't know if it's just typically what happens … But the women who were like couples who came, only the men came through for services. Maybe the women again, not feeling like they know a lot, not having a lot of language, maybe more prone to cultural elements—of looking after the children, staying at home, things like that, not really having a good understanding of the opportunities they could have.[63]
>
> In the past when we've had women with small children, they can't avail of any day-care subsidies. So therefore the women tend to be still staying at home. And the spouse will get to get out and go to a language class or something like that.[64]

Furthermore, all research participants described navigating the systems and services available for refugee claimants in Atlantic Canada as an excruciating experience. Challenges included navigating two levels of systems and bureaucratic inefficiencies. Lack of intergovernmental communication resulted in different policies and practices but also contradictions and gaps. Participants from all four provinces shared that they need to regularly educate provincial and federal personnel on policy-related issues: "The onus always comes back on us to make sure that other agencies make sure that clients' needs are being met. And it shouldn't be that way."[65]

This complexity of navigating two sets of services is evident in the community. Health and language services for refugees in Canada are federally funded but accessed through provincial systems. However, the majority of this funding support is not accessible to claimants. Another example of contradictory policies are medical personnel who, generally reimbursed provincially, often refuse to provide service to refugee claimants because personnel are unfamiliar with the federal health program. Medical providers struggle to be reimbursed for services covered, adding to their reluctance to accept claimants as patients. Further, the federal government modified this program in 2011 to exclude most forms of coverage for claimants. With regard to the severely reduced medical services, an interviewee stated, "It means that people have no coverage for dental, eye, mobility aids, medications, or anything beyond what an MSI [basic provincial medical coverage in Nova Scotia] card gives you. And if refugee claimants are not eligible for an MSI card, which they never are, they will have nothing, except for emergency health care. If they're sort of dying, I think they can go to the hospital."[66]

Although the participants did not feel that the changes to the IFHP [Interim Federal Health Program] coverage would have significant gender impact, they did express concern about the lack of prenatal health care for pregnant women: "A pregnant woman would have more difficulties when it comes to accessing health care, and then [there are] the challenges with getting coverage for the baby after the birth."[67]

In three of the Atlantic Provinces, the ineffective interactions and gaps between the two systems is observable in the lack of health coverage for babies born to refugee claimants. One participant described this as "a bureaucratic nightmare. It's really frustrating." The federal government claims the provinces are responsible for health care because the baby is born in Canada, while many of the provinces, including PEI, New Brunswick, and Newfoundland and Labrador suggest that the federal government is responsible for health coverage because the parent does not have resident status.[68] This intergovernmental gap leaves some of the newest Canadian-born without health coverage in many regions in Canada.

The participants ultimately reflected that if they themselves were struggling to navigate these systems in their own country where they speak the language, the challenges are multi-fold for newcomers who may not know their rights and responsibilities. Such challenges are even greater because of gender role cultural constraints. "Women are often more isolated than men would be, right within the same cultural circles as well."[69]

### *Perceptions of Needs and Vulnerabilities of Refugee Claimants by Gender*

From a gendered perspective, most service providers felt that needs and supports were identified by "humanity not sex." They suggested needs were more closely connected to family composition rather than gender. Women with children and families were identified as having needs different from those of single individuals, largely as the result of limited shelter and child-care options in this region. As well, women fleeing violence, pregnant women, and women requiring female medical practitioners were identified as having distinctive needs. In other cases, male claimants were seen as having greater challenges: "Sometimes I notice increased barriers for our male clients, perhaps because they're the most stigmatized, so-called 'queue-jumping bogus criminals.'"[70] "With the men when they come, it's an extreme struggle to find housing for them because with the women, we do have places that they can go. There's no men's shelters in Charlottetown that you can have refugee claimants stay at."[71] Thus, single males can be regarded with more suspicion and be the recipient of deterrence. As well there is less infrastructure overall in the Atlantic region to support refugee claimants.

Participants emphasized that needs vary from individual to individual. One participant stated that supports "depend on the person and personality … sometimes people



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are more willing to help women … there seems to be more compassion."[72] Another participant identified gender-based needs based on the cultural background and countries of origin.[73] Several participants also stated with few claimants in the region, categorical responses to needs were challenging. Participants from PEI, New Brunswick, and Newfoundland and Labrador were particularly reluctant to generalize responses because there were few claimants in these provinces.

When asked who is most vulnerable within the claimant population, one participant stated that they are "all vulnerable for different reasons."[74] Women service providers were especially reluctant to identify a need for gendered services or to say that women were more vulnerable, illustrating an unwillingness to construct needs utilizing a gendered analysis. Rather they favoured individually tailoring services, repeatedly emphasizing the difficulty of generalizing about gender, given low numbers.

Paradoxically, when the discussion revolved around specific needs, they did identify unique needs of women claimants. When probed to provide more detail, participants highlighted care responsibilities as key in rendering women more vulnerable. Women were described as vulnerable because "women always put their children first"[75] and because of higher levels of fear. These responses reveal a gendered analysis: "It is harder for women if they are by themselves; worse if they are single mothers. The process is harsher and the times are harder for them, and the process of finding and getting proof of their claims is harder for a woman than it is for a man."[76] Additionally, this participant cautioned that women have more to fear from traffickers: "As I say, women maybe, because of the potential for trafficking into prostitution … probably with the only female we've dealt with recently … I felt that there was a vulnerability there that was rooted in a fear, that I hadn't quite experienced in other stuff that I've done."[77]

Cultural barriers and past experiences of women were also identified as contributing vulnerability, resulting in less access to services and voicelessness related to trauma.

> [Decreased time to prepare for hearings] certainly may be more harmful to female claimants, because if they've been through a situation of sexual abuse or rape or something like that, that's very difficult to talk about … in such a short period of time. Although not to say that there aren't men … that have experienced violence or other traumatic situations too, but that particular female sexual abuse, or female genital mutilation, or … fleeing forced marriages and violence within their own family … so dealing with some of those issues in such a short period of time before they've had time to build up a trust with the people they're working with [is a problem].[78]

Interviewees indicated that not only do refugee claimants have limited access to mental health services but the refugee process may further exacerbate their mental duress (e.g., by being required to speak about experiences of physical and sexual violence to a stranger so soon after arrival and possibly to a person of the opposite sex). Even when mental health services are available, this may be a culturally alien process. As Miller and Rasco express it, "Most refugees, the majority of whom come from non-Western societies … bring with them culturally specific ways of understanding and responding to psychological distress."[79] Additionally, the women may feel more vulnerable and isolated as the result of separation from families and friends and coping with the idea they may never see them again.[80]

Strang and Ager[81] utilize the concept of social capital to understand refugee integration, noting that bonding relationships are critical for refugees, establishing trust as soon as possible to avoid fearfulness and isolation. The refugee determination process is affected when trust has not been established. Interviewees explained that women could be coming from "a culture where dealing with the government is even more dangerous than dealing with the illegal armies or guerrillas … so having to deal with a government official through the phone for women is going to be even more scarier. It's going to pose a threat in her heart, and it's going to make her really uneasy. And oftentimes, the interpreter is a male, which constrains even more their ability to express."[82]

Ultimately, however, gendered norms influence behaviours that are assumed to be masculine or feminine. Such norms render people vulnerable, as our participants explain. One participant described enhanced vulnerability as being connected to women "not used to being outspoken." Yet men are also vulnerable to gendered norms:

> Differences between male and female refugee claimants? … sometimes a male claimant won't even access a service or ask for it because of perhaps there's that pride, or not wanting to ask for charity. [Then] they become more vulnerable because they aren't getting certain services that they need, or that they could use really to help them settle.[83]
>
> Sometimes it's even more difficult to get the men to open up about those things [such as sexual violence], because men aren't supposed to be vulnerable, and they're not supposed to be victims, and they're not supposed to be crying, and things like that.[84]

In sum, there was a discrepancy between participants' initial statements—claiming no differences between male and female refugee claimants in terms of needs and vulnerabilities—yet later statements identified important differences. The participants may have wanted to avoid stereotyping



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women refugee claimants as victims or as a group requiring special treatment and resources (pejoratively constructed as more burdensome by the current federal government). Interestingly, and as a consequence, the interviewees emphasized both women's resilience men's vulnerability. "When it comes to housing and food and just being able to navigate the system, I haven't noticed too many differences [between men and women]. But then again, we've had some incredibly strong and resilient female clients, so maybe that's also just a bias in the sample we see here. I've been always really impressed by our female clients, as a lot have been, I've noticed they've been better able to cope, and it might be due to their backgrounds and that's just a coincidence."[85] The denial of gender differences might have also been a consequence of a hegemonic neo-liberal ideology emphasizing individual experience rather than recognizing the commonalities of categories and groups.

Overall, the small numbers of refugee claimants dictate against overgeneralization of vulnerabilities or categorical responses to needs. However, higher levels of fear, family composition in terms of dependent children, and psychological trauma related to sexual violence all create unique needs for women refugee claimants. As described below, small numbers also mean there are fewer service arrangements to address gendered needs of refugee claimants.

*Low Cultural Competence in Health and Social Services*

According to immigrant service providers, there is a lack of culturally competent practitioners in institutional health and social services available in the Atlantic Provinces. Medical services and ineffective interpretation services were identified as significant gaps, negatively affecting refugee claimants and further constructing vulnerability. In two examples, ineffective interpretation nearly resulted in a negative refugee status determination. Furthermore, as one participant observed, "When it comes to cultural differences and cultural customs, there's a huge difference from one region to another [within one country of origin]." Just because two people speak the same language, cultural nuances may be lost in translation, resulting in serious consequences for the claimant. Issues of cultural competency were also described in relation to health services. Participants revealed many examples of clients attempting to access health services where health professionals demonstrated a lack of respect for the cultural or religious practices of the client.

Participants stated that they did not offer gender-based services but rather a general intake process, which resulted in individually tailored services, such as securing female medical practitioners for female claimants or seeking an alternative shelter for men where no institutional housing service existed. Yet interviewees identified cultural sensitivities by gender that were not addressed in policy development, implementation, or settlement services that gravely affect women's ability to access services: "There are a number of cultural sensitivities that are not addressed … where women cannot be allowed or their culture won't allow them to go out without female company, and so many other constraints. Even if they are Latin American that has no religious or cultural constraints, the lack of social support and the lack of social skills will prevent them to efficiently access the services that may be available for somebody that is more outgoing."[86]

Thus, gender norms and state services are constructed culturally, and these constructions are transferred to the new country. In terms of health services, interviewees underscored not only cultural insensitivity among health professionals but lac of access to female doctors, given coverage provisions: "It is harder for female refugee claimants who need a female doctor, to find appropriate care or to get access. Yeah, we refer all of our clients initially to a male general practitioner who we know will accept the coverage. And then when we get a female client who is not comfortable with a male doctor, we have to look for a female GP [general practitioner] who accepts IFHP, and they are few and far between. Then there's a whole other level of challenge or difficulties when it comes to specialists."[87]

*Increasing Deterrence Policies*

Participants described a "hardening" of migration policies, particularly for refugee claimants, and a shifting public ideology that increasingly dehumanizes claimants. This is in agreement with other research findings from Atlantic Canada underscoring a securitization of migration.[88] The participants perceived that federal funding cuts and policy changes now focus on deterrence and lack the humanitarian approach originally inscribed in the Geneva Convention, with significant negative impacts on refugee claimants in Canada.

The participants described the changes as regressing from policies designed to protect refugees. "We've totally lost the thread about protection and about what refugee protection is, and now it's all putting up barriers, timelines, deterrents, punitive measures and not at all the core of the matter."[89] Others added, "We're going back to pre-2002." "When it comes to the federal government, we all know that the previous four governments, it doesn't matter which political party they belong, the refugee process is being reduced and it's being converted into a very hard process for people to come along."[90] Importantly, the participants discussed the changes as violating human rights, preventing family reunification, which has been a Canadian



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priority in the past, detaining people seeking protection (including children), and prioritizing national interests over refugee protection.

Mandatory detention was cited as an area of greatest concern for refugee claimants. One participant observed that detention will greatly increase separation of families and stated, "It will be five years before they are allowed to get their permanent residence … if you can't get your permanent residence for up to five years, then they can't start the process of applying for their family members until they get their permanent residence. And that could take another three years, so you could be looking at families separated for like eight years."[91]

Some saw the new legislation as "harsh on women's rights" with a greater impact on women, not only in potential detainment but also in the impacts of the reduced time allotted to prepare claims. While participants suggested that change to the timeframe was necessary, its significant reduction was an increased barrier for claimants who had experienced trauma, particularly women. "If they sit down within three to six weeks with a government official, and try to tell their story, I think that the trauma they're still holding is going to make that very difficult. And a lot of claimants may end up losing their claims because they haven't given full disclosure. And the reason they haven't given full disclosure is they're probably going to be too terrified within that short period of time."[92]

Further time required to access corroborating documentation for cases from all regions of the world is not acknowledged. In Newfoundland and Labrador, refugee board hearings are often held over the phone, resulting in increased cultural barriers for some women communicating with male judges about their experiences of sexual violence and persecution: "They [Newfoundlanders and Labradorians] are absolutely helpful and would do everything for the claimant … the problem is the constraints that the legal system presents … they have a better chance somewhere else."[93]

In sum, all interviewees noted decreased funding for services to refugee claimants and enhanced monitoring systems as part of a punitive deterrence culture around refugee claimants.

## Conclusion and Recommendations

Our findings show that service providers in Atlantic Canada are aware of and understand shifting migration policies, particularly policies and funding correlated to working with refugee claimants. Despite their varying levels of awareness of specific refugee policy, our findings show service providers perceive that shifting public policy—marred by contradictions between federal and provincial levels, bureaucratic inefficiency, and lack of effective communication—has negatively affected claimants in Atlantic Canada, resulting in decreased services, difficulty in accessing services, increased complexity in navigating government systems, and increased deterrence for people seeking asylum.

While our interviewees initially suggested that a gender-based analysis was not a primary factor in determining needs and identifying vulnerabilities of refugee claimants in Atlantic Canada, gender differences were clearly acknowledged, the gender-based differential impact was discussed, and differences in service provision were described. We assume that the initial reaction might have been due to (1) a desire to avoid stereotyping women as victims (thus contributing to pejorative constructions of female refugee claimants as a social burden or denying their agency); (2) a desire to recognize the diversity among this highly vulnerable population and vulnerability across gender lines; and (3) hegemonic neo-liberal ideology emphasizing individual experience rather than recognizing the commonalities of categories and groups. Further research is needed to assess these hypotheses.

For two-way integration to occur, the service providers identified that more Canadians need to value immigration and refugees and understand the benefits of a diverse population. One participant declared a need "to create an entire ideological shift with the government and with the sort of general population that would see refugees and immigrants of all categories as assets rather than liabilities."[94] Current neo-liberal political discourse on immigration and the dehumanizing of refugees in mainstream media were highlighted as barriers to more progressive changes in social policy and public attitudes. Opportunities for refugee claimants to share their experiences and to dialogue with Canadians and other immigrants could challenge current political discourse.

Clearly immigrant service providers are working with a diverse group of individuals with varying degrees of vulnerabilities and needs, whose voices are often ignored by an inattentive state that treats refugee claimants as non-persons.[95] While our article highlights refugee claimants in the Atlantic region, it also centres the voices of immigrant service providers—who are often overlooked in the literature about refugee claimants, particularly in Atlantic Canada. Their role is critical for the health, well-being, security, and protection of refugee claimants. While our participants experience satisfaction through assisting people in need, they are also frequently discouraged and frustrated at restrictive or misunderstood policies, and decreasing funding.

We conclude with a few major recommendations. First, more research should be conducted to explore the complexity of service providers' work, so that their roles, concerns,



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and educational/training needs are better understood and addressed. A gendered analysis of such research would bring to light the gendered aspects of this work, including the hidden and emotional labour of this work. Second, more resources need to be earmarked for supporting refugee claimants in the region, and in particular female claimants who have experienced physical and sexual violence. This is not only in keeping with Canada's humanitarian tradition but also with a realistic recognition of Atlantic Canada's demographic and economic realities. Finally, our research especially underscores the need for culturally sensitive services.

### Notes

1 Evangelia Tastsoglou and Alexandra Dobrowolsky, eds., *Women, Migration and Citizenship: Making Local, National and Transnational Connections* (Aldershot, UK: Ashgate, 2006).
2 Sarah J. Mahler and Patricia R. Pessar, "Gender Matters: Ethnographers Bring Gender from the Periphery toward the Core of Migration Studies," *International Migration Review* 40, no. 1 (2006): 27–63.
3 Jane Freedman, "Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?," *International Migration* 48, no. 1 (2010): 175–98.
4 United Nations High Commission of Refugees, *Displacement: The New 21st-Century Challenge* (Geneva: UNHCR, 2013).
5 Ibid.
6 Ibid.
7 Canadian Social Trends, "Canada's Immigration Policy in the 1980s and 1990s" (1999), http://search.proquest.com/docview/224107048?accountid=13803.
8 Citizenship and Immigration Canada, *Canada Facts and Figures: Immigration Overview, Permanent and Temporary Residents* (Ottawa: Minister of Public Works and Government Services Canada, 2012), http://www.cic.gc.ca/english/pdf/research-stats/facts2012.pdf.
9 Ibid.
10 Ibid.
11 Alan B. Simmons, *Immigration and Canada: Global and Transnational Perspectives* (Toronto: Canadian Scholars' Press, 2010).
12 The "economic class" is one of the immigration categories in Canada, established through immigration legislation. It consists of individuals selected "on the basis of their ability to become economically established in Canada." Immigration and Refugee Protection Act, S.C. 2001, c. 27, 12 (2).
13 Citizenship and Immigration Canada, "Section 5: Gender-Based Analysis of the Impact of the *Immigration and Refugee Protection Act*," *Annual Report to Parliament on Immigration*, 2013, http://www.cic.gc.ca/english/resources/publications/annual-report-2013/section5.asp.
14 Catherine Dauvergne, "Security and Migration Law in the Less Brave New World," *Social and Legal Studies* 16, no. 4 (2007): 533–49.
15 Juliet Cohen, "Safe in Our Hands? A Study of Suicide and Self-Harm in Asylum Seekers," *Journal of Forensic and Legal Medicine* 15, no. 4 (2008): 235–44; Anita J. Gagnon, Geoffrey Dougherty, Robert W. Platt, Olive Wahoush, Anne George, and E. Stanger, "Refugee and Refugee-Claimant Women and Infants Post-Birth: Migration Histories as a Predictor of Canadian Health System Response to Needs," *Canadian Journal of Public Health / Revue canadienne de santé publique* 98, no. 4 (2007): 287–91.
16 Snezana Ratkovic, "The Location of Refugee Female Teachers in the Canadian Context: 'Not Just a Refugee Woman!,'" *Refuge* 29, no. 1 (2013): 104.
17 Alice Szczepanikova, "Performing Refugeeness in the Czech Republic: Gendered Depoliticisation through NGO Assistance," *Gender, Place and Culture* 17, no. 4 (2010): 462.
18 Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (New York: Routledge, Taylor and Francis Group, 2006).
19 UNHCR, *Displacement*.
20 Priya N. Kissoon, "(Dis)Advantages of Illegality," Metropolis British Columbia, Working Paper Series 10–11 (2010).
21 Isabel Dyck and Parin Dossa, "Place, Health and Home: Gender and Migration in the Construction of Healthy Space," *Health and Place* 13, no. 3 (2007): 691–701.
22 Rita Chi-Ying Chung and Fred Bemark, "Revisiting the California Southeastern Asian Mental Health Needs of Assessment Data: An Examination of Refugee Ethnic and Gender Differences," *Journal of Counseling and Development* 80, no. 1 (2002): 111–19; Anita J. Gagnon, Jodi Tuck, and L. Barkum, "A Systematic Review of Questionnaires Measuring the Health of Resettling Refugee Women," *Health Care for Women International* 25 (2004): 111–49; Mary Ann Mulvihill, Louise Mailloux, and Wendy Atkin, *Advancing Policy and Research Responses to Immigrant and Refugee Women's Health in Canada* (Winnipeg: Centres of Excellence for Women's Health, 2001).
23 Ather Akbari and C. Sun, "Immigrant Attraction and Retention: What Can Work and What Is Being Done in Atlantic Canada?" *Our Diverse Cities* Summer 2 (2006): 129–33.
24 Statistics Canada, "Immigration and Ethno-Cultural Diversity in Canada (2011)," http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x2011001-eng.cfm.
25 Ather Akbari, S. Lynch, J.T. McDonald, and W. Rankaduwa, *Socioeconomic and Demographic Profiles of Immigrants in Atlantic Canada* (Halifax: Atlantic Metropolis Centre, 2007).
26 Kissoon, "(Dis)Advantages of Illegality."
27 Citizenship and Immigration Canada, *Canada Facts and Figures: Immigration Overview—Permanent and*



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*Temporary Residents* (Ottawa, ON: Minister of Public Works and Government Services Canada, 2012), http://www.cic.gc.ca/english/pdf/research-stats/facts2012.pdf.

28 Ibid.

29 J. Hollander, "Resisting Vulnerability: The Social Reconstruction of Gender in Interaction," *Social Problems* 49, no. 4 (2002): 474–96.

30 Pierrette Hondagneu-Sotelo, *Gendered Transitions: Mexican Experiences of Immigration* (Berkeley: University of California Press, 1994), 3.

31 Chung and Bemark, "Revisiting the California Southeastern Asian Mental Health Needs"; Gagnon, Tuck, and Barkum, "Systematic Review"; Mulvihill, Mailloux, and Atkin, *Advancing Policy and Research Responses*; Yvonne Riaño and Nadia Baghdadi, "Understanding the Labour Market Participation of Skilled Immigrant Women in Switzerland: The Interplay of Class, Ethnicity, and Gender," *Journal of International Migration and Integration* 8, no. 2 (2007): 163–83.

32 Mahler and Pessar, "Gender Matters."

33 Fionnuala Ní Aoláin, "Women, Vulnerability, and Humanitarian Emergencies," *Michigan Journal of Gender and Law* 18, no. 1 (2011), 1–23.

34 Sarah Willen, "Migration, 'Illegality,' and Health: Mapping Embodied Vulnerability and Debating Health-Related Deservingness," *Social Science and Medicine* 74 (2012): 806.

35 Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* (London: Routledge, 2008).

36 Nyers, *Rethinking Refugees.*

37 Isabel Dyck and Arlene Tigar McLaren, "Telling It Like It Is? Constructing Accounts of Settlement with Immigrant and Refugee Women in Canada," *Gender, Place and Culture* 11, no. 4 (2004): 513–34.

38 Catherine Bryan and Myriam Denov, "Separated Refugee Children in Canada: The Construction of Risk Identity," *Journal of Immigrant and Refugee Studies* 9, no. 3 (2011): 242–66.

39 Sepali Guruge and Nazilla Khanlou, "Intersectionalities of Influence: Researching Health of Immigrant and Refugee Women," *Canadian Journal of Nursing Research* 36, no. 3 (2004): 32–47.

40 Jane Freedman, "Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?," *International Migration* 48, no. 1 (2010): 175–98; Nicole LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines," *Peace Research Abstracts Journal* 44, no. 6 (2007): 282–90.

41 Immigration and Refugee Board of Canada, "Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution," 1996, http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx.

42 Audrey Macklin, "Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims," *Georgetown Immigration Law Journal* 13, no. 25 (1998): 39.

43 Nicole LaViolette, "Gender-Related Refugee Claims."

44 Macklin, "Cross-Border Shopping for Ideas," 25–71.

45 Ibid., 47.

46 Ibid.; Nora Markard, "Gender Violence in New Wars: Challenges to the Refugee Convention," in *Women and Immigration Law: New Variations on Classical Feminist Themes*, ed. Sarah K. van Walsum and T. Spijkerboer, 67–85 (Abingdon, UK: Routledge-Cavendish, 2006).

47 Ibid.

48 Ibid., 39.

49 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, http://www.un.org/womenwatch/daw/cedaw/cedaw.htm.

50 Jane Freedman, "Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?," *International Migration* 48, no. 1 (2010): 194.

51 Richard Price, "Transnational Civil Society and Advocacy in World Politics," World Politics 55, no. 4 (2003): 580.

52 Rupaleem Bhuyan, "Negotiating Citizenship on the Frontlines: How the Devolution of Canadian Immigration Policy Shapes Service Delivery to Women Fleeing Abuse," *Law & Policy* 34, no. 2 (2012), 211–36.

53 Laura Simich, Morton Beiser, Miriam Stewart, and Edward Makwarimba, "Providing Social Support for Immigrants and Refugees in Canada: Challenges and Directions," *Journal of Immigrant Health* 7, no. 4 (2005): 259–68.

54 Leslie R. Bloom and Patricia Swain, "Ethical Responsibility in Feminist Research: Challenging Ourselves to Do Activist Research with Women in Poverty," *International Journal of Qualitative Studies in Education* 22, no. 3 (2009): 333–51; Chandra Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham, NC: Duke University Press, 2003); Amber L. Zimmerman, M. Joan McDermott, and Christina M. Gould, "The Local Is Global: Third Wave Feminism, Peace, and Social Justice," *Contemporary Justice Review* 12, no. 1 (2009): 77–90.

55 Mahler and Pessar, "Gender Matters," 31.

56 Nova Scotia Advisory Council on the Status of Women and the Atlantic Metropolis Centre Gender / Immigrant Women Research Domain, *Immigrant Women and a Framework for Immigration to Nova Scotia: A Brief Prepared in Response to a Framework for Immigration* (Halifax: Province of Nova Scotia, 2004).

57 Yvonna S. Lincoln and Egon G. Guba, *Naturalistic Inquiry* (Beverly Hills, CA: Sage Publications, 1985).

58 The Canada-US Safe Third Country Agreement stipulates that persons seeking refugee protection must make a claim in the country in which they arrive first (United States or Canada) unless they qualify for an exception to the agreement. Canada Border Service Agency, http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html.

59 Participant #9, Nova Scotia.



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60 Ibid.
61 Participant #11, Nova Scotia.
62 Participant #3, Newfoundland and Labrador.
63 Participant #12, Nova Scotia.
64 Participant #4, Newfoundland and Labrador.
65 Participant #11, Nova Scotia
66 Participant #14, Nova Scotia.
67 Participant #11, Nova Scotia.
68 The Government of Nova Scotia has now implemented policy to provide provincial health coverage for babies born to refugee claimants on a case-by-case basis.
69 Participant #12, Nova Scotia.
70 Participant #10, Nova Scotia.
71 Participant #2, PEI.
72 Participant #11, Nova Scotia.
73 Participant #3, Newfoundland and Labrador.
74 Participant #2, PEI.
75 Participant #9, Nova Scotia.
76 Participant #3, Newfoundland and Labrador.
77 Participant #1, PEI.
78 Participant #9, Nova Scotia.
79 Kenneth E. Miller and Lisa M. Rasco, eds., *From Clinic to Community: Ecological Approaches to Refugee Mental Health* (New Jersey: Lawrence Erlbaum, 2010), 51.
80 Karen Chung, Ellie Hong, and Bruce Newbold, "Resilience among Single Adult Female Refugees in Hamilton, Ontario," *Refuge* 29, no. 1 (2013): 65–74.
81 Alison Strang and Alistair Ager, "Refugee Integration: Emerging Trends and Remaining Agendas," *Journal of Refugee Studies* 23, no. 4 (2010): 589–607.
82 Participant #3, Newfoundland and Labrador.
83 Participant #9, Nova Scotia.
84 Participant #10, Nova Scotia.
85 Ibid.
86 Participant #3, Newfoundland and Labrador.
87 Participant #11, Nova Scotia.
88 Diane Crocker, Alexandra Dobrowolsky, Edna Keeble, Carmen Celina Moncayo, and Evangelia Tastsoglou, *Security and Immigration, Changes and Challenges: Immigrant and Ethnic Communities in Atlantic Canada, Presumed Guilty?* (Ottawa: Status of Women Canada, 2007).
89 Participant #10, Nova Scotia.
90 Participant #3, Newfoundland and Labrador.
91 Participant #9, Nova Scotia.
92 Ibid.
93 Participant #3, Newfoundland and Labrador.
94 Participant #12, Nova Scotia.
95 A. Miklavic, "Canada's Non-Status Immigrants: Negotiating Access to Health Care and Citizenship Medical Anthropology," *Cross-Cultural Studies in Health and Illness* 30, no. 5 (2011): 496–517.

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# The Meeting of Myths and Realities: The "Homecoming" of Second-Generation Exiles in Post-Apartheid South Africa

Zosa Olenka De Sas Kropiwnicki


### *Abstract*

*This article is based on the findings of a qualitative study of second-generation exiles, who were born in exile and/or spent their formative years in exile during apartheid. It is based on in-depth interviews with forty-seven men and women who spent their childhoods in North America, Western Europe, Eastern Europe, West Africa, East Africa, and southern Africa as second-generation exiles during apartheid. This article will focus on the tensions that arose over the myths and realities of return, in what often became dashed expectations of returning to a welcoming, free, and progressive post-apartheid South Africa, politically and socially united around key liberation principles. It will also discuss the manner in which the experience and memory of exile influenced former second-generation exiles' perceptions of their roles as agents of change in post-apartheid South Africa—roles that were often adopted in the name of an ongoing liberation struggle.*

### *Résumé*

*Cet article présente les résultats d'une étude qualitative d'exilés de seconde génération qui sont nés et/ou ont passé leur jeunesse en exil pendant l'apartheid sud-africaine. Cette étude repose sur des entrevues approfondies menées avec quarante-sept hommes et femmes qui ont grandi en Amérique du Nord, en Europe de l'Ouest et de l'Est, et dans l'ouest, l'est et le sud de l'Afrique, en tant qu'exilés de l'apartheid. Cet article examine plus précisément les tensions issues des mythes et des réalités du retour au pays, et des attentes déçues d'un retour à une Afrique du Sud accueillante, libre, progressiste et unie politiquement et socialement par des valeurs liées à l'idéal de liberté. On y analyse également comment les expériences et les souvenirs de ces anciens exilés marquent leur propre perception de leur contribution à la société post-apartheid, bien souvent pensée comme une contribution à la poursuite d'une lutte pour la liberté.*


### *Introduction*

*Exile* in this article has been defined as a "condition" or "process"[1] that is both historically and contextually specific, associated with forced separation, physical "banishment," and geographical dislocation compelled by a political regime.[2] In the South African context, exile has been associated with a strategic space characterized by transnational political struggles against "norms of a nation."[3] It is estimated that from the early 1960s, 40,000 to 60,000 South Africans were exiled, and that between 1990 and 1995 approximately 15,000 to 17,000 former exiles returned to South Africa.[4] In the secondary literature, *exile and return* has been described narrowly as an adult experience with emphasis on the perceptions and memories of adults who waged political struggles against the apartheid state. In light of this dearth in information, this article will discuss the unique experiences of children and youth who returned to post-apartheid South Africa.

On the basis of forty-seven life-history interviews with second-generation exiles who were born and/or spent their formative years in exile, it will be argued that although



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many children had little or no lived experience or memories of South Africa, "myths of homecoming" were constructed under the influence of their parents' narrated memories and hopes of a "new" South Africa, their personal relationships with political stalwarts in exile, the international media's portrayal of political developments within South Africa, and dominant political discourses at the time. These myths were constructed around images of joyous interpersonal reunions, the realization of liberation principles, and the meaningful democratization of political processes. These myths in turn heightened expectations of homecoming. Notwithstanding the legal-policy and service-provision measures in place for voluntary returnees (and their children), disillusionment was fuelled by the reality of unbridgeable schisms in familial relationships and broader socio-political networks; inequitable racial, socio-economic, gendered, and gerontocratic hierarchies; and "false promises" pertaining to recognition, compensation, and democratic governance.

Despite these dashed expectations, it will be argued that disappointment has not fuelled passivity among the second-generation exiles in my study, many of whom have embraced agentic roles in their communities, precisely because of the manner in which their childhoods were constructed in exile, with emphasis placed on obligations and responsibilities towards their parents, the liberation movement, and the nation. The politicization of their childhoods has shaped the way that they view the post-apartheid present and future. Hence, despite the rupture brought about by the exile experience, continuity is evident in their sense of self, aspirations, and perceptions of "home." The time when notions of "home" were formed in the life cycle should, therefore, be considered when analyzing the experience of exile and return for children and youth.

### *Conceptualizing Homecoming*

Said referred to the "perilous territory of not-belonging"[5] occupied by the exile caused by the "rupture of the true self and its true home."[6] In this territory, notions of home are laden with a sense of love and loss for "one's native place"[7] and for the "space where affections centre,"[8] a space from which exiles have been forcibly separated. These affections support the idealization of the "homeland" and "myths of return."[9] "Home" in these myths is often centred on location, space, and geography,[10] but may be linked to habitual notions, traditions, and cultural practices,[11] even when exile locations are perpetually shifting.[12] A shared history, relationships, and networks may also constitute notions of home in transnational exile communities.[13] Importantly for this study, home may be linked to visions of a "triumphant ideology or a restored people."[14] In recollection and narration, the past may be constructed in a way that serves the needs of the present, thereby enabling exiles to find content for notions of "home" and "belonging," often under the sway of dominant discourses and collective memorialization efforts.[15] "Home" can therefore be "made, re-made, imagined, remembered or desired."[16] These constructions may relieve the pain of separation from a homeland but also keep the "myth of return" alive.[17]

To conceptualize return for the exile, it is necessary to disengage notions of "homecoming" from a simplistic association with location, space, and geography. Exiles do not merely return to a geopolitical concept of "country of origin"; they also return to imagined notions of home centred on remembered attachments and associations.[18] Dichotomies that associate "return" with the security, stability, and belonging of fixed geographical space[19] fail to consider the rupture caused not only by the initial physical separation from a "home" forced by a state or legal regime, but also the dislocation caused by separation from the state of exile in the name of "homecoming."[20] Black and Gent argue that "in practice, the experience of return may be more, rather than less, problematic than the experience of exile."[21]

This dislocation is felt not only geographically but also in socio-economic, psycho-social, and ideological terms. In the process of "homecoming," "the nostalgia for a politics of place is challenged."[22] It is therefore essential to understand the meaning of return for exiles relative to myths of return.[23] These myths centre not only on the likelihood of return, but also on the timing and context to which an exile will return.[24] This can create unrealistic expectations for returning exiles, which are difficult to fulfil in the country of origin.[25]

Parker[26] and Warner[27] note that returning to their country of origin does not necessarily mean going "home," because exiles may have found other "homes," fulfilled their aspirations elsewhere, and may not necessarily be able to pursue these aspirations in post-independence Africa. Not only has the individual's life and identity evolved in exile, but the state and communities in the country of origin have changed as well.[28] The influence of time should, therefore, be considered in the rupture that may be experienced by returning exiles, and the process of adaptation and integration, into what may have previously existed or have been remembered as home.[29] The past and future are important sources of reference in the present. Muggeridge and Dona describe the first visit home as a "meeting between imagination and reality" [30] in which returning exiles are forced to confront their perceptions of home and "transition from belief to hope, from mythologizing the past to coming to terms with the present."[31] This article focuses largely on this first meeting.

It is also important to consider the life cycle and the time when "home" was defined and mythologies formed.[32] Cornish and colleagues note that "returning to a homeland



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can be as stressful as fleeing into exile. This may be especially true for second-generation refugees born in exile, who are likely to find 'home' a strange or even threatening place."[33] They are bearers of "postmemory"[34] in that they have formed idealized impressions of "home" through their identification with their parents. Many cope with these dashed expectations by identifying themselves with other returnees, contributing to their isolation from local communities.[35]

This study will consider the manner in which second-generation exiles have navigated the myths and realities of return in post-apartheid South Africa in relation to evolving legislative, political, socio-economic, and interpersonal contexts.

## Legal-Policy Context

### *Definitions*

The right to flee and seek assistance from political persecution was first articulated in Article 14(1) of the *Universal Declaration of Human Rights*.[36] Since then, the *Convention Relating to the Status of Refugees* has been adopted to form the foundation of international refugee law. It defines the term *refugee* as "any person who has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group, or political opinion; is outside of his/her country of origin; and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution."[37] South Africans in exile, by virtue of their having fled the apartheid regime, clearly met the definition of a refugee under both refugee conventions.[38]

The Organization of African Unity's *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) adapted the definition of refugee to include groups of persons escaping civil disturbances. A refugee is defined under this convention to be "any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality."[39] This means that "individuals and large numbers of people"[40] fleeing "civil disturbances, widespread violence and war"[41] are also entitled to claim refugee status without showing proof of their individual circumstances beyond the fact that they come from a particular region. In its 1985 *Resolution on the Root Causes of the African Refugee Problem*, the council ministers noted that "the oppressive systems of apartheid, colonialism and racism constitute major causes for the exodus of refugees from South Africa."[42] It referred to the situation or condition that these refugees found themselves in as a state of exile.[43]

Specific to exiled children, the General Assembly on 4 December 1986 adopted the *Resolution on Measures of Assistance Provided to South African and Namibian Refugee Women and Children*, which called upon all governments, intergovernmental organizations, and non-governmental organizations to assist refugee children outside South Africa and Namibia.[44] No distinctions were made between refugee children, unaccompanied children in exile, and the children of political exiles in this resolution.

In the specific context of this article, the United Nations High Commissioner for Refugees (UNHCR) referred to returnees as "any South African refugee and/or political exile who return(s) voluntarily to South Africa as an unarmed citizen."[45] Although it differentiated between refugees and political exiles in the title of its operational procedures, it did not distinguish between these two concepts both at a conceptual level and in terms of the level of assistance each category of persons was entitled to in the process of voluntary return.[46] As a result, the terms exile and refugee were often used interchangeably, or subsumed under the term returnee. The forthcoming section will, therefore, use the term returnee in line with key legal-policy frameworks employed at the time.

### *Voluntary Return*

On 2 February 1990, the state president's speech recognized the African National Congress (ANC) as a legitimate political party with legitimate claims.[47] It also announced the democratization of the state system, the normalization of political processes, and the onset of negotiations for a new constitution.[48] Thereafter, the release of South Africa's Nelson Mandela signalled the end of apartheid and changed the face of the region, allowing thousands of South African exiles to return home in safety.

Their return was facilitated by a number of legal and political initiatives. Chief amongst these, in 1991, a Memorandum of Understanding on the voluntary repatriation and reintegration of South African refugees and exiles was entered into between the government of South Africa and the UNHCR.[49] This granted blanket amnesty to returnees who had committed political offences before 8 November 1990.[50] Accordingly, all returnees, including those who had committed political offences or had left the territory in an irregular manner, were able to "peacefully return to South Africa without risk of arrest, detention, imprisonment or legal proceedings, whether civil or criminal, in respect of the political offences."[51]

Further, the state undertook to co-operate with UNHCR on the funding, planning, and implementation of a repatriation operation.[52] To facilitate the readmission, reception, and reintegration into South Africa of the returnees, the



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government and the UNHCR agreed upon a set of procedures published as an annexure to the memorandum.[53] After indemnity was granted by the South African Department of Justice upon receipt of documentation from UNHCR, travel documents were to be issued by the South African authorities and delivered to the UNHCR for transmission to those who were cleared for return.[54] Of primary importance was the principle that returnees participating in repatriation were acting voluntarily, and participants signed a declaration to show that their request to repatriate was made of their own free will.[55]

In the name of preserving "family unity," spouses and children of returnees who were themselves citizens of other countries were "permitted to enter and remain in South Africa on the basis of Temporary Residence Permits."[56] Similarly, surviving non–South African spouses and/or children of South African citizens who may have died while abroad were granted the right to enter and remain in South Africa to preserve their family links with the territory.[57] Mechanisms for tracing family members and for family reunification were also established.[58]

In the case of returnees who were unaccompanied minors under eighteen years of age, the South African authorities undertook to notify parents, next of kin, or guardians of their return, well in advance. They were "encouraged" to take immediate custody of these children or alternative placements would be found,[59] without prejudicing their readmission into South Africa. Commitments were made to provide humanitarian material assistance to support the returnee child, following an assessment of household conditions.[60] The UNHCR granted transportation, immediate assistance of a grant for food, basic domestic utensils and temporary shelter for each family and/or a one-time cash grant to cover essential needs.[61] This voluntary repatriation programme was praised as successful by the United Nations Human Rights Commission, which in 1993 noted with satisfaction the progress made.[62]

In addition, many thousands of exiles chose to return on their own, without participating in the repatriation programme.[63] The General Assembly, for its part, appealed to the international community to "increase humanitarian and legal assistance to the victims of apartheid, to the returning refugees."[64]

### *Reintegration*

In order to support the reintegration of returning children from exile, legal-policy and service provisions were made for their documentation, indemnity, reparations, rehabilitation, vocational training, and education.

Since the abolition of apartheid, a number of laws have been passed that have had a significant effect on the recognition of the nationality of children born or raised in exile, upon their return to South Africa. The Restoration and Extension of South Africa Citizenship Act No. 196 of 1993 restored South African citizenship to all persons, who, but for the effect of apartheid legislation aimed at their denationalization, would have been a South African citizen by birth,[65] descent,[66] or naturalization,[67] and who would not have otherwise lost their citizenship in terms of the ordinary application of the provisions of the South African Citizenship Act 44 of 1949 (hereafter the "1949 Citizenship Act"). Persons who had previously been disenfranchised were now able to pass on South African nationality to the children born to them either within the country or abroad (such as children born in exile). All laws aimed at the denationalization of non-white South Africans were repealed.[68] Two years later, the South African Citizenship Act 88 of 1995 (hereafter the "1995 Citizenship Act") was adopted to repeal and replace the 1949 Citizenship Act. This act has since governed the acquisition and loss of South African citizenship (it remains in force today, albeit in an amended form). However, for children born before 1995, only the 1949 Citizenship Act is relevant to the determination of their nationality. Nevertheless, under the provisions of the 1995 Citizenship Act, a person who was recognized as a citizen under the old act is protected and would thus remain a South African citizen.

Many children who had been raised during the apartheid era, even those who were raised primarily or exclusively in exile, bore witness to atrocities during that time or were involved in criminal activities as members of the struggle movement. Legislation aimed at facilitating their reintegration through indemnity, reparations, and rehabilitation were outlined in the Promotion of National Unity and Reconciliation Act 34 of 1995 and the Indemnity Act 35 of 1990.

In terms of education, under the Memorandum of Understanding, diplomas, certificates, or degrees acquired by returning exiles while abroad were considered as valid by the competent authorities. To facilitate the integration of any unskilled returnees—notably the youth—into the economy, provisions were made for on-the-job training and apprenticeships.[69]

It was noted that "children of the returnees were affected by the failure to guarantee schooling."[70] This led to the establishment of the Batlagae Trust in 1991 by the Oversight Committee of the National Coordinating Committee for the Repatriation of South African Exiles (NCCR) in collaboration with the liberation movements and the South Africa Council of Churches to assist the educational reintegration of political exiles, under the executive directorship of Mohammed Tikly.[71] Approximately R30 million was



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received by the trust between 1992 and 1995, largely from the Nordic states and a few external non-governmental organizations and South African donors. Its mandate included administering a bursary program for returnee scholars at all levels of study and the establishment of a reception centre with educational facilities for repatriated parents who could not be reunited with their families.[72]

In terms of the former, approximately 10,000 learners ranging from nursery to postgraduate level received bursaries for fees and books between 1992 and 1996. In terms of the latter, the Yeoville Community School was established to provide nursery and primary schooling to approximately 200 returning children between 1993 and 1995, with financial assistance from the provincial Department of Education. In addition, the Yeoville Educational Polyclinic provided psychological and academic support to returning children from preschool to high school levels in Johannesburg between 1993 and 2000.[73]

The Batlagae Trust also included representatives from Sacred Heart College who assessed children at Solomon Mahlangu Freedom College and expedited their repatriation and placement. Sacred Heart College raised funds independently to accommodate these children, with assistance from the Anglo-American Chairman's Fund.[74] Records from the 487th Meeting of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on 7 October 1993 noted that the trust was short of R8.5 million to assist approximately 2,600 beneficiaries in 1994.[75] However, there is little documented information available about the reach and impact of the trust in terms of second-generation exiles' well-being.

The Umkhonto we Sizwe Military Veterans Association Trust also provided scholarships to returning exiles. Apart from media articles on the misuse of R5.4 million of these trust funds by MK Veteran leaders,[76] no information is available on the scope, reach, and impact of these trusts on children.

### *Literature Review*

Various studies have considered the material and psycho-social challenges experienced by returning exiles. Reference has been made to a shortage of accommodation and employment,[77] leading to dependency on the African National Congress (ANC) settlement and chronic-illness medical aid allowances, as well as the cash grants.[78] It also led to long-term dependency on relatives for accommodation and subsistence, thereby souring interpersonal relations.[79] Many experienced a range of psycho-social challenges including post-traumatic stress syndrome,[80] "reverse culture shock," altered living conditions, dislocated social networks, unrealistic family expectations, loss of a defined collective, political identity, and realization that notions of "home" were merely "idealized" constructions.[81]

Despite the plethora of research on adult returnees, the experiences of children have been neglected. Sixteen per cent of Majondina's sample was born in exile, but the significance of this was not discussed.[82] His survey also included questions related to children's adjustment in South Africa, of which 34 per cent mentioned little or no difficulty in return and 66 per cent mentioned some to extreme difficulty. However, the nature of these difficulties and children's coping strategies were not discussed. Nine per cent of Cock's sample included people aged sixteen to twenty years; however, the findings were not disaggregated by age. She also referred to children who were left behind when their parents joined Umkhonto we Sizwe in exile and quantified the number of dependents per cadre, but she failed to discuss the particular challenges faced by these dependents as second-generation exiles or children who were "left behind."[83] Nell and Shapiro referred to exiles' "difficulty in taking on social roles such as mother, father or breadwinner."[84] However, they failed to highlight what it meant to be a child cared for by these troubled former combatants.

In other secondary sources, passing reference has been made to linguistic challenges hindering children's transition into school.[85] Lissoni stated in passing that children from former exile families were forced to leave school or join their fathers at the South African Defence Force as the result of poverty.[86] Manghezi described the challenges faced by an unrepresentative sample of four children of political leaders in returning to South Africa.[87] Ngcobo's collection of life stories also highlighted some of the challenges faced by second-generation exile children whom she described as "mutated,"[88] because they have "intrinsic or inbuilt recollection or memory card of the 'home' that others make frequent references to."[89] These exile children were shocked by "rejection," "unending joblessness," and the loss of "free-thinking attitudes, public analysis and debate" upon return to post-apartheid South Africa.[90] She also argued that their exposure to "a different reality and set of values early on in their lives—such as non-racial human and social interactions"[91] could prove to be an asset in post-apartheid South Africa. However, the extent to which the children of returning exiles can play a role in South Africa's political, social, cultural, and economic development has not been explored. Many of the second-generation exiles are now youth, who can potentially become key "agents of change"[92] in post-apartheid South Africa.

### *Methodology*

This study sought to understand the manner in which childhood was constructed and experienced in exile during



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apartheid and upon return to South Africa. This article focuses on the latter. Secondary and primary data were collected for this study. Secondary data included accredited journal articles, academic books, autobiographies, and biographies. A detailed review of media articles and legal-policy documents was also undertaken.

Primary data were collected from July 2013 to August 2014 in Gauteng, Western Cape, and Kwa-Zulu Natal Provinces. Forty-seven second-generation exiles who were born and/or spent their formative years (to the age of eighteen) in exile during apartheid and who had returned to South Africa were identified through snowballing. Non-directive questions were posed to respondents in relatively unstructured interviews, using a life history approach. The interviews were digitally recorded, transcribed, and shared with respondents to verify the data or raise concerns, although no such concerns were raised. Open coding was used to categorize and examine themes and patterns using Microsoft Word.

The ethical standards promoted by the Oral History Association of South Africa Code of Conduct guided the study.[93] This included provisions for informed written consent, the right to withdraw or seal a transcript, confidentiality and anonymity, and protected storage of data. Given the potential for "pain caused by remembering difficult memories,"[94] respondents were encouraged to contact qualified counsellors at the University of Johannesburg, although this opportunity was not taken up.

The main limitation of this study is the nature of retrospective interviews and the potential for memory lapses[95] as well as the "inauthenticity" of memories as a source of data, considering their construction and selective recovery.[96] Nevertheless, the narration of memories provides opportunities for reflection,[97] gives insight into partial perceptions and diverse versions of experiences, and may give voice to the marginalized.[98]

The sample characteristics were as follows: twenty were male and twenty-seven were female. Under official South African race classifications, twenty-seven were black, nine were Indian, six were white, and five were coloured. At the time of the interviews, four were younger than thirty years of age, sixteen were aged thirty to thirty-five, ten were aged thirty-six to forty, and seventeen were older than forty-one years.

The ages at which respondents went into exile were as follows: twenty-five were born in exile; fifteen were aged one to five years, and seven were older than seven years. Ten returned to South Africa when they were aged up to ten years, fifteen were aged eleven to eighteen years, and nineteen were older than nineteen years. Two respondents have since returned to their exile communities.

When in exile, families moved frequently. In exile, fourteen lived in one country, ten lived in two countries, fifteen lived in three countries, and seven lived in four countries. With this in mind, twenty-nine spent a period of exile in southern Africa, eighteen in eastern Africa, three in West Africa, one in South East Asia, eight in Western Europe (excluding the United Kingdom), nineteen in the United Kingdom, eleven in the former Soviet Bloc, eleven in North America, and one in Australasia. These figures are significant if one considers that the return to South Africa was one move following many others, each move bearing a potential for "rift and rupture," as argued by Said.[99]

## Findings

### *The Myth of Homecoming*

Home for many exiles was not necessarily related to geographical space, traditions, or attachments, but was associated with a "triumphant ideology or a restored people."[100] This ideology centred on beliefs of a liberated South Africa: "There was a whole language about when we go back, when we are free, and when Mandela is free. So it was definitely part of my psyche growing up, that it [exile] was a temporary situation."[101] In exile, "home" was constructed as a transitory sojourn, on a voyage leading back to South Africa.

As many were born in exile and/or spent their formative years in exile, children found themselves "parroting" their parents' "longing for home and their perception of home."[102] This longing was often based on memories of a mythic past, with its static attachments and associations: "They [my parents] didn't prepare me much, because they were thinking they were going back to fourteen years earlier, so they weren't that prepared either."[103]

Elsewhere I have discussed the political socialization of second-generation exiles.[104] At various stages in their life cycles, mythologies of "home" crystalized under the influence of narratives that emerged before they were born.[105] This informed their constructions of homecoming: "I guess growing up outside of South Africa for most of their [parents] lives, they saw post-apartheid South Africa through rose-coloured glasses and that is how we were always brought up."[106]

For most exile families, the release of Nelson Mandela was a turning point in the decision to return home. Exile communities eagerly watched television broadcasts of this event, which contributed to excited anticipation of return to the "beautiful place that South Africa will become."[107] In this period, the myths of "home" solidified. As a respondent noted, "There was a sense of things having changed, like a 'freedom will reign supreme' kind of atmosphere. So it was a very hopeful time. We believed that home was paradise,



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but when we got to South Africa, we got the shock of our lives."[108]

Some recalled having little decision-making power over the decision to return, in part because they were young: "I was just a kid, following everyone around. I wasn't given much of a choice."[109] Others actively wanted to return despite the risks: "We didn't know what it was like to go back home as exiles: my parents were not sure what would happen and if my dad would get arrested. I didn't want to wait, I wanted to go back home. It is ironic that I am calling it home, even though I had never been there."[110]

Children did not passively accept this mythology of "home" but actively interpreted and resisted it. One respondent contacted a Danish social worker seeking out alternative familial placements to avoid returning to South Africa. She described the devastation that she experienced in leaving significant social networks in exile. This desolation often played out in the "non-spaces"[111] of transit lounges, motels, and airplanes—spaces that are in fact laden with meaning. For instance, some respondents recalled experiencing motion sickness that originated less from the flight and more from "feeling sad and lonely,"[112] while others remembered feeling disconnected from the excitement and anticipation felt by their families: "My sister and my dad didn't have a problem coming out here. They were just eating toasted sandwiches while I was crying and crying. I just felt so hopeless. I felt stripped of grounding and identity."[113]

### *Interpersonal Myths and Realities*

The first visit home was indeed a "meeting between imagination and reality."[114] For children of ANC leaders, memories of arrival centred on security and public accolades: "The airplane came into the airport and it was surrounded by this perfect circle of South African police wearing dark glasses. It was extraordinary … We were put on a platform overlooking all these people. Standing up there and seeing this ocean of people, it was like 'Wow, Daddy, is this all for you?'"[115]

In contrast, many other children were confronted with the harsh reality of empty airport arrival halls that did not coincide with their expectations of return: "It was such a long flight, and when we were arriving the sun was just rising, and it sort of burst red, and it felt like a new beginning, but a heavy new beginning. They [relatives] didn't even come and meet us at the airport, and that let us know that we were coming into a battle; we weren't coming home to a sea of kisses and hugs and love."[116]

In some cases, meaningful interpersonal encounters were thwarted by the absence of shared histories: "You look like these people, but you have nothing in common. We don't have a history."[117] This was particularly salient for reunions involving siblings who were left behind. In addition to material hardships and racial prejudice, they experienced a sense of parental abandonment. Anger and guilt characterized these first unions: "They blamed me because I was given the love that should have been shared amongst all of us."[118]

Initially, many returning exile children were treated like "celebrities,"[119] but this response was quickly replaced by accusations that they had absconded from their "frontline" duties in the liberation struggle. Many spoke of an unexpectedly hostile reception from relatives and the disappointment that they felt when the "romantic view of being welcomed"[120] failed to materialize: "Certain uncles and aunts ignored me, and there you are, arriving back, expecting open arms, because you have been fighting the struggle your entire life in exile."[121]

While they were in exile, their relatives suffered under an oppressive regime. Reunions were often marred by blame and guilt: "They said that we had a better life, we were lazy and at fault for not being here."[122] Assumptions were made that exiles lived lifestyles of "champagne and money," without acknowledging the everyday struggles facing many second-generation exiles, including poverty, violence, and social exclusion: 'I suffered, maybe not in the context of being shot at by rubber bullets, but there were times when there was no food. There were times you worried about your safety. There were times when you got bullied. There were times when I felt unloved and rejected, not by my family but by the world, like no one gave a damn."[123]

In place of experiencing compassion, many second-generation exiles were jeered, taunted, and socially excluded in the playground. "Instead of being 'Wow, your father died for us,' it was more like, 'Who do you think you are? You weren't even here.'"[124] This was a shock for many children who believed that their sacrifices would be acknowledged upon return: "We were taught that we would be heroes, and all the stuff we were giving up was for this greater good, and it would be appreciated one day, and it never was."[125]

Language constraints hindered communication with relatives and peers. Respondents were called "traitors" for speaking English.[126] Many parents dedicated their time to the struggle, often at the expense of their children's linguistic development: "My mother didn't get a chance to teach me her language. She would have if she could, but you people were more important than we were. So just be grateful to them for what they did for this country. You have no right to judge us. Our parents sacrificed everything for this country, including me."[127]

Some respondents struggled to identify with cultural practices. The sudden pressure to participate in initiation ceremonies upon return fuelled frustrated exchanges



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between exile children and their parents: "You start asking your parents, 'Why didn't you do this for me when I was a child?' and they say, 'Well, we don't do that in our other [American] culture.'"[128] Another respondent spoke of being forced to undergo training as a traditional healer, despite her Western upbringing.[129] Some were chastised for behaving in a "snobby way" [130] because they found it difficult to eat unfamiliar foods or wear traditional dress. They were harried to adapt to the culture as soon as possible, often fuelling intergenerational tension.

Suddenly children were treated differently by their parents, many of whom were described as very 'liberal' in exile but upon return paid credence to traditional constructions of childhood: "Before, I could drink with my parents and tell them about my boyfriends. But in South Africa everything is now a secret and parents choose to believe their teenagers are innocent five-year-olds."[131] Many were disciplined for "talking back to the elders"[132] when engaging in what they regarded as commonplace communication and enquiry. Suddenly they had to deal with the scrutiny of a large family, which they were not used to in the relative isolation of exile.

The majority of respondents described integration into such social networks as a source of stress and disappointment: "I think central to being an exile child is that we go back to the places and communities that our parents left, as strangers. Our families, communities, and countries do not accept us."[133] As a result, many children sought out their own exile communities within South Africa. Referring to Sacred Heart School, one respondent stated, "I would gravitate to other exile kids. It felt like a different world. It was like an island. We only felt different when we left the school, like when I used to visit my cousins in the township. They called me names."[134]

*Liberation Myths and Realities*

For returning children, disappointment often centred on interpersonal struggles. For others, it was related to the uneasy meeting of myths and realities associated with liberation: "I thought to myself that we were going to come back to black, green, and gold flags flying, but it wasn't what happened. We thought the ANC comrades would be like the ones we had grown up with, so it would be a nice safe place, but I came back to a completely racist, angry space where everyone is nuts."[135] While many South Africans are critical of political and socio-economic developments, the critique voiced by second-generation exiles stems from their unique experiences in exile, the myths of return constructed in exile, and the meeting of myths and realities upon "homecoming."

Many believed that they would be returning to a liberated, free, and equal society in which racial, socio-economic, gender, and generational hierarchies would be dismantled through the struggle. However, the reality was very different, particularly in the schools and playgrounds to which they returned. Reference was made to racial discrimination from peers and teachers alike, which was particularly salient for children who had attended interracial schools, embraced cosmopolitanism, and questioned racial hierarchies in exile. White children were offended that their former black friends from exile would not play with them for fear of being ostracized by the black community; excuses included "people are going to think that I am sucking up to white people."[136] The manner in which South Africans categorize people in racial terms contradicted their construction and experiences of childhood: "People are forcing this whiteness on me. It means that when I walk into a shop, I don't get followed around in case I am going to steal, like all my black friends do. I counted myself as part of everyone else in exile, but all they care about here was that I am white."[137]

Black respondents complained that their white peers at school would exclude them, and use discriminatory language and violence: "They would say, 'Shut up kaffir,' hold me down, and beat me to a pulp."[138] Teachers openly humiliated black children in front of their peers, such as by punishing them for their "exotic" hairstyles and "tribal ways."[139] Being forced to wear a school uniform and learn Afrikaans—"the language of the oppressor"[140]—was a source of discontent shared by the majority of returning exile children.

Returning children were also concerned about levels of xenophobia in their schools, particularly since many exile families were welcomed by the same African nations that are under attack by South Africans: "Xenophobia is such a big thing, for me who has been living outside of this country and has been so warmly welcomed by all types of African people. It almost feels like a betrayal for me not to stand up for them, because they stood up for me.[141]"

Overlapping socio-economic and racial hierarchies in South Africa were particularly salient for these returning children. Upon return, many white second-generation exiles were separated in geopolitical and socio-economic terms from children with whom they had grown up in exile. When confronted with the reality of their peers living in far-off townships, "It was like, 'Oh, this is what apartheid is.' Just because the ANC was unbanned, doesn't mean apartheid was dismantled."[142]

Many black respondents who lived in North America and Western Europe provided vivid descriptions of the change in landscapes and spaces as they moved into the townships upon arrival in South Africa. The physicality of space and the sensory experience emerged as central in



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their narrated memories.[143] For instance, "After we left the airport, we were driving into the township and I remember asking Mom, 'Why is it so dark here? Why are there no street lights? Why are people living in cottages squashed together?' Immediately when we arrived, we sensed that something was not right."[144] These sensory descriptions underscore the magnitude of the socio-economic and geopolitical changes to which second-generation exiles would have to become accustomed.

Others had a different experience, particularly when they had moved from front-line states to South African middle-class suburbs. Their descriptions were equally vivid: "I remember when we got to this apartment, the gate opened by itself and I was like, 'Oh my goodness, look at this gate. We are living the life right now. This is the land of milk and honey!'"[145] The children of political leaders often referred to the sudden change in their landscapes, now comprising swimming pools, spacious gardens, and often tennis courts. Hence, during their first visit "home," second-generation exiles experienced first-hand the effect of socio-economic hierarchies, which they were brought up to believe would be dismantled in the 'liberated' South Africa. Time has done little to change this reality.

Despite being brought up to believe in a society of gender equality, many girls suddenly experienced pressure to marry and adopt subservient roles. They were unexpectedly confronted with images of their mothers "on the floor serving men,"[146] and they felt pressed to conform to these traditional constructions of gender: "There is no way to contest that very easily, because the structures are so rigid."[147] Victims of sexual and gender-based violence denounced the failure of their parents and the ANC leadership to bring perpetrators of sexual violence to justice upon return: "That messed me up … In South Africa it has been normalized by society."[148] In this regard, reference was made to the recent trial of Jacob Zuma, who, it was alleged, had raped a former second-generation exile.[149]

Gendered restrictions on freedom of movement were justified on the grounds of safety and security from violence, which many respondents argued was "not endemic in the places we grew up."[150] The narrated memories were littered with visual descriptions of the physical effect of interpersonal violence on the landscape of post-apartheid South Africa, and in turn on the construction and experience of childhood: "Our parents brought us up as highly independent, but then you come here. You can't even look out the window without these burglar bars. It was a prison. Everyone was like, 'Oh, my God, you can't walk about by yourself as a girl.'"[151]

Respondents argued that this violence is symptomatic of a "damaged society": "Right now we are all pretending that only the kids who went into the army are damaged—rubbish."[152] Through comparisons to the exile communities in which they had grown up, reference was made to the perpetuation of a "culture of violence" in post-apartheid South Africa: "We are a violent nation. We resolve things with violence and ironically the countries that I have lived in [in exile] don't."[153]

### *Political Myths and Realities*

Upon return, many second-generation exiles were confronted with a stark contrast between the political myths of a progressive and politically united country and the realities of false promises, party-political divisions, corruption, and government inefficiency. This has become particularly salient over time: "I look back and I see how naïve my parents were, how naïve we all were to think that everything is going to fall into place, that we would just return to SA and everybody would just live in harmony. I feel a lot of disappointment at the direction we are taking as a country. There has been a shift from a sense of collective to entitlement."[154]

False promises emerged as a recurrent theme in the study. While some respondents argued that exile children are no more deserving of support than those who had remained behind, many criticized the ANC for failing to live up to its obligation to returning exiles. It was argued that more should have been done to provide psycho-social assistance to second-generation exiles, who were experiencing exile yet again, ironically in their "homes" of origin: "Absolutely nothing was done for the children who went into exile. And for a lot of them, they went into exile when they came back. A lot of them are suicidal and have drinking problems. Something has to be acknowledged."[155]

Reference was also made to the maladministration and inequitable distribution of funds earmarked for second-generation exiles: "There was a situation where children of top ANC ranked members were going to good schools and those lower down were not able to access those funds."[156] The sudden suspension of a respondent's scholarship from an MK Trust Fund was attributed to corruption. Second-generation exiles are still approaching SOMAFCO for financial assistance: "It pains us, what we read about the history of SOMAFCO. It is supposed to be shared amongst us, the people of South Africa so we cannot be an exclusive group, but they [second-generation exiles] need assistance."[157] Respondents spoke of the failure of the ANC to compensate their parents for their work in exile, leaving them unemployed or eking out a meagre living in the informal economy.

Many argued that the ANC no longer represents the principles of the liberation struggle and angrily described the corruption of the ANC leadership. Political leaders were often known personally by children in exile. Their presence



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in the narratives underlines the sense of disappointment that second-generation exiles felt about the failure of the myths of liberation and return to materialize: "I feel that generation let us down. They were supposed to be leaders. You can imagine there is a scandal involving Mac Maharaj; this is the person who taught me the Freedom Charter. You don't know who to believe. People who you looked up to as heroes are being exposed as 'tenderpreneurs' and you don't know who is lying. I look at the ANC now and I don't know what can save it."[158] Others felt taunted by the images of previously beloved political leaders, who failed to address corruption and poor service-delivery: "There is this picture of Zuma, the man I grew up with, who gave me my first political lesson when I was small. There is this picture of him smiling over us, with these people treating us like animals. I remember phoning my mother and saying, 'Is this what my father died for?'"[159]

For many exile families this was a source of pain. "Homecoming" has revealed that their beliefs in the ANC and its leaders were to a large extent beliefs in myths: "We were so disillusioned. We were brought up with struggle music, but now it is too painful to listen to it. My mom made my father promise from now on, this chapter would be dedicated to us as a family and no longer to politics."[160] Even more startling is the extent to which the liberation principles that featured so prominently in the way that their childhoods were constructed have been shaken: "People turned their backs on those ideals as they turned to getting their lives in order, making money and getting top jobs. It felt like a betrayal."[161]

Although many second-generation exiles do not experience any sense of obligation towards the ANC, they described the responsibility that they feel towards their parents and those who died in the struggle. Beyond these interpersonal duties, many spoke of a deeper sense of responsibility to "take the legacy forward"[162] by continuing to live the struggle in post-apartheid South Africa: "We grew up with a vision for utopia for South Africa and we were allowed to experience some of that utopia in our childhood, but we didn't know it at the time. But now our job in the society is to create that vision for utopia from within, not from outside, but inside."[163]

Many have described themselves as "agents of change" trying to hold the leadership accountable to the principles of liberation, through their work as social commentators, journalists, academics, writers, poets, and artists. Others work actively in social development, seeking to dismantle the racial, socio-economic, gendered, and generational hierarchies described in this article. This desire to bring about change has its roots in constructions of childhoods in exile: "As a fourteen-year-old, if you asked me what I lived for, I would tell you that I lived to liberate my country, nothing more. If you asked me now, I would not tell you a different story because my purpose is not over; liberation is still needed."[164]

### *Concluding Reflections on Home, Time, and Space*

Said argues that for exiles, experiences in "new" environments occur "contrapuntally"[165] with memories of experiences in "old" environments. This holds true for those who have returned to South Africa. Their narratives contain juxtaposed descriptions of the exile past, post-apartheid present, and the potential for a future that mirrors the "myths of home" constructed in exile.

Second-generation exiles found it particularly difficult to adapt to what they were brought up to believe would be their authentic "home." The findings suggest that the first meeting of myths and realities upon arrival in South Africa set the tone for ongoing challenges in integration. These returnees were forced to confront the truth that the myths they had grown up with—the welcoming warmth of social networks, the freedom and equality of a liberated society, and a just and fair political system—did not coincide with the reality of post-apartheid South Africa. This fuelled disappointment, frustration, and nostalgia towards the exile experience.

Although this disappointment has not dissipated over time, many have carved out new roles, identities, and social networks, which have made the experience of return easier. The role of time in mediating the return and integration experience should therefore be considered. Respondents spoke of initially being forced to "choose" a singular identity confined to geographical spaces associated with exile and the country of origin. However, over time they have forged their own identities, in part as a result of their maturation.

Many have avoided the "exile" label, given its association with the negative social stereotypes described above. Instead, they have appealed to notions of cosmopolitanism and a "plurality of vision"[166] to argue that they cannot be "boxed in by territorial labels."[167] They are "children of the world"[168] and "international citizens,"[169] who are at liberty to challenge social norms, criticize unjust hierarchies, forge unrestricted social attachments, and explore the multiple and intersecting dimensions of their identities. Their identities are perpetually "becoming,"[170] and should be seen on a continuum of past, present, and future. Exile does not define them, but it has influenced their world view and sense of self.

"Home" for these cosmopolitan exiles is not within a particular country, and it does not necessarily entail "being acknowledged or accepted anywhere."[171] "Home" is far more personal, defined by each individual differently at different times, in relation to relative to varying interests, evolving



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spaces, and dynamic social networks. For some, "home" is associated with a shifting space "where affections centre,"[172] creativity thrives,[173] or attachments form. For others, "home" is associated with landscapes and sensory experiences. For many second-generation exiles in this study, "home" is centred on an unwavering belief in the vision of a liberated South Africa and a sense of duty towards bringing this vision to life.. Although notions of "home" may be populated by memories and myths, many second-generation exiles earnestly believe that the liberation vision is not a utopian myth, but can materialize as reality in post-apartheid South Africa. Many former second-generation exiles have, therefore, embraced agentic roles in order to contribute to the fulfilment of this reality.

Some second-generation exiles called for financial and material compensation from the ANC-led government, in line with the demands currently voiced by second-generation exiles who returned to Namibia.[174] In South Africa, an alternative could be the targeting of unemployed second-generation exiles in the second phase of the Youth Service program, as outlined in the National Youth Policy (2009–14) in order to develop their skills (and self-efficacy) through accredited learning, voluntary work, and eventually paid employment.[175] Alternatively, they could be targeted in the Youth Work program, so that as peer counsellors and mentors, their beliefs in the liberation vision, respect for diversity, and sense of civic responsibility can become a positive influence on other youths.[176] Some respondents recommended the strengthening of social networks, such as the SOMAFCO Trust, through funding, administrative support, and capacity building. Once again the provisions of the National Youth Policy could be applied to strengthen these social networks, which are described in this policy document as important for the development of youth identity, self-esteem, and belonging.[177] Furthermore, these networks could be capacitated to locate other second-generation exiles, who are engaged in risky behaviour and/or are particularly marginalized and vulnerable, to promote their engagement in community service, positive forms of recreation, and socio-economic inclusion. Furthermore, the policy could be used to support the development of targeted psycho-social interventions for vulnerable and marginalized second-generation exiles, many of whom have failed to adjust to the realities of post-apartheid South Africa.[178]

In addition to the concrete actions described above, all of the second-generation exiles wanted some form of acknowledgment and meaningful recognition of the diversity of the exile experience, their trials and tribulations in exile and return, and their ongoing efforts to further the liberation struggle in South Africa. As 2014 marks the twenty-year anniversary of the official dissolution of apartheid, many second-generation exiles argued that this would be an opportune time to showcase their agentic action to inspire other youth to behave as agents of change. Thus far, however, the results have been disappointing. For instance, recent television broadcasts on Heritage Day (24 September 2014) perpetuated the stereotypical images of spoilt exile children living in the lap of luxury both in exile and upon return to South Africa. This article is, therefore, timely in that it tries to draw out the complexities of return as experienced by children and highlights the important roles that many second-generation exiles are playing as social commentators, activists, and development practitioners in post-apartheid South Africa.

## Notes

1 James Clifford, "Diasporas," *Cultural Anthropology* 9, no. 3 (1994): 302–38; Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (London: Routledge, 1996).
2 Edward W. Said, *Reflections on Exile and Other Essays* (Cambridge, MA: Harvard University Press, 2000), 181.
3 Clifford, "Diasporas," 307.
4 Zonke Majondina, "Dealing with Difficulties of Return to South Africa: The Role of Social Support and Coping," *Journal of Refugee Studies* 8, no. 2 (1995): 213.
5 Said, *Reflections on Exile*, 177.
6 Ibid., 173.
7 Ibid., 181.
8 Kenneth, "Home Is Where the Heart … Lies," *Transition* 59 (1993): 67.
9 Anne-Marie Fortier, *Migrant Belongings: Memory, Space, Identity* (Oxford: Berg, 2000).
10 Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (London: Routledge, 1996), 180; and Barbara Bender and Margot Winer, eds., *Contested Landscapes: Movement, Exile and Place* (Oxford: Berg, 2001).
11 Devleena Ghosh, "Coda: Eleven Stars over the Last Moments of Andalusia," in *Critical Studies, Exile Cultures, Misplaced Identities*, ed. Paul Allatson and Jo McCormack (Amsterdam: Rodopi, 2008), 284.
12 Brah, *Cartographies of Diaspora,* 180.
13 Paul Allatson and Jo McCormack, "Introduction," in *Exile Cultures, Misplaced Identities,* ed. P. Allatson and J. McCormack (Amsterdam: Rodopi, 2008), 20.
14 Richard Black, "Conceptions of 'Home' and the Political Geography of Refugee Repatriation: Between Assumption and Contested Reality in Bosnia-Herzegovina," *Applied Geography* 22 (2002): 126.
15 Ibid., 126; and Sarah Nuttall, "Telling 'Free' Stories? Memory and Democracy in South African Autobiography since 1994," in *Negotiating the Past: The Making of Memory in South Africa*, ed. Sarah Nuttall and Carli Coetzee, 75–88 (Oxford: Oxford University Press, 2000).
16 Black, "Conceptions of 'Home,'" 126.



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17 Ibid.; and Daniel, "Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics," *Journal of Refugee Studies* 7, nos. 2/3 (1994): 160–74.
18 Warner, "Voluntary Repatriation," 165.
19 Richard Black and Saskia Gent, "Sustainable Return in Post-Conflict Contexts," *International Migration* 4, no. 3 (2006): 20.
20 Warner, "Voluntary Repatriation," 166.
21 Ibid.
22 Black and Gent, "Sustainable Return," 20.
23 Roger Zetter, "Reconceptualizing the Myth of Return: Continuity and Transition amongst the Greek-Cypriot Refugees of 1974," *Journal of Refugee Studies* 12, no. 1 (1999): 1–22.
24 Mark Graham and Shahram Khosravi, "Home Is Where You Make It: Repatriation and Diaspora Culture among Iranians in Sweden," *Journal of Refugee Studies* 10, no. 2 (1997): 115–33.
25 Black and Gent, "Sustainable Return," 15–38.
26 Parker, "Home Is Where the Heart … Lies," 67.
27 Warner, "Voluntary Repatriation," 171.
28 Ibid., 172.
29 Ibid.; and Zetter, "Reconceptualizing the Myth of Return," 1–22.
30 Helen Muggeridge and Giorgia Dona, "Back Home? Refugees' Experiences of Their First Visit Back to Their Country of Origin," *Journal of Refugee Studies* 19, no. 4 (2006): 427.
31 Ibid.
32 Black, "Conceptions of 'Home,'" 127.
33 Flora Cornish, Karl Peltzer, and Malcom Maclauchlan, "Returning Strangers: The Children of Malawian Refugees Come 'Home'?" *Journal of Refugee Studies* 12, no. 3 (1996): 265.
34 Marianne Hirsch, "Past Lives: Postmemories in Exile," in *Exile and Creativity: Signposts, Travellers, Outsiders, Backward Glances,* ed. S.R. Suleiman (Durham, NC: Duke University Press, 1998), 420.
35 Cornish, Peltzer, and Maclauchlan, "Returning Strangers," 279.
36 Article 14(1) of *Universal Declaration of Human Rights,* Resolution 217 A (III) of 10 December 1948. United Nations, General Assembly. Paris.
37 United Nations, *Treaty Series* (189): 137. Entered into force 22 April 1954.
38 Sam Amaize Aiboni, *Protection of Refugees in Africa* (Uppsala: Svenska Institutet For Internationell Ratt, 1978), 32.
39 Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 UNTS 45, refworld, http://www.refworld.org/docid/3ae6b36018.html.
40 Rachel Murray, *Human Rights in Africa* (Cape Town: Cambridge University Press, 2004), 188.
41 Kate Jastram and Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (Geneva: UNHCR and Inter-parliamentary Union, 2001), 13, http://www.ipu.org/pdf/publications/refugee_en.pdf.
42 Council of Ministers of the Organisation of African Unity, *Resolution on the Root Causes of the African Refugee Problem* (CM/Res 987(XLII), Forty-Second Ordinary Session in Addis Ababa, Ethiopia. See also *International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa* (CM/Res. 1181 (XLIX).
43 C. O. C. Amate, *Inside the OAU: Pan-Africanism in Practice,* New York: St. Martin's, 1986), 471.
44 United Nations General Assembly, *Resolution on Measures of Assistance Provided to South African and Namibian Refugee Women and Children* (GA Res 41/123) of 4 December 1986. On this topic, see also General Assembly resolutions 34/93 K of 12 December 1979, 35/206 N of 16 December 1980, and 36/172 K of 17 December 1981.
45 *Memorandum of Understanding between the Government of the Republic of South Africa and the United Nations High Commissions for Refugees on the voluntary repatriation and reintegration of South African refugees,* GN 2814, published in Government Gazette 13644 on 29 November 1991.
46 UNHCR, "South Africa Repatriation Operation: Information for South African Refugees and Exiles on Voluntary Repatriation," 24 October 1991.
47 Bertus De Villiers, *Birth of a Constitution* (Cape Town: Juta, 1994), 4.
48 Ibid.
49 Section 3(a), *Memorandum of Understanding.*
50 Ibid.
51 Section 3(b), *Memorandum of Understanding*
52 Ibid., Section 4(d), *Memorandum of Understanding.*
53 Annexure A, *Memorandum of Understanding.*
54 Section 8, Annexure A, *Memorandum of Understanding.*
55 UNHCR, "South Africa Repatriation Operation."
56 Section 13, Annexure A, *Memorandum of Understanding.*
57 Ibid.
58 Section 14, Annexure A, *Memorandum of Understanding.*
59 Section 19, Annexure A, *Memorandum of Understanding.*
60 Section 22(b), Annexure A, *Memorandum of Understanding.*
61 Section 22(c), Annexure A, *Memorandum of Understanding.*
62 Commission on Human Rights, Resolution 1993/9 of 24 February 1993.
63 UNHCR, "Lesotho Marks the End of an Era for Apartheid's Refugees," 26 August 2002, http://www.unhcr.org/3d6a139e4.html.
64 Resolution A/RES/48/159, Elimination of apartheid and establishment of a united, democratic and non-racial South Africa (24 January 1994) section 13.
65 Section 3, *Restoration and Extension of South Africa Citizenship Act No. 196 of 1993.*
66 Ibid.
67 Section 4, *Restoration and Extension of South Africa Citizenship Act No. 196 of 1993.*



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68 Section 5, *Restoration and Extension of South Africa Citizenship Act No. 196 of 1993*.
69 Article 24, Annexure A, *Memorandum of Understanding*.
70 James Ngculu, *The Honour to Serve: Recollections of an Umkhonto Soldier* (Claremont: David Philip, 2010), 206–7.
71 "Batlagae Trust Records, 1991–2002," ANC Archives, http://ancarchives.africamediaonline.com/?page_id=62.
72 Ibid.
73 Ibid.
74 Neil McGurk, "History of Sacred Heart College," unpublished, 2014.
75 Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of Forty-fourth Session, 487th Meeting*, 7 October 1993, Geneva (A/AC.96/SR.487, 12 October 1993).
76 Lionel Faull, "Leading MK Vets 'Looted Millions,'" *Mail and Guardian Online*, 14 June 2012, http://mg.co.za/article/2012-06-14-leading-mk-vets-looted-millions.
77 Ngculu, *Honour to Serve*; and M. Nell and J. Shapiro, *No Place by the Fire: The Story of South African Ex-Combatants and the National Peace Accord Trust*, 2012, http://www.atlanticphilanthropiesorg/sites/default/files/uploads/NoPlacebytheFire.pdf; Jacklyn Cock, "The Social Integration of Demobilised Soldiers in Contemporary South Africa," *South African Defence Review* 12 (1993): 1–16; and Majondina, "Dealing with Difficulties."
78 Ngculu, *Honour to Serve*, 206–7.
79 Ibid.
80 Nell and Shapiro, *No Place by the Fire*.
81 Majondina, "Dealing with Difficulties," 223.
82 Ibid.
83 Cock, "Social Integration of Demobilised Soldiers."
84 Nell and Shapiro, *No Place by the Fire*.
85 Christopher S. Wren, "Uneasily, South Africa Exiles Return," *New York Times*, 12 March 1991.
86 Arianna Lissoni and Maria Suriano, "'Married to the ANC: Tanzanian Women's Entanglement in South Africa's Liberation Struggle," *Journal of Southern African Studies* 40, no. 1 (2014): 129–50.
87 N. Manghezi, *The Maputo Connection* (Johannesburg: Jacana Media, 1991).
88 Lauretta Ngcobo, *Prodigal Daughters* (Durban: University of KwaZulu-Natal Press, 2012).
89 Ibid., 91.
90 Ibid., 44.
91 Ibid., 46.
92 Office of the Presidency, *National Youth Policy 2009–2014* (Pretoria, 2009), 6, http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/YouthPublications/NationalYouthPolicyPDF/NYP.pdf.
93 Philippe Denis and Radikobo Ntsimane, *Oral History in a Wounded Country: Interactive interviewing in South Africa* (Pietermaritzburg: University of KwaZulu Natal Press, 2008).
94 Ibid.
95 Ghosh, "Coda," 284.
96 Nuttall, "Telling 'Free' Stories"; and Gary Minkley and Ciraj Rassool, "Orality, Memory, and Social History in South Africa," in Nuttall and Coetzee, *Negotiating the Past*, 90–8.
97 Njabulo Ndebele, "Memory, Metaphor and the Triumph of Narrative," in Nuttall and Coetzee, *Negotiating the Past*, 20.
98 Ingrid de Kok, "Cracked Heirlooms: Memory on Exhibition," in Nuttall and Coetzee, *Negotiating the Past*, 61.
99 Said, *Reflections on Exile*, 181.
100 Ibid., 177.
101 Interview, female respondent, Johannesburg, 3 June 2013.
102 Interview, female respondent, Johannesburg, 3 August 2013.
103 Ibid.
104 Zosa O. De Sas Kropiwnicki, "Childhood in Exile: The agency of Second-Generation Exiles Seeking Refuge from Apartheid," *Refuge* 30, no. 1 (2014): 35–46.
105 Black, "Conceptions of 'Home,'" 127; and Hirsch, "Past Lives," 420.
106 Interview, female respondent, Johannesburg, 22 May 2013.
107 Interview, male respondent, Johannesburg, 17 May 2013.
108 Interview, male respondent, Johannesburg, 21 January 2014.
109 Interview, male respondent, Johannesburg, 4 September 2013.
110 Interview, female respondent, Johannesburg, 3 June 2013.
111 Bender and Winer, *Contested Landscapes*, 9.
112 Interview, male respondent, Johannesburg, 17 May 2013.
113 Interview, female respondent, Johannesburg, 3 August 2013.
114 Muggeridge and Dona, "Back Home?," 427.
115 Interview, female respondent, Johannesburg, 30 May 2013.
116 Interview, female respondent, Johannesburg, 22 May 2013.
117 Interview, female respondent, Johannesburg, 30 May 2013.
118 Interview, male respondent, Johannesburg, 21 January 2014.
119 Interview, female respondent, Johannesburg, 3 June 2013.
120 Interview, female respondent, Johannesburg, 31 August 2013.
121 Interview, male respondent, Johannesburg, 28 May 2013.
122 Interview, female respondent, Johannesburg, 23 May 2013.
123 Ibid.
124 Interview, female respondent, Johannesburg, 6 June 2013.
125 Ibid.
126 Interview, male respondent, Johannesburg, 17 May 2014.
127 Interview, female respondent, Johannesburg, 30 May 2013.
128 Interview, male respondent, Johannesburg, 28 May 2013.
129 Interview, female respondent, Johannesburg, 23 May 2013.
130 Interview, female respondent, Johannesburg, 23 November 2013.
131 Interview, female respondent, Johannesburg, 3 August 2013.
132 Interview, male respondent, Johannesburg, 4 September 2013.



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133 Interview, female respondent, Johannesburg, 3 August 2013.
134 Interview, female respondent, Johannesburg, 23 May 2013.
135 Interview, female respondent, Johannesburg, 6 June 2013.
136 Ibid.
137 Ibid.
138 Interview, male respondent, Johannesburg, 4 September 2013.
139 Interview, female respondent, Johannesburg, 23 November 2013.
140 Interview, female respondent, Johannesburg, 6 June 2013.
141 Interview, female respondent, Johannesburg, 23 November 2013.
142 Ibid.
143 Bender and Winer, "Contested Landscapes," 5.
144 Interview, male respondent, Johannesburg, 17 May 2014.
145 Interview, female respondent, Johannesburg, 23 November 2013.
146 Ibid.
147 Interview, female respondent, Johannesburg, 6 June 2013.
148 Interview, female respondent, Grahamstown, 4 June 2013.
149 Interview, female respondent, Johannesburg, 23 June 2013.
150 Interview, female respondent, Johannesburg, 3 June 2013.
151 Interview, female respondent, Johannesburg, 3 August 2013.
152 Interview, male respondent, Johannesburg, 28 May 2013.
153 Interview, female respondent, Grahamstown, 4 June 2013.
154 Interview, male respondent, Johannesburg, 21 January 2014.
155 Interview, female respondent, Johannesburg, 3 August 2013.
156 Interview, male respondent, Johannesburg, 24 May 2013.
157 Interview, female respondent, Johannesburg, 24 May 2013.
158 Interview, female respondent, Johannesburg, 6 June 2013.
159 Interview, female respondent, Johannesburg, 6 June 2013.
160 Interview, female respondent, Johannesburg, 23 May 2013.
161 Interview, female respondent, Johannesburg, 23 November 2013.
162 Interview, female respondent, Johannesburg, 5 June 2013.
163 Interview, female respondent, Johannesburg, 22 May 2013.
164 Interview, female respondent, Johannesburg, 17 August 2013.
165 Said, "Reflections on Exile," 186.
166 Ibid.; and Hilda Bernstein, *The Rift: The Exile Experience of South Africans* (London: Jonathan Cape, 1994).
167 Interview, female respondent, Johannesburg, 3 August 2013.
168 Ibid.
169 Interview, female respondent, Johannesburg, 17 August 2013.
170 James Clifford, "Partial Truths," in *Writing Culture: The Poetics and Politics of Ethnography*, ed. J. Clifford and G. E. Marcus, 91–6 (Berkeley: University of California Press, 1986).
171 Interview, female respondent, Johannesburg, 3 August 2013.
172 Parker, "Home Is Where the Heart … Lies," 67.
173 Said, "Reflections on Exile," 173–83.
174 See for example AFP, "Namibia Struggle Child Shot Dead," News24, 27 August 2014, http://www.news24.com/Africa/News/Namibia-struggle-child-shot-dead-20140827.
175 The Presidency, *National Youth Policy 2009–2014* (Pretoria: Government Printer, 2009), 33–5, http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/YouthPublications/NationalYouthPolicyPDF/NYP.pdf.
176 Ibid., 35–6.
177 Ibid., 29–33.
178 Ibid.

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# Seen in Its True Light: Desertion as a Pure Political Crime

Amar Khoday


### Abstract

*Individuals from democratic states who flee state prosecution and seek refugee status in Canada face significant challenges in obtaining asylum. There is a strong presumption that the legal system of their country of nationality will provide adequate procedural safeguards. This presumption extends to US military deserters who refused to serve in Iraq. The consequence is that numerous claimants have been denied over the past decade.*

*This article contends that where the feared prosecution relates to a political crime, there should not be a presumption of state protection. Furthermore, the article posits and discusses why desertion should constitute a pure political crime much like treason, sedition, or espionage. Lastly, the article argues, pursuant to United Nations policies, that such deserters should be able to obtain refugee status only where their desertion constitutes a refusal to be associated with military actions that are internationally condemned as contrary to the basic rules of human conduct.*

### Résumé

*Les personnes originaires de pays démocratiques faisant face à des poursuites font face à plusieurs difficultés lorsqu'elles fuient leur pays et font une demande d'asile au Canada. Il y a en effet une forte présomption que le système légal de ces pays peut assurer une procédure judiciaire sécuritaire et équitable. Ces présomptions s'appliquent également dans le cas des militaires américains qui ont déserté pour éviter de servir en Irak. Plusieurs demandes d'asile ont par conséquent échoué pendant la dernière décennie. Cet article avance qu'il ne devrait pas y avoir de présomption de sécurité lorsque les procédures judiciaires relèvent de crimes politiques. De plus, on y argumente que la désertion devrait être considérée comme un véritable crime politique, tout comme le sont la trahison, la sédition et l'espionnage. Enfin, cet article montre, en accord avec les politiques des Nations Unies, que les déserteurs devraient obtenir le statut de réfugié seulement lorsque leur désertion consiste en un refus de participer à des manœuvres militaires qui sont internationalement condamnées en raison de principes moraux humains.*


### Introduction

Soldiers play important roles in the defence of their nation. However, there are reasonable legal limitations to what they should be expected to do in the name of defending their country or in combatting an internal insurgency against the state. The legal limitations can be located in international conventional and customary law as well as domestic law. Throughout history, and despite the presence and development of these norms over the past century, many governments (including those elected in democratic states) have required their soldiers to engage in armed conflict that is not defensive (despite claims to the contrary). In many other situations, even where the lawfulness of the armed conflict itself may not be in question, governing authorities have ordered soldiers to commit acts that are unlawful and in violation of the laws of war. Just as soldiers play an important role in defending their nation, they also serve an important function as legal agents by deserting the military as a way of refusing to (further) engage in unlawful actions that violate international norms. In these particular circumstances, they may be viewed as temporary and



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context-dependent public office-holders at international law[1] stepping in to act where superiors, states, and/or the international community have failed to do so.

Nevertheless, desertion as a form of political resistance comes at a significant price to the principled military resister. Some will submit to the home state's punishment, while others will also legitimately seek asylum in other countries to avoid it. There is a logical reason why soldiers who desert in order to refuse participation in violations of international law seek protection from a third-party state. Deserting soldiers face prosecution and potentially severe punishment for their resistance. In some jurisdictions, this includes the possibility of a death sentence.[2] It is therefore a serious crime.[3] Are such individuals eligible for political asylum under international law? Indeed, soldiers who desert the military as an act of resistance to unlawful military actions and who then seek asylum in a third-party state to avoid prosecution as a form of persecution in their countries of nationality have been deemed eligible to obtain refugee status under the 1951 Convention Relating to the Status of Refugees[4] and/or the 1967 Protocol Relating to the Status of Refugees.[5] There is a fairly well-established jurisprudence confirming this.[6]

Not every foreign military resister has been able to obtain this protection in Canada, however. Soldiers from fellow democratic states who have sought refugee status in Canada, for example, have been largely unsuccessful. As I discuss in this article, this includes US soldiers who have deserted to avoid (further) participation in military operations in Iraq following the illegal invasion of the country in 2003. When military resisters seek refugee status to avoid prosecution and punishment, they must—like all other such asylum-seekers—prove that they have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion.[7] Yet demonstrating a fear of prosecution for desertion may not be easily conducive to showing a well-founded fear of persecution.[8] It is contingent on the proof of certain elements. Asylum-seekers must show, as part of a well-founded fear of persecution, that their country of nationality is unable to provide adequate protection.[9] In the case of US military resisters, many Canadian judges and adjudicators have determined that because the US military court system provides adequate protection through procedural safeguards, their claims for refugee status fail.[10] Typically, if sufficient state protection is unavailable, it must be determined whether the conduct that is alleged to be persecutory provides an objective basis for a well-founded fear of persecution.[11] This persecution must then also have a nexus to one of the above-mentioned convention grounds such as "political opinion." Political opinion has been defined under Canadian law as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[12] The notion of what constitutes the "political" is heavily tied to the state. While desertions may be politically motivated, not all deserters will be considered eligible for refugee status. However, the UNCHR *Handbook* provides that where a soldier refuses to be associated in a military action that is internationally condemned as contrary to the basic rules of human conduct, punishment for desertion can be viewed as persecution.[13] Although the UNCHR Handbook is not binding on states party to the Refugee Convention and/or Protocol, this above-mentioned provision has been applied numerous times in refugee cases relating to deserters and has become a recurring feature within the jurisprudence on deserters seeking refugee status.[14]

Given that state protection has been so critical to the denial of US war resisters seeking refugee status in Canada, in this article I focus on the analytical stage of assessing the existence or absence of state protection as part of the overall analysis of determining whether there is a well-founded fear of persecution. Flowing from the Hinzman decision of the Canadian Federal Court of Appeal,[15] Federal Court of Canada justices as well as panel members at the Immigration and Refugee Board have determined largely that there is a substantial presumption that because the United States is a democratic state, it protects its deserting soldiers by providing fair and impartial trials replete with procedural protections.[16] This approach has also received scholarly support from Patrick J. Glen, who contends, "U.S. deserters in Canada do not qualify as refugees under international or Canadian law, and should not be afforded such status no matter how much sympathy one may feel towards them."[17] For Glen (and likely many others), the "[d]eserters have committed a crime. Deserters' actions cannot be justified under any acceptable rubric of refugee law."[18]

In this article, I respectfully take a view different from Glen's and make three arguments with respect to these cases. First, there should be no presumption of state protection, even in democratic states where the fear of state prosecution relates to an offence such as desertion, which is in essence a (pure) political crime. Flowing from the underlying rationale for the political crimes exception rooted in international refugee law and extradition law, there is significant doubt that courts in the prosecuting state can be fair and impartial when the target of the crime is the state itself. Second, assuming that the fear of prosecution for political crimes eliminates the presumption of state protection accorded to courts in an asylum-seeker's country of nationality, I address whether military desertions are indeed "political crimes." As I elaborate in greater detail below, desertions are in essence political crimes, given that the main "victim" or



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target of an act of desertion is the state. Furthermore, such desertions should be designated as "pure political crimes" akin to offences such as treason, sedition, and espionage. Third, I contend that even as a pure political crime, a desertion must still meet the test established in jurisprudence and formulated by the United Nations High Commissioner for Refugees (UNHCR). That is, the desertion is one that is committed to avoid association with military actions that are internationally condemned as contrary to the basic rules of human conduct as set out in paragraph 171 of the UNHCR *Handbook*.[19] Thus even if desertions should be more broadly viewed as pure political crimes as part of the state protection analysis, this will not mean that every such act will give rise to an individual obtaining refugee status if the requirements of paragraph 171 are not satisfied.

### State Protection and Political Crimes

Underlying the concept of state protection is the belief that states have an obligation to protect their own citizens. Asylum-seekers must first seek protection from their own country of nationality before seeking "surrogate" protection from a third-party state.[20] Typically the expectation is that one must first seek protection from law enforcement or other appropriate agencies of the executive branch charged with enforcing the laws in the jurisdiction. This is particularly relevant where the agents of persecution are non-state actors or minor government actors acting perhaps in an unsanctioned manner. However, where the alleged agents of persecution are in fact law enforcement authorities themselves, where is the asylum-seeker to turn to? The jurisprudence indicates that where a well-founded fear of persecution relates to a prosecution for a crime, one is expected to turn to judicial authorities to ensure that a fair and impartial trial is held. Yet when the offence in question is political, that is to say a crime that is directed primarily at the state or government for the purpose of challenging its policies, the presumption of fairness and impartiality should not be taken for granted.[21]

The presumption of state protection as a basis for rejecting deserting US soldiers' claims for refugee status in Canada has been a recurrent issue in recent years.[22] This has been the case specifically for the numerous US soldiers who have refused to serve in Iraq and more recently includes those refusing to return to fight in Afghanistan. The main basis for their rejection has been the presumption that the United States, as a democratic state, provides sufficient state protection through procedural guarantees of fairness during trials, including military proceedings.[23] This then requires the asylum-seeker to provide "clear and convincing confirmation of a state's inability to protect."[24] Because the United States is presumed to be capable of protecting its own citizens, through the existence of an independent judiciary, asylum-seekers from the United States are deemed to bear a heavy burden in attempting to rebut the presumption that their state is incapable of protecting them.[25]

This poses an important question: can a legal system that can otherwise provide a fair and impartial trial in the prosecution of non-political offences prevent against individual and/or institutional biases that arise when the crime being prosecuted is inherently a political crime?[26] If it could, would it then not undermine the rationales underlying the political crimes doctrine that has developed both in extradition and refugee law? Although extradition law and refugee law serve and advance different purposes more generally, a common theme running through both legal regimes is the political crimes exception. At this stage it will be useful to consider these rationales and the relevance of the political crimes doctrine to refugee protection and state protection.

A central purpose of the political crimes exception, which developed in extradition law within the nineteenth century, was to protect individuals from being returned to jurisdictions where they may be subjected to unfair trials and punishments because of their political opinions that form the basis of their actions.[27] Prior to the creation of today's refugee protection system founded within the Refugee Convention and Protocol, extradition law's adoption of the political crimes exception effectively operated as a form of political asylum. As Lord Reid of the House of Lords once observed, the political crimes exception within the extradition context gave effect to the principle that asylum should be offered to political refugees.[28] Extradition law's protection for political refugees extends to today. Canada's Extradition Act, for instance, mandates that individuals shall not be extradited where the purpose of the extradition is to prosecute or punish individuals because of their "political opinion,"[29] or with respect to a "political offence or an offence of a political character."[30] Such protections do not exclude instances where the state seeking extradition is a democratic one.[31] The clear assumption underlying the political crimes exception is that states cannot provide fair trials in cases where the primary nature of the crime for which extradition is sought is political.

The political crimes exception has also become incorporated within the framework of international refugee law through Article 1F(b) of the Refugee Convention.[32] It states that the "provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee."[33] By its plain terms, the individual who is designated as having committed "serious non-political crimes" is the person whose exclusion is mandated, not the



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political criminal or someone who has committed a less serious or minor non-political crime.[34] An underlying concern of the Convention's framers was with allowing criminals who have committed serious crimes to escape legitimate prosecution by claiming refugee status.[35] Through their examination of the drafting history of Article 1F(b), James Hathaway and Michelle Foster demonstrate that there was a strong correlation between political crimes within the extradition context and its expected role in the refugee protection regime.[36] Specifically, the framers were focused on preventing fugitives who committed serious non-political crimes from availing themselves of the protections offered in the Convention.[37] As Hathaway and Foster articulate, the "inclusion of the 'non-political crime' proviso thus furthers the general purpose of ensuring that only persons whose admission would threaten the integrity of the refugee protection system are excluded by Art. 1F(b)."[38] Since political criminals were not viewed as bona fide fugitives from justice, they did not pose such a threat.[39]

In addition to the drafting history, some courts have also emphasized the connection between the political crimes exception in extradition law and refugee law.[40] Indeed in the case of *Gil v Canada,* the Canadian Federal Court of Appeal, after extensively reviewing the political crimes extradition jurisprudence, adopted the legal test used in Anglo-American political crimes cases in extradition law for application in the Article 1F(b) context.[41]

It is worth observing that while the political crimes doctrine continues to exist, there have been significant international and domestic efforts to limit its scope, particularly where the use of violence has been employed. In many cases, various crimes are explicitly excluded as qualifying as a political crime, including murder.[42] This is regardless of the fact that the victim of such a crime may be a legitimate non-civilian target and the means employed were not disproportionate. Similarly, in other instances, broadly worded legislation within refugee law has specifically deemed individuals inadmissible for conduct that also involves any use of force, regardless of the nature of the target, the nature of the oppression being countered, or the proportionality of the means adopted.[43] However, despite these significant changes, military desertion has not been excluded explicitly and certainly does not qualify as being a violent crime.

Given this history of protecting political offenders, it seems reasonable that where the fear of state prosecution is for a political crime, the presumption of state protection should not come into play.[44] As noted above, the political crimes doctrine was created in part because there were serious doubts that the legal systems wherein the crimes took place could provide fair and impartial trials to political offenders. While it may not necessarily be the case that all states will be unable to provide adequate safeguards as part of their mandate to provide state protection, given that all refugees must meet the burden of establishing a well-founded fear of persecution (which necessarily includes a finding of inadequate state protection), those refugees who fear political persecution at the hands of the state should, almost by definition, have a less difficult time satisfying this burden.[45]

Where soldiers are involved, the prosecutions take place within the specific context of courts martial. Such courts are seldom interested in the political motivations of deserting soldiers and antagonistic to (at least) open demonstrations of disobedience and desertion.[46] There is an institutional bias within the military against desertions and disobedience, and it is reflected in legal norms.[47] Even where a military judge may view the conduct of the deserter sympathetically, there may be ramifications to such a jurist for legitimizing an act of desertion. In recent years, Federal Court of Canada decisions have held that US military judges lack adequate independence and thus may cater to the actual or perceived attitudes held by superiors toward deserters.[48] Specifically, such judges lack security of tenure and sufficient institutional independence.[49] As a general rule, tenure may be secured through fixed appointments and removal only for just cause. Institutional independence is marked by the tribunal's control over the day-to-day running of its functions. Both are missing in the US military court system and relevant to the issue of whether state protection exists. However, even assuming US military judges and courts had the indicia of independence, there is the inherent bias against desertion, given its political nature and the need to maintain the chain of command and discipline. This is why the political crimes exception ought to play a role in the analysis of state protection under Article 1A(2) of the Refugee Convention and invalidate a presumption of state protection.

Certain questions still remain. Even if a prosecution for a political crime should give rise to a negation of the presumption of state protection in the case of political crimes, is desertion considered a political crime as matter of law? If not, should it be?

### *Desertion: A Pure Political Crime?*

In this section, I articulate why military desertions can and should be considered political crimes, specifically pure political crimes. At present they are not explicitly considered political crimes at all. As developed in extradition and refugee law, there is a recognized distinction between "pure" and "relative" political crimes. Pure political crimes are offences aimed directly at the state: treason, sedition, and espionage.[50] Such offences do not violate the private rights



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of individuals.[51] By contrast, relative political offences are "common law offences" such as murder (that do affect, by implication, individual rights but), are motivated by political objectives.[52] As desertions do not implicate the rights of other individuals (at least directly), there cannot be any basis for designating them as relative political crimes.

Desertions should be considered pure political crimes because the main "victim" of the crime is the state. A desertion is essentially the refusal to (continue to) bear arms for the state (or other entity to which allegiance was given). Desertions bear a sufficiently close relationship to acts of treason, sedition, and espionage such that they should be considered pure political crimes. An examination of these three offences illustrates this point. Definitions of treason, sedition, and espionage are not uniformly worded. Yet the common element is the target of these crimes—the state. Treason includes armed attacks on the state or the attempt to overthrow the government.[53] Treason is also defined as attacks on the life of the head of state and significant public officials.[54] Sedition is designated as the advocacy to effect any governmental change through the use of force.[55] Espionage involves the disclosure of confidential or secret state information to another government without the permission of the state that holds the secret.[56] There will be instances where deserting soldiers or officials will engage in specifically treasonous or seditious acts as well as espionage after their defection, but the act of desertion itself is not included within the definitions of these specific crimes.

Although these offences are likely to be driven in part, if not in substantial measure, by the political motivation(s) of the perpetrator, the presence or absence of such motivation(s) is not necessary for an offender to qualify for the "pure" political crimes exception.[57] Feasibly, a paid assassin or mercenary who is not motivated by political objectives can still commit treason, sedition, or espionage that advances the cause of political freedom in a totalitarian state. There is nothing illegitimate about such hired persons advancing the goals of resistance to an oppressive government and their being granted protection to avoid a politically motivated and biased trial.

Drawing from the observations above, should desertions qualify as pure political crimes? Like the aforementioned offences, desertion is a crime against the state. A soldier who deserts at a time of armed conflict in particular deprives the government or ruling authority, at minimum, of an asset to fight an opposing force in the said conflict. If the soldier deserts for specific political reasons—for example, the refusal to advance the goals of an oppressive and/or illegal military action—it is no less a political crime than that of the "freedom fighter" who seeks to overthrow the government by force, who calls for the overthrow of the state through direct military action, or the spy who provides crucial data that will facilitate an attack on the oppressive government's defences or security network. Where the deserting soldier is of a higher rank, the government's interests may be further imperilled by the danger of other soldiers being influenced.[58] This is of particular concern to governments that rely on voluntary recruitment or conscript their personnel.

As with treason, sedition, and espionage, statutes defining desertion do not require that the political motivations of the accused constitute an element of the offence.[59] The subjective fault requirement is that the soldier intended to avoid his or her duties. Nevertheless, military desertions are inherently political acts. One may go so far as to say that regardless of the political reasons that an individual has deserted, the act of desertion from the military is and should be considered a political one by its very nature and its impact on the state as the "victim" or object of the offence. The Canadian Federal Court of Appeal has affirmed Guy S. Goodwin-Gill's position that "[m]ilitary service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority, it is a political act."[60]

Lastly, another factor that suggests that desertion should be considered a political crime is the fact it has not yet been considered a serious non-political crime. Or, put another way, soldiers seeking asylum have not been excluded from being designated refugees by virtue of their desertion, having been construed as a serious non-political crime. To recall, Article 1F(b) of the Refugee Convention requires exclusion where there are reasonable grounds to consider that an asylum-seeker has committed a serious non-political crime. Desertion is most certainly a serious offence, given the considerable penal consequences that may be imposed on a deserting soldier. If desertion is a serious non-political crime, it is curious that this has not been used to exclude soldiers seeking refugee status. It would surely be an easy way to exclude an individual without having to engage in an analysis of the claim for refugee status under Article 1A(2). It is a technique that decision-makers at the Immigration and Refugee Board have employed in other circumstances: exclusion under Article 1F(a) of the Convention.[61]

Interestingly, and in connection with deserting US soldiers who have avoided (re)deployment in Iraq, the use of Article 1F(b) could avoid the seemingly unnecessary (and potentially) embarrassing determination of whether the United States is a jurisdiction that fails to provide suitable legal protections. It focuses on the fact that the individual in question belongs to an excludable class of persons—criminals as a result of their act of desertion. The likely reason that



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tribunals and courts do not exclude asylum-seekers on the basis of such a designation may well be the fact that they implicitly recognize such desertions, as well as others, for what they are: political crimes. This is particularly so when the desertion is the manifestation of a selective conscientious objection in accordance with paragraph 171 of the UNCHR *Handbook*.[62] All of this stands to reason that if desertion from the military during a time of armed conflict is a political crime (in addition to being designated a military crime too), this should give rise to concerns about the level of protection any state will practically be able to give during a criminal prosecution with respect to such a political criminal.

### *Paragraph 171 Desertions*

It may cause consternation for some to regard desertions as "pure" political crimes as a matter of law, for the perception may be that it will open the floodgates for every military deserter to claim refugee status. Yet in order for deserters to secure refugee status, it must be shown that prosecution and any punishments that arise therefrom amount to persecution. That persecution must also be connected to a Convention ground, including political opinion. Not every desertion motivated by political opinions will justify the granting of refugee status. To recall, paragraph 171 of the UNCHR *Handbook* provides that

> [n]ot every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.[63]

As such, even if desertion is to be considered a pure political crime, within the context of an inclusion analysis under Article 1A(2) there is still the necessity to determine whether the well-founded fear of persecution has a nexus to, in this case, a political opinion. That political opinion, however, must also be connected to such military conduct that is condemned by the international community as contrary to the basic rules of human conduct.

Although paragraph 171 does not spell out what actions fall within its purview, case law from Canada and other jurisdictions has provided guidance. They include[64] the refusal to participate or assist in the prosecution of chemical warfare;[65] participate in an international armed conflict that was initiated without just cause;[66] take part in the murder of non-combatants;[67] fire onto an unarmed group of protestors;[68] engage in ethnic cleansing;[69] participate in systematic but non-grave breaches of international humanitarian law during the course of military operations;[70] arrest leaders of political parties and seize their property following a military coup d'état;[71] follow an order to engage in paid assassinations;[72] and participate in the persecution of an identified class of people based on race or some other prohibited ground.[73]

Paragraph 171 also indicates that the conduct objected to be internationally condemned as being contrary to the basic rules of human conduct. There is, however, no consensus as to what constitutes international condemnation. Two courts suggest that international condemnation may be established through explicit statements of condemnation. In its most restrictive incarnation, one US court has articulated that universal condemnation is evidenced through statements by international governmental bodies such as the United Nations.[74] Such an approach is problematic, since international bodies are fundamentally political, and states may be unwilling to openly criticize and censure other states. Doing so may hinder diplomatic relations or spark international tensions.[75] A Canadian court, by contrast, has articulated an alternative approach whereby international condemnation may be ascertained through a broader range of sources. These include the statements, writings, and documented reports of international non-governmental human rights organizations such as Amnesty International, Human Rights Watch, and others.[76]

Unlike the previous examples, others have questioned whether paragraph 171 requires such explicit condemnation by international intergovernmental or non-governmental organizations. Indeed, paragraph 171 indicates that condemnation by the international community is concerned with the "type of military action" that the individual refuses to be associated with.[77] The use of the words "type of" strongly suggests that condemnation by the international community can, for example, relate to the prohibited use of chemical or biological agents more generally without having to locate specific statements by international organizations about their particular use in a given context.[78] Hathaway rightly observes that "there is a range of military activity which is simply never permissible, in that violates basic international standards."[79] He asserts that these would include military actions perpetrated with the intent to "violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory."[80]

Some courts and tribunals in the United Kingdom take the position that evidence of condemnation by the



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international community should merely be relevant but not a mandatory or determinative consideration.[81] In support, one UK tribunal decision suggested that to require condemnation by the international community for military deserter cases would be incongruous with the general approach applied in other refugee claims assessments.[82]

Amongst the various approaches articulated, the approach articulated by Hathaway and pursued by some Canadian courts is most consistent with the text of paragraph 171 and the humanitarian objectives of international law. Also, unlike the UK approach, the reference to condemnation of the international community as it appears in paragraph 171 does not seem to read as merely optional language. On the other hand, the need to establish international condemnation should not require specific and express condemnation of new outbreaks of international legal violations. As already articulated, certain "types of military conduct" have already been generally condemned by the international community through the signing and ratification of international conventions and the recognition of certain customary international legal prohibitions.

The high standard that paragraph 171 sets, however, is important. Military organizations must be able to maintain discipline and to rely on its personnel to obey orders. However, this requirement is not to be followed blindly in the commission of internationally condemned actions. Paragraph 171 furthers important norms and principles of international law and the recognition that individual soldiers have a responsibility to disobey orders in certain contexts.[83]

Once an applicant establishes that she or he has committed a "paragraph 171 desertion," it leads to considerable doubts that the state that perpetrates such internationally condemned conduct will give the deserting soldier a fair and impartial trial. Such states already demonstrate that they are willing to commit internationally condemned breaches of the basic rules of human conduct. It is at least likely that such states will fail to provide basic procedural protections with respect to deserting soldiers.

## *Conclusion*

In this article, I have argued that deserters who seek refugee status face particular challenges in obtaining refugee status. There has been a presumption in Canadian law that such states provide basic guarantees of procedural protections in connection with prosecutions regarding desertion (or, for that matter, any crimes). I have argued that this presumption should not exist when the prosecution is for desertion, given that desertion is an inherently political crime. This article has argued that desertions can be characterized as a pure political crime, since the primary victim of the offence is the state. Lastly, even if desertions are considered pure political crimes, it must still be established that the desertion is in accordance with paragraph 171 of the *UNCHR Handbook*.

## Notes

1. I am grateful to Evan Fox-Decent for this particular construction after reviewing my doctoral thesis as an examiner.
2. See e.g. *Uniform Code of Military Justice,* 10 USC s 885 [*UCMJ*] ("Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct" at s 885(c)).
3. For examples of what constitute serious crimes, see *Immigration and Refugee Protection Act,* SC 2001, c 27, ss 36–37 [*IRPA*].
4. Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [Refugee Convention].
5. Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [Protocol].
6. See Amar Khoday, "Protecting Those Who Go Beyond The Law: Contemplating Refugee Status for Individuals Who Challenge Oppression Through Resistance" (2011) 25:3 Geo Immigr LJ 571.
7. Refugee Convention, *supra* note 4 at art 1A(2).
8. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* HCR/IP/Eng/Rev1 (1992) at para 171 [*Handbook*]. Even where the desertion is not deemed to be justified, where the punishment is disproportionate to the crime, the granting of refugee status may still be appropriate. *Ibid* at paras 12 and 169.
9. *Hinzman v Canada (Citizenship and Immigration),* 2007 FCA 171 at paras 42, 54, & 56, 282 DLR (4th) 413.
10. See e.g. *ibid*; *Landry v Canada (Citizenship and Immigration),* 2009 FC 594; *Colby v Canada (Citizenship and Immigration),* 2008 FC 805; *Key* (*Re*), 2010 CarswellNat 4288 (WL Can), 2010 CanLII 62705 (IRB); *X (Re),* 2009 CanLII 47118 (IRB); *X (Re),* 2007 CanLII 71037 (IRB); *X (Re),* 2007 CanLII 57310 (IRB); *X (Re)*, 2012 CanLII 95533 (IRB); *X (Re),* 2010 CanLII 98045 (IRB).
11. *Ibid* at para 42.
12. See *Canada (Attorney General) v Ward,* [1993] 2 SCR 689 at 746, 103 DLR (4th) 1 [*Ward*].
13. *Handbook, supra* note 8 at para 171.
14. See Khoday, *supra* note 6.
15. *Hinzman, supra* note 9 at paras 46–57.
16. See *supra* note 10.
17. Patrick J Glen, "Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status" (2009) 26 Wis Int'l LJ 965 at 1031.



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18 *Ibid.*

19 *Handbook, supra* note 8.

20 See *Ward, supra* note 12 at 709; James C Hathaway and Michelle Foster, *The Law of Refugee Status* 2d ed (Cambridge: Cambridge University Press, 2014) at 292–295.

21 There is no single definition of what constitutes a political crime. For some jurists, political crimes may extend to non-state targets. See *Minister for Immigration and Multicultural Affairs v Singh,* [2002] HCA 7, 209 CLR 533 at 553, Gaudron J.

22 See *supra* note 10.

23 As the Canadian Federal Court of Appeal observed, "[T] he United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process." *Hinzman, supra* note 9 at para 46. The Court also posited that US military service members who deserted and faced prosecution would have their rights respected within a "sophisticated military justice system." *Ibid* at paras 49 and 57.

24 *Ward, supra* note 12 at para 57; *Hinzman, supra* note 9 at para 44.

25 *Hinzman, supra* note 9 at para 46.

26 Even in the prosecution of serious non-political offences, Canadian courts have allowed evidence procured by very questionable police tactics until very recently. See *R v Hart,* 2014 SCC 52.

27 See *Quinn v Robinson,* 783 F 2d 776 at 792 (9th Cir 1986).

28 *Schtracks v Government of Israel and Others,* [1964] AC 556, [1962] 3 All ER 529.

29 *Extradition Act,* SC 1999, c 18, s 44(1)(b).

30 *Ibid*, s 46.

31 *United States v Pitawanakwat,* 120 F Supp 2d 921 (D Oregon 2000) (refusing to extradite First Nations individual to Canada on the basis of the political crimes exception).

32 Hathaway and Foster, *supra* note 20 at 554–562.

33 Refugee Convention, *supra* note 4, art 1F(b).

34 *Handbook, supra* note 8 at para 151. See also Hathaway and Foster, *supra* note 20 at 540–542.

35 *Handbook, supra* note 8 at para 151.

36 Hathaway and Foster, *supra* note 20 at 540–542.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid* at 554–555.

41 *Gil v Canada,* [1995] 1 FC 508, 119 DLR (4th) 497. Notably, however, the Federal Court of Appeal has since adopted a different test for Article 1F(b) political crimes. See *Sing v Canada (Minister of Citizenship and Immigration),* 2005 FCA 125 at para 62, 253 DLR (4th) 606.

42 It is worth noting that while Canadian, Australian, and European law has curtailed the scope of the political crimes exception in extradition law to exclude violent crimes such as murder and terrorist acts, this has not been extended to non-violent crimes or crimes such as desertion. See e.g. *Extradition Act, supra* note 29, s 46; *Extradition Act 1988* (Cth), s 5; European Convention on the Suppression of Terrorism, 27 January 1977, 1137 UNTS 93 art 1 (entered into force 4 August 1978).

43 See e.g. *IRPA, supra* note 3, s 34(1)(b).

44 Furthermore, as Hathaway and Foster assert, there are strong arguments against the presumption more broadly and not limited just to the issue of political crimes. See Hathaway and Foster, *supra* note 20 at 319–323.

45 I am thankful to one of the peer reviewers for this observation.

46 See e.g. *US v Huet-Vaughn,* 43 MJ 105 (Armed Forces CA, 1995).

47 See Mark J Osiel, *Obeying Orders* (London: Transaction, 1999) at 41–89. See also *National Defence Act,* RSC 1985, c N-5, s 88(2); *UCMJ, supra* note 2, s 885.

48 *Tindungan v Minister of Citizenship and Immigration,* 2013 FC 115 at paras 144–159, 426 FTR 200; *Vassey v Minister of Citizenship and Immigration,* 2011 FC 899, [2013] 1 FCR 522; *Smith v Canada,* 2009 FC 1194 at paras 85–87, [2011] 1 FCR 36 ("It is clear that in the Army reigns an atmosphere of unconditional obedience to the hierarchy" at para 43). However *cf RB (Algeria) (FC) and Another (Appellants) v Secretary of State for the Home Department (Respondent),* [2009] UKHL 10.

49 *Tindungan, supra* note 48; Eugene R Fidell, "Military Judges and Military Justice: The Path to Judicial Independence" (1990) 74 Judicature 14; Eugene R Fidell, "Military Law" (2011) 140:3 Daedalus 1.

50 *Quinn, supra* note 27 at 793; *Singh, supra* note 21 at 550; Refugee Appeal No 29/91, *Re SK*, [1992] NZRSAA 3; *Dutton v O'Shane,* [2003] FCAFC 195 at para 186, 132 FCR 35; *T v Secretary of State for the Home Department,* [1996] 2 All ER 865 at 875, [1996] AC 742; *Republic of Namibia v Alfred and Others,* 2004 (2) BLR 101 (CA).

51 *Ibid.*

52 *Ibid* at 794.

53 *Criminal Code,* RSC 1985, c C-46, ss 46–47.

54 *Ibid.*

55 *National Defence Act, supra* note 47, s 82. See also *Criminal Code Act of 1995* (Cth), s 80.2. In India, it is defined more broadly as exciting disaffection or inciting contempt or hatred against the government. *Indian Penal Code, 1860,* s 124A.

56 Under Canadian law, this is considered an act of treason. *Criminal Code, supra* note 53, s 46(2)(b).

57 As I discuss below, however, the presence of political motivation will be key with respect to relative political crimes.

58 Carol Morello, "For One Syrian Officer, a Months-Long Wait for the Chance to Defect to Turkey" *The Washington Post* (12 January 2013), online: <http://www.washingtonpost.com>; Olga Khazan, "A Defector's Tale: Assad's Reluctant Army" *The Washington Post* (9 January 2013), online: <http://www.washingtonpost.com>.



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59 See Canada's *National Defence Act*, which provides that desertion is the intentional act of being absent from military service without authority. *National Defence Act, supra* note 47, s 88(2). The United States *Uniform Code of Military Justice* establishes that it is (1) the intentional act of being or remaining permanently absent from one's unit, organization, or place of duty; or (2) the act of quitting one's unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service. *UCMJ, supra* note 2, s 885.

60 *Zolfagharkhani v Canada (Minister of Employment and Immigration),* [1993] 3 FC 540, 20 Imm LR (2d) 1, 1993 CarswellNat 89 at para 32 (WL Can) (FCA) [emphasis added]. See also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 3d ed (New York: Oxford University Press, 2007) at 111.

61 See e.g. *Merceron v Canada (Minister of Citizenship & Immigration),* 2007 FC 265, 316 FTR 273.

62 *Handbook, supra* note 8 at para 171.

63 *Ibid.*

64 In a number of selective conscientious objector decisions, courts and tribunals may not explicitly refer to the provisions of paragraph 171 for guidance, but in their decisions they indicate nevertheless that the orders that the resister refuses to perform are unlawful and implicitly violate the basic rules of human conduct. Some of these are included below.

65 *Zolfagharkhani, supra* note 60.

66 *Al-Maisri v Canada (Minister of Employment and Immigration),* 183 NR 234, 1995 CarswellNat 133 (WL Can) (FCA). *See also Re Le,* 1994 CarswellNat 2901 (WL Can) (Imm & Ref Bd (Ref Div)).

67 *Abarca v Canada (Minister of Employment & Immigration),* 1986 CarswellNat 867 (WL Can) (Imm App Bd); *Phong v Director of Immigration,* [1997] HKCFI 284.

68 Commission des Recours des Réfugiés [CRR] [Refugee Appeals Board] 5 July 2007, No 597325, I.

69 *Vujisic v INS,* 224 F 3d 578 (7th Cir 2000); *Ciric v Canada (Minister of Employment & Immigration),* [1994] 2 FC 65, 71 FTR 300, 1993 CarswellNat 188 at para 3 (WL Can) (FCTD).

70 *Key v Canada (Minister of Citizenship and Immigration),* 2008 FC 838 at paras 14 and 20, [2009] 2 FCR 625.

71 *Mohamed v Canada (Minister of Employment & Immigration),* 176 NR 60, 1994 CarswellNat 1848 (WL Can) (FCA).

72 *Barraza Rivera v INS,* 913 F 2d 1443 (9th Cir 1990).

73 *Tagaga v INS*, 228 F 3d 1030 (9th Cir 2000); Refugee Appeal No 2248/94 *Re ZH* (NZ Refugee Status App Auth 1995).

74 See *MA v INS*, 899 F 2d 304 at 312 (4th Cir 1990). The court's position in this respect was also supported by one scholarly commentator. See Kevin J Kuzas, "Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?" (1991) 31 Va J Int'l L 447 at 472–473.

75 *Key*, *supra* note 70 (stating that "there are many reasons for countries to be reticent to criticize the decisions or conduct of an ally or a significant trading partner even where the impugned actions would, in some other political context, draw widespread international condemnation" at para 21). During the Vietnam War, thousands of draft-evaders fled to Canada in order to avoid conscription or criminal prosecution for evading the draft. Rather than having status granted through the asylum process, applications were processed through the regular immigration routes, with the result that many draft-evaders eventually obtained Canadian citizenship. Although in so doing Canada effectively endorsed this form of resistance, it did so under the cover of granting immigration status rather than as a statement that the United States was engaging in acts of persecution. However, the true intent of the actions was reflected in Prime Minister Pierre Trudeau's statement, "Canada should be refuge from militarism." See Frank Kusch, *All American Boys: Draft Dodgers in Canada from the Vietnam War* (London: Praeger, 2001) at 94–97.

76 See *Ciric*, *supra* note 69.

77 *Key*, *supra* note 70 ("Article 171 of the UNHCR Handbook speaks of the need for international condemnation for 'the type of military action' which the individual finds objectionable. Thus, even where the response of the international community is muted with respect to objectionable military conduct, the grant of refugee protection may still be available where it is shown that the impugned conduct is, in an objective sense and viewed in isolation from its political context, contrary to the basic rules or norms of human conduct" at para 21).

78 *Zolfagharkhani*, *supra* note 60 at paras 29–31.

79 James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 180.

80 *Ibid* at 180–181.

81 See *Krotov v Secretary of State for the Home Department*, [2004] EWCA Civ 69 at para 48, [2004] 1 WLR 1825 (Eng CA); *Lebedev v Canada*, 2007 FC 207 at para 70, 62 Imm LR (3d) 161.

82 *Foughali v Secretary of State for the Home Department*, 2 June 2000 [00/TH/01513].

83 *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 5 UN GAOR Supp (No. 12) at 11, UN Doc A/1316 (1950). See in particular Principle IV, which reads, "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

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# Book Reviews

## *Governing Refugees: Justice, Order and Legal Pluralism*

Kirsten McConnachie
Abingdon, UK: Routledge, 2014, pp. 200

In some ways the most important feature of Kirsten McConnachie's *Governing Refugees: Justice, Order and Legal Pluralism* is the author's manifest commitment to contextualizing refugees' experience of encampment from within their own perspective, ensuring that their voices are not only heard but dominate the discussion. By resisting the marginalization of refugee voices that is all too common in humanitarian discourse, the author highlights the agency that refugees can and do exercise and their resilience under even the most difficult conditions, and she also shows how these assets have enabled refugee communities to adapt and cope with exile. In this way, *Governing Refugees* adds to the growing body of scholarship promoting refugee-centred humanitarian policy based on refugee participation, community-based approaches, and an emphasis on fostering self-reliance that recognizes refugee camps as locations of potential social and economic development and transformation.

In contrast to a traditional bias in favour of a predominantly economic understanding of self-reliance, Governing Refugees addresses head-on the much overlooked issues of governance and justice within refugee camps, which are becoming ever more important in a world where the incidence of long-term encampment is increasing. Drawing on extensive fieldwork in Thailand with Burmese refugees from the Karen ethnic group, McConnachie offers readers a detailed, insightful examination of how order is produced and law created and implemented within the confines of the Karen refugee camps. Authority, or sub-national sovereignty, it is shown, is not neatly devolved from the host-state to a single power-holder but is instead a negotiated, "pluralistic and networked web of legal and political relationships" that extend beyond the camp's borders (3). These relationships in turn are influenced by and are the product of numerous interrelated factors ranging from the historical context and cultural traditions of the community, to the political structures existing in the host state and the state of origin, and the specific interactions between refugees, state authorities, and humanitarian actors.

Written essentially as an expansive socio-legal and anthropological case study of the situation of the Karen refugee camps in Thailand, Governing Refugees challenges the conventional understanding of the refugee camp as an anomic site of disorder and chaos and as a purely humanitarian and thus apolitical construct. Instead, the Karen refugee camps are revealed to be home to a highly political, culturally self-conscious and organized community with distinct norms, governance structures, and vibrant civil society where the administration of justice and governance both strive towards the same objective: the maintenance of order and social harmony. This emphasis on order and harmony is particularly important, as it underpins both Karen "law" (broadly understood) and morality and consequently influences not only the structure of Karen society within the camp but also how that society interacts with external forces such as humanitarian actors and the host state. As McConnachie explains, more than merely desirable objectives, the emphasis on maintaining order and harmony must be understood as arising from the cultural norms of "Karenness": honesty, peacefulness, and conflict avoidance (63). Thus preferences that might initially be perceived as representing moral positions are in fact revealed to be critical elements in the construction of a Karen ethno-nationalist identity and thus to have inherently political implications.

Throughout *Governing Refugees*, a dominant theme is indeed the way in which diverse influences combine to give form to different layers and types of authority in a refugee camp, which in turn overlap and intersect, on occasion



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strengthening each other but equally often undermining one another and creating confusion. A small sample of the specific influences discussed includes the colonial history of Burma, Christian and animist practices, the longstanding ethnic conflict between the Karen and the dominant Burman ethnic group, the authority of the Karen National Union, the unsettled relationship between UNHCR and the Royal Thai Government, the equally tumultuous relationship between the refugee community and humanitarian actors, international human rights norms, and recent resettlement initiatives. One particular example scrutinized in depth is the interaction between refugee justice systems and justice initiatives spearheaded by humanitarian organizations. This discussion of justice mechanisms exposes the substantial inconsistencies that characterize current refugee assistance initiatives, specifically the tensions between providing assistance and respecting the agency of refugees, between the influence of external norms and the importance of tradition and identity, and between charity and rights. By exploring the way in which the administration of justice is conceived and manifested within the camp, McConnachie provides the reader with insight into how refugees employ a combination of resistance, adaptation, and instrumentalization to negotiate this unstable terrain.

Interestingly, *Governing Refugees*' particular strengths are also what potentially opens it up to some minor criticism. On occasion, McConnachie's insistence on ensuring that the voices of the refugees themselves are given centre stage leaves the analysis feeling slightly unbalanced. While the perspectives of the Karen refugees are given a comprehensive analysis and relatively uncritical acceptance,[1] contrasting opinions from UNHCR and non-governmental organizations are often rejected out of hand. This is not meant to suggest that the author's conclusions are not correct; indeed, she has months of fieldwork to support her positions. Moreover, it is very true that we are often only too willing to view NGOs and international assistance as a panacea, when in fact the power dynamics of external intervention are inherently problematic.[2] Nevertheless, although it does nothing to undermine the important contribution being made by this book, some readers may feel that the author's apparent bias in favour of the refugee perspective detracts from her arguments at points.

A central feature of this book is its emphasis on the refugee community as the unit of analysis. The existence of a strong Karen community within the refugee camps is at the core of the argument in favour of self-governance. It is because of the existence of a strong and unified Karen community that the refugee governance structures exist and are able to function within the camps. Anyone who has had contact with the Karen people will be especially interested in McConnachie's chapter on the construction of identity, and in particular Karen identity, within the camp setting. However, what is missing from this analysis is an acknowledgement and examination of dissenting voices. Accepting the Karen community as a unitary entity means overlooking inequalities and tensions that exist within that group. McConnachie suggests that there is a lack of alternative narratives in the camp, but an example she uses that highlights the resistance to inter-ethnic marriages among the Karen seems to suggest that dissent may exist not far beneath the surface (151). It would be interesting to know how or if these divergent perspectives are manifested within the governance structures or, if there really are no alternative narratives, why this is the case.

While addressed briefly in the final chapter, one question that the reader is left with is to what extent this study can inform our understanding of and approach to other refugee situations. McConnachie's analysis of the Karen situation reveals the refugees' coping mechanisms and governance structures to be the product of the serendipitous conjunction of specific historical, cultural, and political factors, including Karen ethno-nationalism, Karen cultural values, the marginalization of UNHCR by the Royal Thai Government, and an initial period of loose control over refugees that left room for autonomous governance. Other than the general conclusion that some degree of self-governance is possible within refugee camps, is it possible to draw out any other lessons from this analysis, or is the case of Karen refugees in Thailand simply too singular? To fully answer this question is perhaps beyond the scope of this book, but it will be interesting to see if and how McConnachie's insights into the success of refugee self-governance in the Karen camps are applied in future scholarship in other contexts.

Ultimately, *Governing Refugees* makes two important contributions to refugee scholarship. First, it offers a detailed analysis of the dynamics of Karen society in exile, which is likely to be increasingly important, given the recent political changes in Burma, ongoing peace negotiations between the government of Myanmar and the Karen, and the increasing talk of refugee repatriation. Second, and most importantly, *Governing Refugees* is one of the first books to be entirely devoted to the governance and administration of justice in refugee camps. As such it contributes greatly to a burgeoning field of inquiry that in turn has the potential to substantially affect refugee-assistance policy and practice. Amid the discussions of institutions, authority, and power dynamics, *Governing Refugees* is ultimately about something very basic: the inherent dignity of the human person and the capability and right of refugees to be agents of their own destiny.



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**Notes**

1 For instance, while explaining how the emphasis on social harmony that is central to Karen ideology may assist in the maintenance of order within the refugee camp, the author fails to address in any meaningful way the common criticism that prioritizing community harmony in the administration of justice is often at the expense of individual rights and well-being (109).

2 See Barbara Harrell-Bond, "Can Humanitarian Work with Refugees be Humane?" *Human Rights Quarterly* 24 (2002): 51.

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## *The International Law of Migrant Smuggling*

Anne T. Gallagher et Fiona David
Cambridge University Press, 2014: ISBN 987-1-107-01592-0 (Hardback), 783 p.

Les migrations internationales ont été – et demeurent toujours – un élément constant et influent de l'histoire humaine. Elles ont soutenu le processus de croissance économique mondiale, contribué à l'évolution des États et des sociétés et enrichi de nombreuses cultures et civilisations. Les migrations constituent un laboratoire privilégié de l'évolution du droit international général depuis les origines de cette discipline. Force est cependant de constater que la dialectique entre migrations et droit international est encore très largement insuffisamment connue. Le fossé grandissant entre la réalité du mouvement migratoire dans un monde de plus en plus interconnecté et son encadrement normatif demeure, à n'en point douter, un enjeu contemporain majeur. Malgré les travaux et les efforts entrepris depuis plus d'une décennie au plan international et l'accroissement considérable des activités des groupes criminels organisés en matière de trafic illicite de migrants portant gravement préjudice aux États et mettant en danger la vie ou la sécurité des migrants concernés, il n'y a aucun instrument universel qui porte sur tous les aspects du trafic illicite de migrants.

Rattrapé par l'actualité médiatique dramatique, le droit est confronté à un constat synchronique amer, ses règles et principes répondent mal aux problèmes auxquels les États sont confrontés surtout en ce qui concerne le contrôle de l'immigration, la prévention des trafics et la traite des êtres humains. Le durcissement progressif et quasi généralisé des politiques migratoires causé par la multiplication de mesures contre l'immigration irrégulière, diminue d'autant les possibilités légales de migration, créant ainsi un environnement propice à l'augmentation du trafic de migrants. En droit international, le trafic illicite de migrants désigne «le fait d'assurer, afin d'en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel, l'entrée illégale dans un État Partie d'une personne qui n'est ni un ressortissant ni un résident permanent de cet État»[1].

Pour autant, les évènements tragiques de ces dernières années, aggravés par les crises et les conflits actuels de toutes sortes, ont permis une prise de conscience par la communauté internationale de l'étendue et de la gravité du phénomène de la migration irrégulière et de ses conséquences, et l'urgence et la nécessité d'un cadre normatif institutionnel plus structuré. Cette prise de conscience s'est traduite par l'adoption le 15 novembre 2000 de trois instruments essentiels, mais dont l'efficacité peut être mise en doute dans le cadre de la lutte contre le trafic de migrants : la Convention des Nations Unies contre la criminalité transnationale organisée, le Protocole contre le trafic illicite de migrants par terre, air et mer et enfin le Protocole visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants[2].

L'intérêt de l'ouvrage d'Anne T. Gallagher et Fiona David, *The International Law of Migrant Smuggling*, est d'avoir approché le droit international du trafic illicite de migrants non pas en isolation clinique, mais dans le cadre plus général du droit international, fixant ainsi plus solidement la branche de l'immigration irrégulière au tronc plus robuste du droit international coutumier. Ils évitent au passage, le double écueil de l'empirisme stérile ou une description synchronique voire syncrétique des cas de trafic de migrants et du rationalisme abstrait, une analyse purement dogmatique de la normativité sans un effort de confrontation à la pratique étatique. L'ouvrage se propose donc d'appréhender



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le régime juridique international du trafic de migrants à travers deux axes essentiels constitutifs des deux parties du livre. D'une part, une approche plus systémique, une analyse détaillée du cadre normatif général de la migration irrégulière, avec comme prisme d'entrée le droit pénal transnational, le droit de la mer, le droit du contrôle migratoire. Dans ce contexte, les auteurs ont perçu le lien inextricable entre le trafic de migrants et la thématique des droits de l'homme et du droit d'asile, de la responsabilité des États, particulièrement les principes classiques et les tendances nouvelles en matière d'attribution. D'autre part, Anne T. Gallagher et Fiona David abordent, dans la deuxième partie, le trafic de migrants sous un angle plus sectoriel. Ils décrivent la portée de certaines obligations primaires spécifiques notamment l'incrimination du trafic illicite, l'interdiction et le secours en mer, la prévention et la coopération en vue de combattre le trafic, la protection et l'assistance, la détention de migrants victimes du trafic et leur retour.

La structure de l'ouvrage et la démarche des auteurs apparaissent de prime abord assez simples et pertinentes : une présentation du cadre normatif général comprenant les obligations primaires et secondaires des États relatives au trafic illicite de migrants. Les obligations primaires de nature conventionnelle et coutumière découlent notamment du droit international des droits de l'homme, du droit des réfugiés ou des principes de la souveraineté territoriale. Les obligations secondaires sont celles qui gouvernent la responsabilité interna tionale de l'État pour faits internationalement illicites. Il s'agit essentiellement des règles d'attribution et de l'invocation de l'illicéité dans le contexte du trafic de migrants. L'analyse de la *due diligence* est faite en rapport avec la responsabilité des États donnant ainsi l'impression qu'elle fait partie des règles secondaires de la responsabilité. Or le standard de la *due diligence* est une espèce particulière de règle primaire qui traduit la normativité en termes de normalité. À ce titre, elle fait partie des principes généraux de droit applicables même en l'absence d'injonction particulière d'une règle.

Ce cadre général est ensuite suivi d'un examen des règles applicables dans des domaines de portée plus spécifique. Mais, comme l'a si bien dit Ludwig Wittgenstein, la complexité des choses réside dans leur facilité apparente. Ainsi, le chapitre 5 qui se veut une analyse de l'obligation spécifique de l'incrimination du trafic illicite de migrants est en réalité une excroissance du chapitre 1 concernant le droit pénal dit transnational. L'examen de l'incrimination se résume alors à une reproduction du cadre normatif fourni par la Convention contre la criminalité transnationale organisée et son Protocole dont l'article 6 prévoit que chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer au trafic illicite de migrants « le caractère d'infraction pénale, lorsque les actes ont été commis intentionnellement et pour en tirer, directement ou indirectement, un avantage financier ou autre avantage matériel ». De même, le chapitre 6 n'est autre chose qu'une description plus détaillée de l'article 8 du Protocole. Cet article impose aux États l'obligation d'adopter des mesures contre le trafic illicite de migrants par mer. Or ce même Protocole ainsi que les règles et principes issus du droit de la mer avaient fait l'objet de traitement dans la première partie. De plus, ce qui est considéré comme obligation spécifique de prévention[3] de coopération ou d'assistance dans le domaine du trafic de migrants est en fait une répétition du cadre normatif général tel que prévu par les articles 10 à 16 du Protocole et de l'obligation de prévention bien établie en droit international coutumier[4]. L'obligation spécifique de la prévention dans le cadre du trafic de migrants inclut toutes les mesures de contrôle des frontières prévues à l'article 11 du Protocole.

Au chapitre 7 de l'ouvrage, les auteurs constatent en filigrane que, malgré le renforcement de la prévention et de la coopération, et l'élargissement des mesures aux frontières, les migrations demeureront largement incontrôlables, à moins que nos États démocratiques ne deviennent des États policiers. L'ampleur grandissante des migrations internationales et du trafic de migrants en particulier est une importante conséquence de cette montée des disparités et des inégalités sociales. Dans la mesure où le durcissement des politiques migratoires rend nécessaire l'aide d'une personne pour traverser une frontière internationale, l'efficacité de l'effet dissuasif recherché par les mesures prévues dans la Convention sur la criminalité transnationale organisée et son Protocole ainsi que les mesures draconiennes mises en place par les États, peut être mise en doute. En dépit de la volonté manifeste des États d'incriminer le trafic de migrants et de punir les auteurs de peines plus sévères, l'efficacité de la répression reste inversement proportionnelle à la sévérité du discours politico-judiciaire. On ne peut donc s'empêcher de se poser les interrogations suivantes : contre qui, contre quoi se dirige réellement la lutte contre le trafic illicite de migrants, les trafiquants ou les migrants? Cherche-t-on à réprimer un comportement criminel grave ou n'est-ce qu'une mesure parmi d'autres pour réduire l'immigration irrégulière ?

Le Protocole contre le trafic illicite de migrants par terre, air et mer, dispose à son article 18 que : « Chaque État Partie consent à faciliter et à accepter, sans retard injustifié ou déraisonnable, le retour d'une personne qui a été l'objet d'un acte énoncé à l'article 6 du présent Protocole et qui est son ressortissant ou a le droit de résider à titre permanent sur son territoire au moment du retour ». Cette disposition pose l'épineuse question du retour des migrants objets



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de trafic. Il faut reconnaitre avec nos deux auteurs que le droit du retour des migrants objets voire victimes de trafic demeure fluctuant et ses contours imprécis. Si le Protocole reconnait aux États le droit de renvoyer les migrants objets de trafic, l'exercice de ce droit reste néanmoins encadré par les règles fondamentales en matière de protection des droits de l'homme et de la dignité humaine et les principes du droit d'asile, notamment l'obligation de non-refoulement.

*The International Law of Migrant Smuggling*, malgré ses faiblesses, est à ce jour, une contribution substantielle à la thématique de la migration. S'inscrivant dans une perspective positiviste pour décrire le droit tel qu'il est, Anne T. Gallagher et Fiona David ont, implicitement mis en exergue le paradoxe de la dialectique sein/sollen. L'audace pour nos deux praticiens est d'avoir abordé la question du trafic de migrants à travers le prisme du droit international des droits humains. Ils reconnaissent en fin de compte que les États, dans l'exercice de leur droit souverain à déterminer qui peut entrer et demeurer sur leur territoire, doivent s'acquitter de leur responsabilité et de leur obligation de protéger les droits des migrants. En cherchant à endiguer la migration irrégulière, les États doivent coopérer activement entre eux afin que leurs efforts ne mettent pas en danger les droits humains, notamment le droit des réfugiés à demander l'asile. Le cadre légal et normatif applicable au trafic illicite de migrants doit être mis en œuvre d'une façon plus efficace et sans discrimination afin de respecter les droits humains et les conditions de travail dont chaque migrant doit pouvoir bénéficier. Conformément aux dispositions de ce cadre législatif et normatif, les États et les autres acteurs doivent ainsi aborder les questions migratoires de façon plus conséquente et cohérente. C'est seulement en cela que les opinions publiques prendront la mesure de ce que l'étranger, migrant régulier ou irrégulier, objet ou victime de trafic est un titulaire de droits inaliénables et un justiciable à part entière et que, dans une nouvelle conception de la citoyenneté, sécurité et droits fondamentaux devront bien être réconciliés pour assurer au migrant la protection que requiert sa vulnérabilité. Sir Gerald Fitzmaurice avait certainement raison lorsqu'il affirmait il y a quarante ans déjà: « lawyers must often confront themselves not just with the question of 'what is the law?' but also with the much more challenging one of determining 'what the law is'»[5]. *The International Law of Migrant Smuggling* en est la parfaite illustration.

## Notes

1. Article 3 du *Protocole contre le trafic illicite de migrants par terre, air et mer.*
2. Pour le texte de ces instruments, voir Nations Unies, Recueil des Traités, vol. 2225, p. 209.
3. Anne T. Gallagher, Fiona David, *The International Law of Migrant Smuggling*, Cambridge, Cambridge University Press, 2014, p. 498 et ss.
4. La nature coutumière de la prévention a été reconnue à plusieurs reprises par la Cour international de Justice. Sur ce point, voir notamment *Réserves à la Convention pour la prévention et la répression du crime de génocide*, avis consultatif, *C.I.J. Recueil 1951*, p. 23 ; *Application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine* c. *Serbie-et-Monténégro)*, arrêt, *C.I.J. Recueil 2007*, p. 155, par. 432, *Usines de pâte à papier sur le fleuve Uruguay (Argentine* c. *Uruguay)*, arrêt, *C.I.J. Recueil 2010*, Opinion individuelle du juge Cançado Trindade, p. 6.
5. G. Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today', Special Report, *Annuaire IDI*, *Livre du Centenaire* (1973), 251.

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## *Young, Well-Educated and Adaptable: Chilean Exiles in Ontario and Quebec, 1973–2010*

Francis Peddie
Winnipeg, Manitoba: University of Manitoba Press, 2014

Francis Peddie explores experiences of exile and adaptation in *Young, Well-Educated and Adaptable: Chilean Exiles in Ontario and Quebec, 1973–2010.* The central question addressed by Peddie is why so many Chileans, who remained largely oriented and longed to return to Chile during exile, chose to remain in Canada following the end of the military dictatorship when the prospect of a safe return became a viable option. The author



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answers through a broad historical analysis of the process of exile beginning with events leading up to the coup d'état in Chile in 1973, through to the return to democratic rule in 1990, and beyond. He focuses his analysis on the cohort of Chilean exiles who arrived in Canada between 1973 and 1978 under the Special Movement Chile (SMC) program. His primary data source is in-depth interviews with 21 participants, although he uses a variety of other primary and secondary data sources as well. Peddie argues that many Chileans chose to remain in Canada even with the prospect of a safe return, as the result of a number of changes they and their families underwent in Canada as exiles, combined with changes that occurred in Chile during the military dictatorship and return to democratic rule.

*Young, Well-Educated and Adaptable* provides a critical account of the specificity of the Chilean exile experience, recognizes diversity among Chilean exiles, and examines agency within exile from a bottom-up perspective. Peddie argues that there is a tendency in the literature to overemphasize the coup d'état as the defining moment in Chilean history, rather than to place the obvious importance of this event within a wider and more complex history. The latter, he maintains, allows for a better understanding of the experiences of exiles. Peddie draws on oral history and the concept of memory, providing an interpretive analysis of participants' perspectives and stories of lived experience over time. He situates these stories in relation to broader Chilean politics and history, the Cold War, and Canadian immigration and foreign policies.

Chile, like much of Latin America in the post–Second World War context at the time, was experimenting with Import Substitution Industrialization, a model of economic development designed to reduce dependence on foreign aid. Progressive segments of Chilean society, however, went one step further in aspiring to a model of "socialism without revolution" (29). The model promised to address not only the issue of development, but also that of social inequality. International responses were mixed. Predictably, the United States was competing with Moscow for control of the future of Chile. Canada, by contrast, approached the Chilean situation with a mixture of caution and curiosity. Peddie emphasizes that the opening and closing of the historic opportunity in Chile in the form of the election of the Unidad Popular under Allende in 1970, and the coup d'état in 1973, respectively, coincided roughly with the election of the Liberals in Canada under Pierre Trudeau. Trudeau was looking to expand international trade and relations, in Latin America and elsewhere, and to decrease dependence on the United States. Cold War rhetoric influenced concerns among immigration officials in Canada that Chilean exiles might pose a national security risk; however, a broad-based domestic lobby challenged this position and pressured the government to condemn the Pinochet regime and accept Chilean exiles. The partial success of the lobby, according to Peddie, was due to the appeal to humanitarianism, but also to the fact that many of those who were being targeted and exiled were middle-class intellectuals and other professionals. Consistent with Canadian immigration policy over time, officials saw an opportunity to benefit the nation economically by accepting "young, well-educated and adaptable" Chileans.

The coup in Chile on 11 September 1973 was followed by severe repression of supporters of the deposed Unidad Popular. Among those targeted were university professors and students, doctors, and other professionals. Peddie argues that the Canadian embassy in Chile was very cautious, denounced the Allende government, and essentially looked the other way when the Unidad Popular was replaced with the military junta. Notwithstanding the common experience of repression for some 140,000 Chileans who went into exile between 1973 and 1978, Peddie argues that individuals—and more often families—had specific stories of the wider exile experience, which included details of timing, opportunities or lack thereof, and destinations for those who found shelter. Some of Peddie's participants emphasized that it was easier for "professionals with resources, knowledge and connections" to find shelter, and recognized their good fortune in that regard. While the federal government was suspicious of the Chilean exiles, there was broad support for them in Canada from various organizations, including the church. The wider lobby urged Parliament to condemn the Pinochet regime, while the church urged the government to adopt a strictly humanitarian rather than a politically motivated response. Peddie argues that once the SMC program was underway, the lobby exerted even greater pressure, because in practice Chilean applicants were being processed as immigrants, rather than being assessed under humanitarian criteria. By 1980 roughly 10,000 Chileans were admitted to the country, as the result, in part, of continued pressure by the lobby in support of the exiles.

Chilean exiles who were a highly educated population overall, as the result of immigration screening, became active in Canada, drawing on their organization skills to establish self-help networks in Canada. In retrospect, participants in Peddie's study emphasized practical issues as well as gaining a sense of belonging in their adjustment to life in Canada. They formed bonds mostly with other Chileans and regained a sense of community and identity in Canada. He argues that political activism among Chileans initially directed mostly towards the struggle in Chile, and specifically the return to democracy that would allow them to return to their homeland, was important in "forging a community



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where emotional needs could be met and networks could be formed" (119). Their associations with other Chileans therefore allowed for both "cultural preservation" and "integration." This finding is significant, given that the Canadian government continued to provide economic support to the junta in Chile even as it accepted Chilean exiles through the. Peddie argues that over time Chileans developed a greater Latin American identity and sought to educate the wider public about issues facing Latin American countries. Furthermore, he argues that they applied their skills to the formation of an infrastructure of Spanish-language services in Canada, and became involved in struggles facing other exile communities.

Peddie devotes one chapter to exploring challenges faced by Chilean exiles during their adjustment in Canada, focusing on employment, education, family and gender relations. He argues that despite the strong orientation of this early cohort of exiles to return to Chile, his participants did eventually begin to put down roots in Canada. The first to do so, such as by purchasing a house, faced resistance from other Chileans, some of whom regarded them as "traitors." They also faced barriers to employment, as do many immigrants, such as failure to have their training and qualifications recognized, language difficulties, and other forms of discrimination. Initial loss of status in Canada was further complicated by changing gender roles within the home and stress on the family as a whole. Peddie argues, however, that these challenges should be placed in context. The economic downturn in the 1970s as a result of the oil shocks is one factor that complicated economic integration. This was particularly bad for Chilean exiles in Quebec, who, despite experiencing greater social integration than their counterparts in Ontario, had a harder time adjusting economically as a result of instability in the Quebec labour market. Another was that some Chilean men felt that they lost status in Canada in relation to women, while Chilean women gained both status and independence. These changes were often correlated with high divorce rates, but Peddie points out that divorce was already on the rise overall as a result of changes in the labour market, values and laws in Canada. Certainly, different values in Canada obliged Chilean exiles to adjust to different gender roles within the family, for instance, and likely increased stress on the family, including parent-child relations. However, the variation of experiences narrated by participants in Peddie's study reveal "the complexity of re-imagining individual and group identities" in the context of adjustment to Canada. Peddie concludes that the greatest challenge for his participants in Canada was lack of support from an extended family. He argues further that while family and interpersonal adjustment proved to be more difficult than economic adjustment for participants, in some cases families became closer. Interestingly, he found that over time a strong Chilean identity gave way to a sense of identity that was multiple and less rooted in place.

With the return of Chile to democratic rule in 1990 and the prospect of return, Chileans became aware of personal changes in identity and belonging. Surprisingly, Peddie finds that once return to Chile became a viable option, most of his participants chose to stay in Canada. Drawing on narratives, he attributes this to a combination of changes that the Chileans underwent in Canada, and changes to Chile during the military regime and return to democratic rule. The latter included lack of resettlement assistance in some cases, a relatively cold reception by the general public in Chile, lack of employment opportunities, and discrimination. Perhaps even more significant, however, is that the participants in Peddie's study came to appreciate the multiculturalism and tolerance of Canada, and some even claimed they felt they had become more Canadian. Conversely, they felt their sense of belonging was questioned in Chile. Others felt they had developed a detachment from place during their exile to Canada, so that where they lived became secondary to other concerns such as family, employment, and other life goals. A minority felt that successful return was possible, but required relinquishing nostalgia and coming to terms with the effects of the extended military rule on Chile, and the neo-liberal model of development it left in its wake.

*Young, Well-Educated and Adaptable* contributes to our understanding of exile and adaptation. First, the retrospective data-gathering technique allows for a broad and comprehensive understanding of the exile, settlement, and integration/reintegration process for the first wave of Chilean exiles to Canada, as a result of the coup d'état and ensuing repression, from the perspective of those who entered as part of the Special Movement Chile program. Second, this approach allows the author to answer the question of why so many Chileans decided to stay in Canada, even once the prospect of safe return to Chile was possible. He points to the complexity and ongoing process of exile, including practical issues, family considerations, sense of belonging and identity, and the difficulty of reintegration. Third, the book illustrates the importance of identity and belonging in the context of adjustment. The challenges of exile reveal the potential for fluidity, multiplicity, and hybridity in identity, and for transnational forms of identity to emerge. For example, some Chilean exiles felt that while in Canada they had developed a hybrid Chilean (social activist) Canadian (multicultural and tolerant) identity.

There are three areas of weakness in the text that give rise to questions for further research and reflection. First, a more detailed reflection of the author's subjectivity in



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relation to the participants would help to clarify important commonalities as well as differences, and possible implications for the analysis. For instance, did the author anticipate that gender dynamics might influence data collection, and how was this possibility addressed? Second, the book covers too much ground and therefore treats some issues only superficially. Related to this point, sometimes review of literature substitutes for analysis of empirical data, but this is not explicit, rendering the precise contribution to the field unclear. For instance, the author draws on literature to suggest that class differences are central to the process of exile and to the social dynamics of integration in a host country, and/or eventual return, but the data gathered do not allow for an analysis of the issue. Finally, the framework for understanding the potential for fluidity, hybridity, and new forms of identity to emerge in exile could be further clarified. A related question for future research is how Chilean national identity evolved differently in Chile under the military dictatorship from that of exiled Chileans in Canada over the same period.

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