Barbra Schlifer Commemorative Clinic
Freedom From Violence.

October 21st, 2016

Submissions to the UN Working Group on People's of African Descent

Background on the Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic is the only Clinic of its kind in Canada. It has been providing legal representation, counselling, and interpretation in over 100 languages to women who have experienced all forms of violence since 1985. The Schlifer Clinic was established in the memory of Barbra Schlifer, an idealistic young lawyer whose life was cut short by violence on the night of her call to the bar of Ontario on April 11, 1980. The Schlifer clinic does not substitute for the state mandated legal aid services in Ontario, Canada; rather, it supplements the lack of legal aid services for survivors of violence.

We assist about 4,000 women every year. We also engage in various educational initiatives, including public legal education, professional development for legal and non-legal professionals, and clinical education for law students. We work on law reform activities both within Canada and internationally, and consult broadly with all levels of government on policy or legislative initiatives that impact on women survivors of violence. The Clinic serves women from ethno-racially and socio-economically diverse backgrounds, frequently from highly marginalized communities. Our clients often experience multiple social inequalities, including poverty, homelessness, racism, and discrimination on the basis of religion, country of origin, newcomer status, mental health, and disability.

We have been part of numerous legal test cases, are represented at public policy tables and in law reform efforts related to violence against women. For example, the Clinic intervened in a case involving a Muslim woman's right to testify about sexual assault while wearing a niqab.[1] We also actively challenged the government's baring of niqabs at the citizenship oath ceremony, at first through the UN Reporting mechanisms (UN Committee on the Elimination of Racial Discrimination, "CERD")[2], and later in the case

[1] *R v NS*, 2012 SCC 72. See also Barbra Schlifer Commemorative Clinic, 2012. "Media Release." (December 20, 2012). Online: http://schliferclinic.com/womens-rights-supreme-court-releases-n-s-decision.
[2] Amanda Dale, "The Intersection of Race and Gender in the Matter of the Canadian State's Ban on Facial Coverings During the Course of Citizenship Oaths", 2012. Online: http://schliferclinic.com/wp-content/uploads/2012/09/CERD_Citizenship_Ban_Schlifer.pdf .

of a woman who challenged the government under federal law.[3] Beginning in 2012, the Barbra Schlifer Clinic made an application to challenge the federal government's destruction of the gun registry on the basis that it violated the Charter rights of women who experience violence.[4] We have also intervened at the Supreme Court of Canada on the need to broaden the scope of humanitarian and compassionate grounds in Canada's immigration provisions, [5] and at the Federal Court on the need for Canada's refugee determination process to recognize the intersecting vulnerabilities of identifiable groups from so-called "safe countries of origin" who experience state neglect and harm, such as women who experience violence, gay, lesbian and trans people, and others. [6]

Visible minorities, religious minorities, newcomer women, and women of African descent face numerous intersecting barriers to accessing justice and services. This often takes the form of lack of access to information on their legal rights and recourse, as a result of isolation, language barriers, or racial profiling. Newcomer women from racialized communities in situations of violence also sometimes fall through the cracks between women's organizations and settlement organizations due to a lack of awareness and training of front-line workers regarding the particular vulnerabilities and problems they face.

In an effort to provide recommendations to the United Nations Working Group on People of African Descent (UNWGPAD) as part of its mandate to study the problems of racial discrimination experienced by people of African descent, this memorandum will highlight specific problematic policies enacted by the Canadian government which exacerbate the marginalization of women of African descent, and provide comments on the international mechanisms aimed at protecting the human rights of women.

Canada's policies and their impacts on Women of African Descent

Racial Profiling of Peoples of African Descent in Canada

A number of groups, including the Ontario Human Rights Commission and the Canadian Civil Liberties Association (CCLA), have found persistent racial profiling in

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[3] *Ishaq v. Canada (Citizenship and Immigration*), 2015 FC 156 (CanLII), <http://canlii.ca/t/ggc86>, retrieved on 2016-09-14

[4] Shaun O'Brien, Nadia Lambek, Amanda Dale. 2016. "Accounting for Deprivation: The Intersection of Sections 7 and 15 of the Charter in the Context of Marginalized Groups." 35 *National Journal of Constitutional Law* 163. Online: http://schliferclinic.com/wp-content/uploads/2016/05/Accountingfor-Deprivation.pdf. See also: Laurie Monsebraaten. 2013. "Toronto's Barbra Schlifer Clinic files evidence in Charter case to restore Canadian gun registry." *The Toronto Star.* Online: https://www.thestar.com/news/canada/2013/05/30/torontos_barbra_schlifer_clinic_files_evidence_in_charter_case_to_restore_canadian_gun_registry.html.

[5] *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61.

[6] *YZ v Canada (Minister of Citizenship and Immigration),* 2015 FC 892, [2015] FCJ No 880.

Canada.[7] In particular, the terms "driving while black" or "carding" are sometimes used to describe this prejudicial treatment. However, racial profiling extends to the full spectrum of activity in public which according to the CCLA "may be perceived as disproportionately suspicious depending on the skin colour of the person engaged in the activity."[8] Biases against visible minorities have been readily documented in Canada's policing practices and there is systemic racial profiling in Canada's criminal justice system.

While there have been some promising developments in policy and public discourse, concerns still remain regarding the treatment of racial minorities and the persistent climate of fear around law enforcement and the justice system for visible minorities. This fear is particularly felt by racialized women who may experience multiple intersecting sources of marginalization and discrimination based on their ethnicity, gender identity, immigration status, and experiences of violence.

Canada presents itself as an international leader on women's issues, and in many ways, it has a past of being such at least at the formal level. However, there are profound gaps in its current legislative frameworks concerning women, especially those from racialized and marginalized communities that the Schlifer Clinic frequently works with.

Bill S-7 and the Criminalization of Forced Marriage [9]

In 2014, the former Federal Government of Canada tabled *Bill S-7: Zero Tolerance for Barbaric Cultural Practices Act*. This Act made participating in and supporting forced marriage a criminal act in Canada.[10] The Government made numerous statements in support of these changes, including the need to guard against "barbaric cultural practices." The Government particularly focused on the need to "protect women" from the practices of polygamy and forced marriage in immigrant communities.

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[7] Ontario Human Rights Commission, "The Existence of Racial Profiling." Accessed 17 October 17, 2016, online: http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/existence-racial-profiling CCLA, 2015. "A recent history of racial profiling and policing." 18 May 2015. Online: https://ccla.org/a-recent-history-of-racial-profiling-and-policing/;

[8] CCLA, 2015. "A recent history of racial profiling and policing." 18 May 2015. Online: https://ccla.org/a-recent-history-of-racial-profiling-and-policing/

[9] Forced Marriage as a form of human trafficking is about the local, national and international movement of women, men and children from one location to another through the formal institution of "marriage." SALCO. 2014. "Forced Marriage as a Form of Human Trafficking." Online: http://www.sawc.org/wp-content/uploads/2015/04/Forced-Marriage-as-a-Form-of-Human-Trafficking-Resource-Guide.pdf

[10] Canada is also a signatory to several international consensus documents including the *Universal Declaration of Human Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women*, and *Convention on the Rights of the Child*. However, Canada has not signed or ratified the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*.

There are a number of issues with Bill S-7 that are detrimental to women who have experienced violence. For example, the Bill criminalizes a wide range of activities associated with forced marriage under the guise of providing "protection" to the survivors and victims of forced marriages. However, criminalization has the potential to become a tool to further target and over-policed and racialized communities. Victims and survivors of gender based violence will be discouraged from coming forward if disclosing that they have experienced forced marriage or trafficking will mean criminal sanctions or deportation for their own family. While prevention is important in the discussion of forced marriage in Canada, a multisectoral approach coupled with an intersectional education strategy is the most effective preventative tool. The young women leaders in our path breaking work on the issue of forced marriages and "honour" based violence (Outburst!) have consistently held this position as the best route to ensuring their safety and access to rights.

Bill S-7 has not been repealed and there has been no effective follow-up on the issue of forced marriage in Canada; no consultations have occurred with expert and advocacy groups that work with newcomer women. In fact, through the criminalization of forced marriage, the practice has been pushed further underground, exacerbating the risks to newcomer women who continue to experience violence. Re-circulating the problematic discourses of "cultural" behaviour inherent in the rhetoric around Bill S-7 oversimplifies important complexities in women's experiences of violence. Importantly, victims and survivors of gender based violence are actively discouraged from coming forward if disclosing that they have experienced forced marriage or trafficking will mean criminal sanctions or deportation for their own family.

Immigration Detention of Women and Children

Racialized and minority communities are overrepresented in Canada's immigration detention system.[11] As a legal rule, children and youth should not be held in immigration detention. Canada has ratified *the United Nations Convention on the Rights of the Child*, which insists that "the best interests of the child" always be a primary consideration and that detention must be a "last resort."[12] Pregnant women are also being detained in Canada, and some have been forced to give birth while in

[11] Stephanie Silverman and Petra Molnar. 2016. "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada," *Refugee Survey Quarterly* 35 (1): 109-127,http://rsq.oxfordjournals.org/content/35/1/109.abstract.

[12] As per Art. 37 of the *United Nations Convention on the Rights of the Child* (1577 UNTS 3, 20 Nov.1989 (entry into force: 2 Sep. 1990. Section 60 of *Immigration and Refugee Protection Act ("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.

immigration detention.[13] Despite knowledge of their legal responsibilities as well as the harms experienced by detained children,[14] Canada Border Services Agency (CBSA) detains children with their families. The UN Special Rapporteur on the Human Rights of Migrants, Francois Crepeau, has condemned the detention of children.[15] A September 2016 report also called for the end to the detention of children. [16]

The Federal Government's August 15, 2016 announcements of wide-ranging changes to Canada's immigration detention policy[17] are welcome, but it is still unclear how these changes will be implemented. However, the UNWGPAD should urge the Canadian Government to immediately stop the practice of detaining children and pregnant women, implement alternatives to detention, such as community release and supervision or tracking mechanisms, and increase oversight and implement independent and effective complaints and monitoring mechanism of CBSA detention policies.

Canada's Live in Caregivers Program

The majority of temporary foreign workers, including Live-In Caregivers are people from racialized communities,[18] including women of African descent. The Live-In Caregiver Program (LCP) introduced by the previous government in November 2014[19] placed caps on applications for permanent residence, thus removing the guaranteed pathway to permanent status in Canada.

According to the Canadian Union of Public Employees (CUPE):

[13]Amnesty International. 2014. "Canada Submission to the United Nations Human Rights Committee." 112th Session of the Human Rights Committee, London. Online: https://www.amnesty.org/en/documents/amr20/1806/2015/en/

[14] See International Detention Coalition (IDC). 2012. "Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum Seeker and Irregular Migrant Children Affected by Immigration Detention." Online: http://www.refworld.org/docid/510a604c2.html

[15] Francois Crepeau. 2016. "Any Detention of Migrant Children is a Violation of their Rights and Must End. Online: https://theconversation.com/any-detention-of-migrant-children-is-a-violation-of-their-rights-and-must-end-64985

[16] International Human Rights Program. 2016. "No Life for a Child": A Roadmap to End Immigration Detention of Children and Family Separation," available at http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-NoLifeForAChild.pdf

[17] CBC News. 2016. "Canada's immigration detention program to get $138M makeover." Online: http://www.cbc.ca/news/canada/montreal/goodale-immigration-laval-1.3721125

[18] Fay Faraday. 2012. "Made in Canada How the Law Constructs Migrant Workers' Insecurity." Metcalf Foundation, online: http://metcalffoundation.com/wp-content/uploads/2012/09/Made-in-Canada-Full-Report.pdf

[19] Government of Canada. 2016. "Live-in caregivers. " Online: http://www.cic.gc.ca/ENGLISH/work/caregiver/index.asp.

> "Caregivers are still required to work as temporary foreign workers for two years so the promise to process applications for permanent residence within six months does not prevent family separation. Women from poor countries who are now working under the LCP are separated from their own children for at least three to five years in the heartbreaking situation of caring for someone else's children here in Canada. Given the reality of medical, security screening and other requirements, in order to apply for permanent residency status, migrant advocates do not expect these changes to be realized or families to be reunited quickly.
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> Migrant advocates are clear that as long as the status of a caregiver is tied to one employer, employers can make demands on caregivers to live in their homes which render the "option" of living outside the home a risk. Providing the option to live out without addressing the root of this vulnerability – being tied to one employer is pointless. Furthermore, caregivers in the LCP are only paid minimum wage, without a living wage most are unable to afford to live out' It is not a real choice."[20]

In our work at the Schlifer Clinic, we are seeing the pathways into human trafficking that are opened up when predators prey on caregivers with precarious status due to being abusively released on arrival by their putative employers, and when women try to protect themselves from sexual or labour exploitation by an employer by "going underground." The UNWGPAD should urge the Canadian government to strengthen pathways to permanent residence for Live-in Caregivers and expedite processing of pending cases instead of imposing what can amount to a gendered migration trap. It should also implement express entry family reunification, reuniting children with their mothers as they work on getting their permanent residence in Canada. Importantly, the government should implement policies that do not tie Live-in Caregivers to one employer, placing them at further risk of isolation and abuse.

Overrepresentation of Black Children in the Child Welfare System in Canada

The overrepresentation of racialized children and children of African descent in the Canadian child welfare system is a pressing concern. Estimates of black children in the system range from 41 to 60%,[21] with advocates observing that this number is on the

[20] CUPE. 2015. "Fact sheet: Temporary Foreign Workers Program and the Live-in Caregiver Program," Online: http://cupe.ca/fact-sheet-temporary-foreign-workers-program-and-live-caregiver-program.

[21] City News, "African-Canadians unfairly treated by Ontario's child-welfare system: report," September 29. 2016. Online: http://www.citynews.ca/2016/09/29/african-canadians-unfairly-treated-ontarios-child-welfare-system-report/ ; Ontario Association of Children's Aid Societies, "ONE VISION ONE VOICE: Changing the Child Welfare System for African Canadians," October 21, 2015. Online: http://www.oacas.org/what-we-do/government-and-stakeholder-relations/one-vision-one-voice/#tab-4

rise.[22] According to a report by the Ontario Association of Children's Aid Societies, the "African Canadians in Ontario make up 4% of the population in the province and 8% of the Toronto population. However, they are largely overrepresented in child welfare making up 41% of all children and youth of the Toronto Children's Aid Society. **This is 5 times their representation in the population**." [23] Black children are also disproportionately affected by poverty and homelessness.[24] Persistent and systemic discrimination in the child welfare system also compounds the discriminatory experiences during a child's life and their experiences in the school system, often resulting in a "school to prison" pipeline for racialized children and youth.[25] This overrepresentation in the child welfare system gravely affects the women that our Clinic works with. Women who report domestic violence are routinely reported to the Children's Aid Society, and their differential treatment can result in their children being removed and also jeopardizes their status in other proceedings, such as their immigration, family, and criminal matters.

The UNWGPAD should recommend to the Canadian government that it must acknowledge the historical significance of persistent racism against peoples of African descent in Canada, including the overrepresentation of black children in the child welfare system. The government should also increase core funding dedicated to developing and providing culturally appropriate programming, both for children already part of the child welfare system but also to those outside the system. This programming should be developed and implemented with thorough community consultation, actively engaging the affected women and youth.

Canada's Family Reunification[26] Policies

Refugee and immigrant families, including families of African descent, are frequently separated for prolonged periods or indefinitely, due to policies and practices that block or delay reunification. The barriers include a narrow definition of family (excluding, for example, non-biological children), costly and time-consuming DNA testing, bars on

[22] The Toronto Star, "Ministry-funded CAS report urges overhaul to keep black kids out of care", September 29, 2016. Online: https://www.thestar.com/news/canada/2016/09/29/ministry-funded-cas-report-urges-overhaul-to-keep-black-kids-out-of-care.html

[23] Ontario Association of Children's Aid Societies, "ONE VISION ONE VOICE: Changing the Child Welfare System for African Canadians," October 21, 2015. Online: http://www.oacas.org/what-we-do/government-and-stakeholder-relations/one-vision-one-voice/#tab-4, emphasis added.

[24] The Homelessness Hub, "Infographic: Race Matters in the Child Welfare System," January 6, 2016. Online: http://homelesshub.ca/blog/infographic-race-matters-child-welfare-system

[25] CBC News, "Cops in schools contribute to school-to-prison pipeline, say critics." October 29, 2015. Online: http://www.cbc.ca/radio/thecurrent/the-current-for-october-29-2015-1.3293767/cops-in-schools-contribute-to-school-to-prison-pipeline-say-critics-1.3293790

[26] Canadian Council for Refugees.2016. "Family Reunification." Online: http://ccrweb.ca/en/family-reunification.

sponsorship if the sponsor is receiving social assistance, a category of "excluded family members," and administrative delays.

Immigration Refugee Protection Act Regulation 117(9)(d) imposes a lifetime bar on sponsorship of a family member, if the family member was not examined by an immigration officer when the sponsor immigrated to Canada. This permanent ban on family class sponsorships, no matter how compelling the case, is inconsistent with the Act's objective of seeing "that families are reunited in Canada." It has an extremely detrimental impact on children.

Refugees, particularly women with children, are among those hardest hit. Women who flee persecution and seek asylum in Canada often arrive by force without their spouse or children. Once recognized as refugees in Canada, they can apply to bring their immediate family members to Canada. However, sometimes they are forced to wait years to be reunited with their spouses and children overseas, who can be in situations of danger and persecution.

The UNWGPAD should urge the Canadian Government to implement express entry family reunification, where children are reunited with their parents in 6 months or less. It should also reinstate the previous age of dependants (to 21 years old) and eliminate the 'excluded family member' rule (Regulation 117(9)(d) to recognize that a definition of family members is broad and inclusive.

Resettlement of Refugees Including Women

Government-assisted refugees ("GARs") are persons who have been found to be Convention Refugees abroad whose initial resettlement in Canada is entirely supported by the Government of Canada. They are usually referred to the Government by the UNHCR, which determines their refugee status claim when they register. GARs must establish that that their case is appropriate for Canadian resettlement because they do not have access to other durable solutions, such as remaining in the country of asylum or returning to their country of origin.

Canada allocates targets each year for the resettlement of convention refugees who are eligible to receive financial assistance from the government. The federal government is fully responsible for GARs for up to one year. This support includes accommodation, food, clothing, and assistance with employment[27] and is delivered by CIC-supported NGOs. Support can last up to one year from the date of arrival in Canada or until the refugee is able to support himself or herself, whichever occurs first.

[27] CIC, "Government-Assisted Refugee Program," 01 February 2015, available at: http://www.cic.gc.ca/english/refugees/outside/resettle-gov.asp.

Two specific programs are particularly useful to women who have experienced violence. The Urgent Protection Program (UPP) ensures that Canada is able to respond to urgent emergency requests by the UNHCR to resettle refugees under threat of being returned home, expulsion or facing direct threats to their lives. The Women-at-Risk (WAR) program is a subsection of the UPP, which processes cases of women who are at risk and who require urgent protection or who are in need of special attention. According to the UNHCR, Canada defines women-at-risk as "women without the normal protection of a family who find themselves in precarious situations and who are in a place where local authorities cannot ensure their safety."[28] WARs may be accepted even if they have "limited settlement prospects" if they are in need of urgent protection.[29] WARs may also be privately sponsored. [30]

State induced displacement also exacerbates women's inability to seek adequate modes of state protection and redress, particularly in situations of protracted conflict, which impact women in numerous regions of Africa, such as the ongoing conflict in Somalia or Sudan. Unfortunately, in the context of state-induced displacement, protection mechanisms implemented by the state have repeatedly instigated violence in women's lives, such as when their bodies are used as shields in cases of exchanges for protection during mass population movements; in instances of state-induced marriages; or forced pregnancies. These phenomena in state-induced displacement create a persuasive case for protection that is unique to women's experiences. The unique vulnerability of women to Sexual and Gender-Based Violence (SGBV) in contexts of prolonged conflict, particularly at the hands of the state, must be recognized when considering the protection needs of women. This includes accounting for the structural inequality experienced by women in contexts of ongoing conflict, including precarious living situations, inadequate access to supports, and vulnerability to attack when fetching water or fuel, and widespread prejudice against women who have experienced violence.

Particularly in instances of prolonged conflict, State Parties must be held accountable for the human rights violations against women in situations of state-induced displacement. This includes disseminating appropriate information to women about available redresses, strengthening access to social supports, including international measures of protection, and the creation of appropriate mechanisms of reparations upon the end of the conflict aimed specifically at rectifying the violence suffered by women in contexts of state-induced displacement and situations of forced migration.

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[28] UNHCR Resettlement Handbook, Country Chapters – Canada, July 2011 – revised August 2014, page 9. http://www.unhcr.org/3c5e55594.pdf.

[29] UNHCR Resettlement Handbook, Country Chapters – Canada, July 2011 – revised August 2014, page 10. http://www.unhcr.org/3c5e55594.pdf.

[30] CIC, "Government-Assisted Refugee Program," 01 February 2015, available at: http://www.cic.gc.ca/english/refugees/outside/resettle-gov.asp.

The UNWGPAD should urge the Canadian government to continue resettling refugees to Canada, including women who have experienced domestic violence and SGBV, and strengthen the UPP and WAR programs for faster processing of particularly vulnerable and at-risk cases, including women who have experienced violence. It should also support private sponsorship in addition to government assisted refugees, including targeted sponsorship of women who have experienced SGBV, committing to a substantive gender analysis in Canada's refugee resettlement policies.

International Standards for the Protection of Women of African Descent

Contextual Specificity in State Protection and Available Redress

Comprehensive national and regional strategies must provide robust frameworks for strengthening the systems that respond to violence against women. These strategies must place women's knowledge, experiences and needs at the centre of a range of forms of evidence to inform plans and measure success. Adequately funded community based responses are critical to the success of any plan. Adequate must be defined in the context of the scope of pandemic proportions, and resourced accordingly.

More robust national and regional plans are needed to effectively incorporate international human rights standards. Within the context of a declaration that violence against women constitutes a global health pandemic, the United Nations had called on all countries to have a National Action Plan on Violence Against Women by 2015. National Action Plans provide a framework for strengthening systems that prevent and respond to violence against women. They establish national standards and collaboration between all levels of government, civil society, survivors, and service responders.

International standards for state protection and the assessment of available redress mechanisms must recognize that forms of persecution and violence experienced by women are often very different from those experienced by men, particularly for women from visible minority communities. This can include persecution specifically on gender-based grounds but also generalized persecution and violence. Although gender is not an enumerated ground for establishing Convention Refugee status, the Convention has been interpreted to include claims by women who demonstrate a well-founded fear of gender-related persecution by virtue of belonging to an innate, immutable social group.[31]

The way that women can access state protection and available redresses also differs from context to context. In forced migration situations and situations of protracted

[31] See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

conflict, women may not be able to effectively access protection due to discrimination, fear of further attacks, reprisals by state or government officials, or re-traumatization when disclosing sensitive material such as instances of sexual assault or SGBV. If women flee their country and make a refugee claim, the evidence that women may be able to bring forward to support their claim may also be different or more difficult to provide. These differences need to be taken into account fully if women's human rights are to be respected.

In 1993, Canada became the first country to issue specific guidelines on the treatment of refugee women claimants fleeing gender-related persecution in the refugee determination system. Other countries (such as the United States and Australia) have adopted their own guidelines, or have changed legislation to recognize gender-based persecution (such as Sweden) or have advanced the issue through jurisprudence (such as the UK). However, problematic assumptions about survivors of sexual assault and gender-based violence permeate all levels of Canada's immigration and refugee determination regime, including at the Immigration and Refugee Board, the newly formed Refugee Appeal Division, and subsequent judgments by the Federal Court.

These prejudices exacerbate the trauma faced by migrant and refugee women going through the system and act as a deterrent to disclose prior sexual abuse as part of their claim for refugee status, potentially leading to insurmountable adverse credibility inferences. Refugee determination should be informed by sound principles and international protection standards and not discriminatory and misogynistic presumptions about the behaviour and lived experiences of women who have experienced violence.

Credibility assessments highlight the problematic assumptions that continue to be made about women when they claim insufficient state protection in their country of origin. Credibility will generally be assessed on the basis of plausibility, relevant knowledge, demeanor, and consistency of testimony.[32] All of these factors are highly problematic in gender-based claims. For example, demeanor credibility findings are well-known barriers for victims of sexual assault. Scientific research on the nature of trauma has shown that survivors' narrative may have significant gaps and disjuncture as the claimant affected by traumatic events will most likely not be able to recount, in a linear fashion, the most salient parts of her experience.[33] The woman may also mistrust authority[34] or may be reluctant to speak about incredibly personal circumstances,

[32] See James C. Hathaway and Michelle Foster. (2014) The Law of Refugee Status, 2nd Edition. Cambridge, UK: Cambridge University Press, page 139.
[33] James C. Hathaway and Michelle Foster. (2014) The Law of Refugee Status, 2nd Edition. Cambridge, UK: Cambridge University Press, page 145.
[34] *Lubana v. Canada (Minister of Citizenship and Immigration*), (2003) FCT 116.

especially in the early stages of the proceeding before trust in the system has been developed or in proceedings before male lawyers and decision makers.[35]

The woman may also testify in such a way that is contrary to Western concepts of plausibility and truthfulness.[36] Furthermore, also pertinent to gender-based claims are assessments of plausibility, which are often highly flawed and based on contested inferences contingent on a fixed understanding of rationality in situations of post-trauma. These inferences manifest in procedural as well as substantive problems when analyzing the refugee claim, and can be seen in negative credibility inferences, insensitive questioning, and a general inability to empathize with claimants as they recount an incredibly difficult and personal violation. [37]

This type of treatment of gender-based claims presupposes that a woman who has experienced violence should be able to think rationally about the trauma that she just suffered and act accordingly. This thinking perpetuates myths of violence against women and does not account for the contextual specificity of available state protection and the unique lived experiences of women in the forced migration context who have experienced violence. Instead, refugee determination systems should consider how the social, cultural, religious, and economic context in which the claimant finds herself shape how the woman may be ostracized by the broader community for disclosing her experiences of violence and seeking state protection.

More focus on the intersecting nature of violence against women is necessary, particularly on how multiple points of marginalization affects women's ability to access state protections and adequately exercise available mechanisms of redress.

Best interests of children in state protection should also be more robustly protected. Recently, the Clinic had leave to intervene on a Supreme Court of Canada case that tested the scope of harms considered by the Humanitarian and Compassionate immigration provision, which is used by women to stay their deportations when their experiences of violence have not been properly heard through the refugee or immigration processes, including best interests of the child ("BIOC"). We won a wide-ranging reinterpretation of that provision, which will assist women who experience violence in making humanitarian and compassionate claims in the future.[38] Broader

[35] This may be particularly exacerbated by the shortened timelines as imposed by the current designated countries of origin (DCO).
[36] For example, averting their eyes or displaying particular type of body language may make the claimant appear dishonest to the eyes of a Canadian decision maker.
[37] See also *Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 405 at para. 28, *Isakova v. Canada (Citizenship and Immigration)*, 2008 FC 149 at para. 26, *Yoon v. Canada (Citizenship and Immigration*), 2010 FC 1017 at para 5. *Desire v. Canada (M.C.I*), [2013] FC 167, [2013] FCJ No. 244; *Dezameau v Canada (M.C.I.),* [2010] FC 559, [2010] FCJ No. 710.
[38] *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61.

interpretations of BIOC factors should be explicitly included in measures of international protections for women experiencing violence.

Definition Of "Intersectionality" In Varying Contexts

Informed critiques of human rights abuses against women and the inadequacy of state protection must also problematize the definition of "intersectionality." This concept varies across contexts and should be used to obscure the specificity of women's lived experiences of violence.

Crucial to the understanding of what a human rights-based approach entails are recent human rights and anti-discrimination developments at the national and international levels. Specifically, it is widely agreed that this view of women's human rights must be "intersectional" in nature, and that international treaty obligations expressly call for an intersectional approach to women's rights.[39] Simply put, an "intersectional approach" recognizes that groups often experience distinctive forms of stereotyping or barriers based on a combination of race and gender, gender identity, ability or status. According to the Ontario Human Rights Commission:

> In Canada, as the understanding of human rights evolves, the focus is increasingly on a contextualized approach to discrimination. A contextualized approach places less emphasis on characteristics of the individual and more on society's response to the person. It also takes into account historical disadvantage experienced by the group the person belongs to.[40]

However, intersectionality, when improperly defined or understood, can invite a hierarchy of rights. For example, certain intersecting vulnerabilities are seen as more deserving of international protection, while other types of marginalization are not. This can be seen in the worldwide rise in Islamophobia, including damaging public discourses about how women should have a "right to choose" while simultaneously imposing discriminating policies robbing women of this choice, such as the bans on hijabs, niqabs, and so-called Burkinis.

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[39] UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13, signed 18 Dec. 1979; entered into force 3 Sept. 1981; CEDAW/C/GC/28; Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002-2003) 34 Geo. Wash. Int'l L. Rev. 483; Kimberle Williams Crenshaw, Gender-Related Aspects of Race Discrimination, Background Paper submitted to the Expert Group Meeting on Gender and Racial Discrimination, U.N. Doc. EGM/GRD/2000/WP. 1 (2000); CEDAW General Comment 19 'Violence Against Women', A/47/38 eleventh Session, 1992; CEDAW. Kell v. Canada. Committee on the Elimination of Discrimination against Women, 2012.

[40] http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims/introduction-intersectional-approach.

In Canada, the debates about the niqab, a veil that covers the face except for the eyes, have revealed that these risks are rampant in advanced liberal democracies. The Clinic was one of three interveners in a case involving a Muslim woman's right to testify about sexual assault while wearing a niqab.[41] In addition to the intervention, the Clinic also sponsored a grass roots movement for young Muslim women, "Outburst!", that engaged multimedia campaigns on the issue of Muslim women's rights. Prior to the *NS* case, the Clinic also presented deputations to the Quebec General Assembly against *Bill 94,* which required women wearing the niqab to unveil when working in the public service.[42] The Clinic was also active in a number of ways in challenging the government's baring of niqabs at the citizenship oath ceremony, at first through the UN Reporting mechanisms (UN Committee on the Elimination of Racial Discrimination, "CERD"),[43] and later in the case of a woman who challenged the government under federal law.[44]

At its most insightful, intersectionality is an approach to anti-discrimination and equality law that attempts to move beyond static conceptions[45] and fixed "identities" of discriminated subjects, and, based on the metaphor of a traffic intersection, delineates the 'flow' of discrimination as multi-directional, and injury as seldom attributable to a single source.[46] However, the literature on intersectionality also has ambitions far beyond an extension of the grounds of discrimination protections. There is little doubt that early exuberance about the achievements of women's rights in domestic legal orders,[47] despite their great potential, and taking Canada as a case in point, has been tempered; feminist scholars have come to acknowledge that "the courts' failure to engage deeply with the equality argument yields an impoverished and decontextualized analysis which allows the differential and prejudicial treatment to

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[41] *R v NS*, 2012 SCC 72. See also Barbra Schlifer Commemorative Clinic, 2012. "Media Release." (December 20, 2012). Online: http://schliferclinic.com/womens-rights-supreme-court-releases-n-s-decision.

[42] Bill n°94: An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, February 24, 2011. Online: http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html. See also: Quebec's Bill 60, the "Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests" is one of Canada's most visceral and infamous of such debates. Available at: http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Charter.pdf.

[43] Amanda Dale, "The Intersection of Race and Gender in the Matter of the Canadian State's Ban on Facial Coverings During the Course of Citizenship Oaths", 2012. Online: http://schliferclinic.com/wp-content/uploads/2012/09/CERD_Citizenship_Ban_Schlifer.pdf .

[44] *Ishaq v. Canada (Citizenship and Immigration*), 2015 FC 156.

[45] Emily Grabham with Didi Herman, Davina Cooper and Jane Krishnadas, "Introduction", *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge Cavendish, 2009) at 1.

[46] Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics 1989 U. Chi. Legal F. 139 1989, at 149.

[47] Doris Anderson, "The Adoption of Section 15: Origins and Aspirations," (2006) 5 JL Equal 39.

persist."[48] Importantly, this diminished law and legal discourse centres on the stripped-down bearer of legal rights, essentialized to a single axis of identity, often competing against herself for protections that may well apply to her as a complex subject, but which are constructed outside intersectional approaches to be separate and at odds with one another.[49] In this sense, even as an elaboration of the law's test or grounds of protection in anti-discrimination law, intersectionality has something to offer.

"Intersectionality" is deserving of a fuller elaboration, and cannot be blindly applied without accounting for women who experience violence and who may experience multiple forms of marginalization by virtue of their gender, ethnic identity, and immigration status.

Moving Away from "Culture" and "Culture-Based" Reasoning when Condemning State Practices

All references to culture are unstable and unhelpful when condemning state practices. Discourses that rely on culture as the explanatory phenomenon for violence against women exacerbate problematic myths about violence in specific communities. [50] Placed against the backdrop of notions of 'reasonable accommodation', [51] 'failed

[48] Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers Experience of Discrimination". In, Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada* (Toronto: Irwin Law, 2012), 109 at 111.

[49] A classic example from the international human rights context is 'Sandra Lovelace v. Canada [1977-1981] and the right to enjoy First Nation (Indian) culture under art. 27 of the International Civil and Political Covenant) 024/1977'. Online at http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/40aef4fd0f005d2d41256c02003.
Sandra Lovelace presents herself as neither subsumed by nor divorced from culture, but in critical negotiation with it. Lovelace was shut out of her right to 'access to culture in community with others' (ICCPR article 27) as an Indigenous person, but on the basis of matrimonial property rights which divested women who married outside of the community differently than it did men who did the same. Lovelace argued her case under ICCPR on the basis of discrimination as an Indigenous person and as a woman experiencing 'sex discrimination' (articles 1 and 2). The state's defense rested on its contention that the patriarchy of her community determined her loss of entitlement, and that, in order to respect their autonomy (group rights), the state could not protect her rights as a woman (individual right). Lovelace countered this by submitting evidence that traditional Indigenous culture was not patriarchal, and that this was a colonial distortion of it. Lovelace thus contested both the colonial state's definition of (her) culture and the Indigenous male leadership's collusion with it. Importantly, this complexity of identity, or revelation of symmetry between the patriarchal state and 'cultural' leadership was not recognized in the holding by the HRC, although Lovelace did win the case on the basis of article 27 (not articles 1 and 2).

[50] Geraldine A. del Prado, 'The United Nations Protection of the Rights of Women: How Well Has the Organization Fulfilled its Responsibility'(1995) William & Mary Journal of Women in the Law 51, 70.

[51] Recent legislative attempts in Quebec to ban the *niqab* in the name of gender equality have prompted feminist opposition of which the author is a part: see John Bonner, 'Coalition Launches Day of Action', May 20 2010, Rabble.ca, http://www.rabble.ca/blogs/bloggers/johnbon/2010/05/coalition-launches-day-action-against-quebec%E2%80%99s-proposed-bill-94, accessed 10 March.

multiculturalism' and constrained pluralism in Western liberal democracies, which have evoked notions of women's equality rights as partial justifications for a roll-back of cultural rights,[52] the question of this manipulation of a stagnant formulation of "culture" takes on urgency for human rights practitioners.

Culture is a notoriously 'spacious' concept in human rights, as Patrick Thornberry has noted, and "finding a discrete substance for the right' to culture is a 'complex undertaking."[53] It is, however, worth noting at a minimum, as Thornberry has, that bundled into the notion are a number of specific and discernible rights, which might well be named concretely, rather than tackled as an amorphous right.[54] Culture as an umbrella concept is particularly unhelpful where "culture is claimed as a justification for practices unlikely to be consistent with human rights."[55] However, women's negotiations at the intersection of these rights and affiliations are complex and painful. Culture in this sense must be examined more critically to "understand the link between culture and relations of power and domination"[56] that so frequently pit a woman as a bearer of individual rights against the claimed requirements of culture, particularly in cases of violence.

In the Canadian context, we have historically seen "cultural practices" used as a reason for oppressive legislation against Indigenous women and families. Recently, in the context of polygamy and forced marriages, we saw legislative changes made that support the ideas that violence against women is a "cultural" issue that happens only in certain communities. However, using such "culture-based" reasoning obscures the complexities of women's experiences of violence, risking the exclusion of women who experience multiple forms of marginalization from state protection. In the context of violence against women, we have observed that this obscure use of the notion of "culture" leaps from supporting equitable protection from violence and instead creates a hierarchical model of who needs more protection over others. Unfortunately, in the context of a one dominant culture and multiple minority communities, these notions places most marginalized women at the bottom of protection grid.

Focusing on "culture" actually endangers the very women that the intended policy changes are supposed to serve. Perpetuating emotionally charged stories without

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[52] See Volpp L, 'Feminism versus Multiculturalism' (2001) 5 Columbia Law Review 1181.See also Amanda Dale,
'Women In Sudan', *Studio Two*, television program, Television Ontario, broadcast April 18, 2006 on the hypocrisy of international invasion as a strategy to protect women's rights in Afghanistan and Sudan (Darfur).

[53] Thornberry P, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5:2 *Human Rights Law Review* 1, page 4.

[54] *Ibid,* page 5.

[55] *Ibid,* page 6.

[56] Yakin Erturk, Report of the Special Rapporteur on Violence Against Women, its causes and consequences' (18 May 2009) A/HRC/11/6, para 18.

critical discussion has real policy implications and results in disastrous misapprehensions and dangerous conflations. These problematic conflations are evident in the linkages of refugees and forced migrants to security threats and terrorism, the ongoing Burkini debate in Europe over the right to dictate women's choices of dress, and Canada's own treatment of forced marriage.

The Schlifer Clinic is committed to providing services to women in culturally and linguistically respectful ways and acknowledges women's experiences and social context in service delivery. The Clinic also suggests that, when the UNWGPAD condemns violent and discriminatory practices against women of African descent, the recommendation should focus on the particular social location, contextual specificity, and lived experiences of the affected women, including the structural elements that condition the context of violence. Broad stroke "culture-based" assertions obscure the nuances and intersecting vulnerabilities of women experiencing multiple sources of marginalization, such as including poverty, homelessness, racism, and discrimination on the basis of Indigeneity, religion, country of origin, newcomer status, mental health, and disability.

State Accountability Mechanisms and Violence Against Women

Careful monitoring of state accountability mechanisms must include domestic and international collaboration on combating violence against women, particularly women who experience multiple forms of marginalization, such as women who belong to racialized or religious minority groups.

We also note with concern that policies regarding violence against women are becoming increasingly neutral on the one hand and punitive on the other. In Canada, this is seen in the discourse and use of terminology such as 'domestic assault' whereby victims of violence – women – are rendered invisible. This is also reflected in the penalization women experience when, in trying to create safety in their lives, they are required by intersecting and contradictory programs and eligibility requirements to, in effect, give up their homes, their communities and sometimes their children.

Importing international gender-based analyses into domestic policy and strengthening international cooperation on improving state protection mechanisms and making existing safeguards available would allow for a critical examination of the differences in women's and men's lives, and identify the potential impact of policies and programs in relation to these differences. Such commitments to gender-based analyses also examine the intersection of gender and sex with other identity factors such as income, race, age, and religion, among other factors.

Employment Equity in the Framework of SGBV and Racialized Communities

A robust international commitment to combat violence against women must also include a direct commitment to pay equity.

For example, the gender wage gap in Canada is a persistent concern. Women in Canada earn an average of 66.7 cents for every dollar earned by men.[57] A 2015 UN Human Rights report raised concerns about "the persisting inequalities between women and men" in Canada, including the "high level of the pay gap" and its disproportionate effect on low-income women, visible minority women, and indigenous women.[58] Out of 34 countries in the OECD, Canada had the 7th higher gender wage gap in 2014.[59]

This disparity in income is exacerbated when dealing with visible minority workers, creating a double marginalization for racialized women. There are striking differences between racialized and non-racialized Canadians, and numerous reports have found that Canadians who are visible minorities are more likely to live in poverty, to face barriers to Canada's workplaces, and to earn less than the rest of Canadians.[60] For example, racialized women make approximately 53.4 cents for every dollar non-racialized men made, while racialized men made 73.6 cents for every dollar than non-racialized men made.[61]

The gender and racial wage gap also exacerbates the effects of violence against women. Inequitable earnings perpetuate the unequal power hierarchy between abusers and their victims, and women are often forced to remain in dangerous situations because of very real financial pressures. Overwhelmingly, women's financial worth is negatively impacted by separation and divorce, particularly in instances of domestic violence and when children are involved.[62] As a result, in addition to rectifying the gender wage gap targeted employment supports for women experiencing domestic violence are also

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[57] Statistics Canada. 2011. "Average female and male earnings." Online: http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2020102

[58] United Nations Office of the High Commission for Human Rights. 2015."Concluding observations on the sixth periodic report of Canada." Online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCAN%2FCO%2F6&Lang=en

[59] OECD.2014."Gender Wage Gap." Online: http://www.oecd.org/gender/data/genderwagegap.htm

[60] See for example, Sheila Block and Grace-Edward Galabuzi. 2011. Canada's Colour Coded Labour Market: The gap for racialized workers. Online: http://www.wellesleyinstitute.com/wp-content/uploads/2011/03/Colour_Coded_Labour_MarketFINAL.pdf; Sheila Block, 2010. ONTARIO'S GROWING GAP The Role of Race and Gender, online: http://ywcacanada.ca/data/research_docs/00000140.pdf

[61] Sheila Block, 2010. ONTARIO'S GROWING GAP The Role of Race and Gender, online: http://ywcacanada.ca/data/research_docs/00000140.pdf

[62] See for example, Anna Aizer. 2010. "The Gender Wage Gap and Domestic Violence," *American Economic Review* 100(4). .

necessary.[63] Additionally, the gendered wage gap reveals and communicates to society more generally the relative valuing of the genders. Undervaluing women, exemplifying and maintaining women's subordinate positions in such a material way, contributes to an overall vulnerability to violence and disrespect.

Sexual Violence in Employment Contexts and State Protection

Sexual violence and its impacts in the employment context highlight yet another dimension of inadequate state protection for women. In situations that exacerbate unequal power dynamics, such as the employment contexts, women, particularly visible minorities, continue to be deterred from reporting sexual assault and adequate state protection mechanisms are often not available. This is particularly true for women from marginalized communities or who are experiencing multiple forms of violence, particularly women are dependent on the employment relationship to continue, such as live-in-caregivers or temporary foreign workers who are tied to one employer and whose immigration status is contingent on maintaining this relationship.[64] Women who are without status and who participate in the informal economy are at an even higher risk because they are afraid to access the limited state protection mechanisms available for fear of deportation. Sexual violence against women who are Indigenous is also alarmingly high.

The UNWGPAD should consider the impacts of violence in the employment context when States report on sexual violence, and explicit measures should be implemented to protect women from sexual harassment and other forms of violence of coercion in the workplace. There should also be robust monitoring of the employment conditions of domestic workers, live-in-caregivers, temporary foreign workers, and women without status to recognize their unique vulnerability to violence in their homes and at work.

Conclusions

Strengthening international commitments to rights protecting mechanism for peoples of African descent and other visible minorities must include a commitment to international standards of state protection towards durable solutions, implementation of these standards into domestic legislation, and a normative shift towards recognizing the multiple intersecting forms of violence experienced by women, particularly those who experience multiple marginalizations on account of their race, religion, and gender identity.

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[63] See for example Government of Ontario.2016. "Gender Wage Gap Strategy Consultation." Online: https://www.ontario.ca/page/gender-wage-gap-strategy-consultation

[64] CUPE. 2015. "Fact sheet: Temporary Foreign Workers Program and the Live-in Caregiver Program," Online: http://cupe.ca/fact-sheet-temporary-foreign-workers-program-and-live-caregiver-program.

We also wish to express that a siloed approach to separating domestic and sexual violence has been shown to have limitations, both in the domestic as well as international arena. We wish to acknowledge that violence against women is experienced in a continuum and across the lifespan, and in different life situations, often by individual women who may not see the benefit of strict policy and strategy separation. It is important that the new approach should acknowledge the social context of the violence but does not create a priority structure among the victims of violence. Attributing violence to notions such as "culture" and "religion," without contextualizing it in ongoing patriarchy places the responsibility over the experience of violence on survivors—particularly those of African descent-- rather than shifting it to the state.

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