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Ukrainian Refugees, Race, and International Law's Choice Between Order and Justice

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Abstract

The resurgence of racist rhetoric and policies concerning people fleeing the war in Ukraine serves as a reminder that the ostensible goals of the 1951 Convention Relating to the Status of Refugees and 1967 Protocol are regularly eschewed by states making decisions about how to allocate grants of asylum. This Essay makes the claim that racial tiering of protection-seekers demonstrates that states use international refugee law to negotiate their national whiteness contracts and to secure racially hegemonic geopolitical ordering.

I. Introduction

While a tradition of white supremacy in the former Soviet bloc nations is no secret,[1] many observers were shocked to see that in the face of a global humanitarian crisis, Ukrainian officials doubled down on racism in attempting to exclude Ukrainian residents of African and Asian descent from fleeing Ukraine after the 2022 Russian invasion.[2] Moreover, rhetoric regarding the Ukrainian war and humanitarian crisis from Ukrainian officials,[3] journalists, and pundits explicitly depicted Ukrainians as more deserving of the world's sympathy and care than other, non-white victims of conflict.[4] One such journalist, a British baron and former politician, wrote

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[1] *See* Amy Shannon Liedy, *Life as a Black Ukrainian: How Some Natives Are Treated Like Foreigners*, Wilson Ctr. (May 2, 2011), *at* https://www.wilsoncenter.org/event/life-black-ukrainian-how-some-natives-are-treated-foreigners.

[2] *See* Monica Pronczuk & Ruth Maclean, *Africans Say Ukrainian Authorities Hindered Them from Fleeing*, N.Y. Times (Mar. 1, 2022), *at* https://www.nytimes.com/2022/03/01/world/europe/ukraine-refugee-discrimination.html.

[3] *See* Philip S. S. Howard, Bryan Chan Yen Johnson & Kevin Ah-Sen, *Ukraine Refugee Crisis Exposes Racism and Contradictions in the Definition of Human*, Conversation (Mar. 21, 2022), *at* https://theconversation.com/ukraine-refugee-crisis-exposes-racism-and-contradictions-in-the-definition-of-human-179150 (containing video link of Ukraine's deputy chief prosecutor, David Sakvarelidze, stating: "It's very emotional for me because I see European people with blue eyes and blonde hair being killed" and Ukrainian Ambassador to the United Kingdom, Vadym Prystaiko, saying, in response to reports of racism, "Maybe we will put all foreigners in some other place so they won't be visible. . . . And (then) there won't be conflict with Ukrainians trying to flee in the same direction.")

[4] *See* Lorraine Ali, *In Ukraine Reporting, Western Press Reveals Grim Bias Toward "People Like Us,"* L.A. Times (Mar. 2, 2022), *at* https://www.latimes.com/entertainment-arts/tv/story/2022-03-02/ukraine-russia-war-racism-media-middle-east (quoting CBS News correspondent Charlie D'Agata as saying: "This isn't a place, with all due respect, like Iraq or Afghanistan, that has seen conflict raging for decades. . . . This is a relatively civilized, relatively

of his empathy with Ukrainians, noting that "They seem so like us. That is what makes it so shocking. . . . Ukraine is a European country. Its people watch Netflix and have Instagram accounts . . . ."[5] Others openly pushed back on these Eurocentric, and fundamentally racialized, expressions of solidarity; MSNBC's Medhi Hasan, for his part, retorted as follows: "When they say, 'Oh, civilized cities' and, in another clip, 'Well-dressed people' and 'This is not the Third World,' they really mean white people, don't they?"[6]

Such biases are reflected in the enforcement of humanitarian law and policy: according to the 1951 Convention Relating to the Status of Refugees (Refugee Convention), asylum is to be accorded to valid refuge seekers in a non-discriminatory fashion, without respect to race.[7] However, many nations consider race in deciding to whom they will and will not grant refuge.[8] Are racial sorting, and racial discrimination, then, violations of international refugee law, or rather part and parcel thereof?

The inability—or lack of will—of the international legal order to adequately meet the needs of Black and other non-white protection seekers, and to compel Ukraine to respect the principles of anti-discrimination and equality in its attempts to quell its humanitarian crisis, show that: international law remains much more political than it is legal; state sovereignty still holds more authority than formal international legal norms; and racism continues to undermine international law's effectiveness as a tool for justice. The Refugee Convention is either not being properly enforced or is meant to gaslight petitioners into believing that remedies are consistently and equitably available to them when, instead, the Refugee Convention is part of the mechanics of racialized geopolitical ordering.[9]

Part II of the Essay claims that international refugee law is not justice and equity-oriented, but instead supports national and global racial contracting and white supremacist geopolitical ordering. Part III then briefly describes how non-white residents of Ukraine were excluded from refugee convoys to neighboring European nations after the Russian invasion began, as well as the claims of public pundits and officials that white Ukrainian refugees deserved special welcome and sympathy from the world specifically because of their whiteness and European origins. The Essay thus challenges readers to reconsider the widespread assumption that international refugee law ensures a right to asylum in a non-discriminatory fashion. It concludes by insisting upon a focus on anti-racist justice and equity in international refugee law by ending racial tiering in asylum enforcement and rejecting states' claims of sovereignty in their use of racist refugee admissions policies.

European—I have to choose those words carefully too—city, one where you wouldn't expect that or hope that it's going to happen.").

[5] *Id.* (quoting Daniel Hannan).

[6] *Id.*

[7] Article 3 of the Refugee Convention prohibits discrimination against refugees on account of "race, religion, or national origin." Convention Relating to the Status of Refugees, Art. 3(1), July 28, 1951, 19 UST 6259, 6261, 189 UNTS 150, 156 (*entered into force* Apr. 22, 1954) [hereinafter Refugee Convention].

[8] *See* Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 643–62, 696–97 (2009).

[9] According to E. Tendayi Achiume and other scholars, the international refugee law regime has excluded non-white refugees since its creation. "The regime excluded Third World, non-white refugees. The confluence of First World [nation-s]tate interest meant that the [UN] Refugee Convention definition of a refugee, which restricted status to those fleeing events in Europe, by design and effect racialized the very first international legal definition of a refugee." E. Tendayi Achiume, *Race, Refugees, and International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 56 (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021).

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II. Racial Contracting, State Sovereignty, and International Refugee Law

When one considers the fundamental role that racial and geopolitical hegemony play in the enforcement of refugee policy,[10] it becomes clear that racism is a strategic instrument through which geopolitics are operationalized and (importantly) bargained for. Refugee law—like much of public international law—is a vehicle for the maintenance of a Euro-dominant world order instead of human rights-focused global justice. The ostensible goals of the refugee law regime, as outlined by the Refugee Convention, comport with the layperson's understanding of justice—reparatory actions taken by people, institutions, and/or states to compensate for human rights violations or other harms, and the implementation of policies and norms that prevent such violations and harms from occurring. Stated succinctly, justice, in the context of the refugee law regime, refers to the realization or restoration of human rights in the form of protection.[11] According to the United Nations high commissioner for refugees: "The Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and *non-refoulement*. Refugee Convention provisions, for example, are to be applied without discrimination as to race, religion or country of origin."[12]

Nonetheless, European and other majority-white states regularly employ asylum policies to renegotiate or reinforce their socioeconomic and political orders, and the racialized social contracts that undergird their societal hegemonies. Rises in ethnonationalism have once again illuminated how racial states use international law in the service of their geopolitical interests, while also using state sovereignty as a shield to avoid compromising their internal racial and ethnic demographics. To maintain white supremacist social contracts that guarantee permanent economic and political dominance for people raced as white,[13] nations invested in maintaining white supremacy ("racial states") even strike up bilateral agreements with other states for the forcible offshoring of refuge seekers.[14] This Essay invites readers to consider the

[10] *See* B.S. Chimni, *The Geopolitics of Refugee Studies: A View From the South*, 11 J. Refugee Stud. 350 (1998) ("In the post-1945 period the policy of Western states has moved from the neglect of refugees in the Third World to their use as pawns in Cold War politics to their containment now."); Achiume, *supra* note 9, at 51–52 (noting that: "In some countries, scholars have argued that racism is actually institutionalized in asylum law and policy governed by the Refugee Convention.").

[11] Refugee law scholars have often described what I characterize here as a dichotomy between justice and order and as a dichotomy between protection and state sovereignty, such as Peter Schuck did in his influential 1997 article. *See, e.g.*, Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 Yale J. Int'l L. 243, 246–47 (1997) (describing his "effort to salvage a meaningful human rights regime from the carcass of state sovereignty" and acknowledging that "many well-informed commentators on refugee law and policy in the academy and in the field . . . often maintain that state sovereignty constitutes perhaps the chief threat and impediment to the fulfillment of human rights goals").

[12] The UNHCR also describes the Refugee Convention as being "[g]rounded in Article 14 of the Universal Declaration of Human Rights 1948" and notes that the Convention has been supplemented by "the progressive development of international human rights law." Office of the High Commissioner for Refugees, "Introductory Note by the Office of the High Commissioner for Refugees (UNHCR)" Convention and Protocol Relating to the Status of Refugees, *at* https://www.unhcr.org/en-us/3b66c2aa10.

[13] *See* Marissa Jackson Sow, *Whiteness as Contract*, 78 Wash. & Lee L. Rev. 1803, 1817–28 (2022).

[14] The United Kingdom, for example, has implemented a "hostile environment" policy to refugees to cater to ethnonationalist sentiments, which led to the formation of its "UK-Rwanda Migration and Economic Development Partnership" asylum claim transfer agreement. *See* Melanie Gower & Patrick Butchard, *UK-Rwanda Migration and Economic Development Partnership*, House of Commons Library (July 12, 2022), *available at* https://researchbriefings.files.parliament.uk/documents/CBP-9568/CBP-9568.pdf; Piyal Sen, et al., *The UK's*

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deleterious impact that racial tiering has upon the ability of the international refugee law regime to effectuate justice. The humanitarian crisis in Ukraine provides evidence of exactly how the contracting of whiteness shapes the law of refugees and states' refugee and asylum policies and enforcement and reveals that international law is more oriented to serving powerful states' interests in sovereignty and geopolitical power than human rights protection and humanitarian assistance.

A. International Law and Post-Colonial Geopolitical Ordering

From the perspective of the rights-oriented scholar or stakeholder, a central purpose of public international law—including the law of refugees—is to provide remedies attaching to the human rights of people when national apparatuses fail them.[15] Viewed through such a lens, the obvious failures of states to provide refuge to those in need thereof because of their race or racialized identities is a flagrant, unjustifiable violation of the Refugee Convention and of human rights law. However, a view of international law that is based in legal realism, and certainly those views that center the relationships between international law and colonialism, may instead recognize public international law as much more focused on geopolitical ordering than rights-focused justice.[16]

Consider, for example, the central role that colonial administration, Eurocentrism, and, therefore, racism played in the development of the contemporary international law regime.[17] The process by which the United Nations was negotiated necessarily excluded the Global South because none of the colonized nations had achieved independence from their European rulers; as such, they had no stake in the establishment of the new global order and the laws meant to govern it, despite being subjected thereto. Though admitted to the UN after independence, the new Black- and Brown-led states were never accorded institutional equity, nor have international norms ever been equally applied to them.[18] Western, European, and other majority-white states enjoy outsized sovereignty by comparison and exert disproportionate decision-making power within the international law regime.[19]

Exportation of Asylum Obligations to Rwanda: A Challenge to Mental Health, Ethics and the Law, 62 MED., SCI., & L. 165 (2022).

[15] *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 130 (1990) ("Refugee law is often thought of as a means of institutionalizing societal concern for the well-being of those forced to flee their countries, grounded in the concept of humanitarianism and in basic principles of human rights.")

[16] *See id.* at 130 ("In practice . . . international refugee law seems to be of marginal value in meeting the needs of the forcibly displaced and, in fact, increasingly affords a basis for rationalizing the decisions of states to refuse protection.")

[17] *See id.* at 134–35 ("Refugee law, with its predominant emphasis on the establishment of secure conditions of exile, is fundamentally a product of European political culture. . . . By the beginning of the twentieth century . . . the view in Europe of the state as an instrument for carrying out a spiritually inspired mandate had been discarded in favor of a conceptualization of the state as an independent political apparatus dedicated to advancing the general good of its own population.")

[18] *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 193 (2004) (contending that "the reproduction of the basis premises of the civilizing mission and the dynamic of difference [is] embodied in the very structure, logic and identity of international institutions")

[19] *See* CHARLES MILLS, THE RACIAL CONTRACT 20 (1997) (describing "international law, pacts, treaties and legal decisions" as part of a "series of acts" by which "Europeans . . . emerge as the 'lords of all the world' . . . with the increasing power to determine the standing of the non-Europeans who are their subjects").

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The racialized people from formerly colonized nations are, thus, doubly marginalized, and strategically so. They are the human capital that provided their colonial masters with the geopolitical force guaranteeing their past and present negotiating power within international lawmaking bodies; meanwhile, their own relative powerlessness continues to result in their exclusion from contractual authority vis-à-vis these bodies. This exclusion from contracting authority is the outgrowth of the terms of a global racial contract that grants Western states outsized sovereignty and dominion over the Global South based on the durable colonial idea that the Global South is too illiberal and unstable to exercise full self-determination, much less decision-making power on a global scale.[20] The ravages of past colonialism and present-day interventionism and exploitation by the West thus continue to precipitate political, social, and economic collapses that lead to persecution and mass human rights violations, and therefore, to asylum-seeking.

B. The Racial Contract, Racial Tiering, and International Refugee Law

Racial contracts[21] are social contracts that depend upon legally enforceable contracts for their survival; the economic exploitation and political and legal dispossession of non-white people by people raced as white is carried forth through commercial and other legally enforceable agreements.[22] Evidence of geopolitical, and racial, contracting is evident throughout international affairs and governance. At the United Nations, for example, no majority Black nation has a permanent seat on the all-powerful Security Council, and, consequently, no veto power and therefore an unequal share of legal and political contracting authority. This permanently inequitable structure was negotiated at the United Nations' founding.[23] Western states have used legal procedures as well as extralegal procedures to bully Global Southern states into scuttling human rights demands.[24] The wealth and power of European and North American nations, obtained via the invasion and colonization of Black and Brown nations and the enslavement of Africans in the Americas, permits these powerful nations to wield outsized power in the drafting of international laws, the interpretation thereof, and certainly in their enforcement. Thus, despite noble formal intent, bilateral and multilateral treaties and conventions effectively keep a racially hegemonic colonial order in place, decades after the formal anti-colonial and independence movements came and went.

[20] *See* ANGHIE, *supra* note 18, at 103 ("[U]nderstanding . . . the role of race and culture in the formation of basic international law doctrines such as sovereignty is crucial to an understanding of the singular relationship between sovereignty and the non-European world."); B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 4 (2004) (arguing that "which exercises the greatest influence in IIs [international institutions] today . . . is that of the transnational fractions of the national capitalist class in advanced capitalist countries with the now ascendant transnational fractions in the Third World playing the role of junior partners").

[21] *See* Jackson Sow, *supra* note 13, 1810–11 (2022).

[22] *See id.*

[23] *See* United Nations, *United Nations Security Council: Current Members*, *at* https://www.un.org/securitycouncil/content/current-members.

[24] *See* E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 HARV. L. REV. F. 378, 379 (2021) (describing Western nations' campaign to undermine the Africa Group's petition for a Commission of Inquiry regarding racial discrimination in the United States in June 2020); David Helps, *"We Charge Genocide": Revisiting Black Radicals' Appeals to the World Community*, 3 RADICAL AMERICAS 10 (2018) (describing the United States' efforts to discredit the 1951 *We Charge Genocide* petition).

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The gap between the text of the Refugee Convention and the actual application and enforcement of refugee law and policy plays a major rule in sustaining racial contracting in international affairs and governance. The presence of text that decries racial discrimination serves as a form of ideological conditioning that convinces stakeholders that law is oriented toward transformative justice when, instead, the international refugee regime conserves a geopolitical order rooted in white supremacy and colonialism[25] and reinforces individual states' ability to preserve their national racial orders. This ideological conditioning, as described by racial contract theorist Charles Mills,[26] works together with brute force[27]—in this case, the violence of racially selective exclusion from refuge—to operationalize white supremacy in refugee admission and other human rights protections. In the Ukrainian context, the physical violence of forcibly preventing non-white people in Ukraine from boarding trains to safety from Russian airstrikes—violence that manifests in other Western and majority-white racial states as family separation policies[28] and refugee offshoring[29]—was met by the discursive violence of pundits advocating for racially selective empathy on Ukrainians' behalf. B.S. Chimni has also called attention to the geopolitics of refugee studies themselves and the influence of racial and imperial hegemony over our understandings of the refugee law regime—ultimately calling for a rejection of formalism and an embrace of contextualism that considers how international organizations function in a given social and political order.[30]

The concessions that the international law regime makes to states' sovereignty ensure that international law is more focused on power and geopolitical order than on global justice. Race matters in this context because it has been, and remains, central to how the law allocates power and sociopolitical order within and between states. Thus, the formal goals of the law of refugees therefore can be used to serve more ignoble purposes: (1) to facilitate asylum for people raced as white as needed, as a means of protecting white supremacy within states and throughout the global order; and 2) to, more broadly, facilitate states' negotiations and renegotiations of their respective racial contracts.

According to James Hathaway, "neither a humanitarian nor a human rights vision can account for refugee law as codified in the United Nations Convention Relating to the Status of Refugees and the Protocol adopted under its authority."[31] Rather, international refugee law provides "a means of reconciling the sovereign prerogative of states to control immigration with the reality of forced migrations of people at risk[.]"[32] According to E. Tendayi Achiume: "Notwithstanding the prohibition of discrimination in the Refugee Convention

[25] *See* Jackson Sow, *supra* note 13, at 1822–23 (discussing the failure of anti-discrimination laws to dismantle white supremacy in the United States).

[26] *See* MILLS, *supra* note 19, at 83 (1997).

[27] *See id.*

[28] The United States notoriously implemented a family separation policy to deter people from migrating or fleeing to the country via the southern border under the Trump administration. *See generally* Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 432 (2020) (describing the origins of the policy and making the case that U.S. and international law limit the Trump administration's ability to put such a policy in place).

[29] *See* Human Rights Watch, *Australia: 8 Years of Abusive Offshore Asylum Processing* (July 15, 2021), *at* https://www.hrw.org/news/2021/07/15/australia-8-years-abusive-offshore-asylum-processing (describing Australia's policy of forcibly transferring asylum seekers to offshore camps for processing in Papua New Guinea and Nauru).

[30] *See* Chimni, *supra* note 10, at 365–68.

[31] Hathaway, *supra* note 15, at 130.

[32] *Id.* at 174.

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and its Protocol, discrimination in access to, and enjoyment of these instruments' protections nonetheless persists."[33] But should this reality remain left unchallenged? As racism in asylum and other humanitarian denials become more visible, and more unabashed, will international refugee law maintain legitimacy? For the law of refugees to survive, it must require that state sovereignty cede to the demands of a justice-focused international system. As Evan Criddle and Evan Fox-Decent warn their readers: "A failure to do so would render the international legal system incapable of claiming to possess legitimate authority vis-à-vis asylum seekers, supplanting the rule of international law in this context with an extralegal use of mere coercive force."[34]

III. The 2022 Ukrainian Refugee Crisis and Racial Tiering of Protection-Seekers

As a formal matter, the law of refugees exists to protect the rights of people to seek asylum from persecution on the basis of a number of protected categories, and parties to the Refugee Convention are to apply its provisions without discrimination against refugees on the basis of their race, religion, or national origin.[35] Refugee law is meant to foster collaborative humanitarian assistance by receiving states, as a means of restoring the peace and justice diminished by the persecution experienced by the asylum seeker in their home state.[36] However, despite the language of the Refugee Convention, states parties to the Convention regularly use race as a way of determining whom to grant and refuse refuge.[37] Racially undesirable asylum seekers are often characterized as opportunistic migrants[38] looking to improve their economic condition by coming to wealthier, majority-white states. These would-be receiving states consider these protection-seekers as a threat to the existing national fabric—a euphemism for the existing racial demographics in a country—their claims of persecution are heavily scrutinized or altogether challenged or denied.[39]

[33] Achiume, *supra* note 9, at 50.

[34] Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law*, 62 Wm. & Mary L. Rev. 1067, 1072 (2021).

[35] *See* note 3 *supra*.

[36] According to Katerina Linos and Elena Chachko, "The preamble to the 1951 Refugee Convention, the cornerstone of the international refugee law regime, includes a general obligation to assist refugee receiving countries through international cooperation." Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 Cal. L. Rev. 897, 898–99 (2022). *See also* Schuck, *supra* note 11, at 246 (describing how most refugee law scholars and commentators focus on the "radical, enforced dislocation and isolation" of refugees, and how to alleviate their plights—a focus that stands in contrast to Schuck's focus on nation-states).

[37] According to Christopher Kyriakides and others, "The construction of 'the refugee' as a 'forced' 'non-Western' object without will or socio-cultural history, to be rescued by the benevolent West is the central point of overlap between racialization and refuge in the contemporary context of refugee reception." Christopher Kyriakides, Dina Taha, Carlo Handy Charles & Rodolfo D. Torres, *Introduction: The Racialized Refugee Regime*, 35 Refuge 3, 5 (2019).

[38] *See* Achiume, *supra* note 9, in which Achiume recalls Chimni's assessment of how refugee scholars contribute to a "Global apartheid" approach to refugee law policy (quoting Chimni, *supra* note 10); *See also* Kyriakides, Taha, Charles & Torres, *supra* note 37, at 4–5 ("A set of political and media-validated scripts play out—particularly in the cultural construction of a war-induced "refugee crisis"—that informs Western assumptions of what a refugee is and that excludes the "non-deserving." In the West, migrants and refugees from the Global South and East are (in)validated within a 'victim-pariah' representational status couplet, where entrants must prove they do not constitute a threat to the receiving state.")

[39] *See id*.

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The Russian invasion of Ukraine catalyzed an enormous refugee crisis,[40] one that has again highlighted the role that racism plays in refuge provision. The racial tiering of refugees in Ukraine was stark, with Ukraine taking steps to use race to determine who would be allowed to leave their territory in search of safety. This Part of the Essay makes the case that racial tiering is not merely an unfortunate byproduct of nations' humanitarian policies, but rather that international refugee and human rights law are tools that states use to renegotiate and reinforce white supremacy and racist national and global geopolitical hegemonies.[41]

A. Race, Refuge, and Ukraine

The 2022 Russian invasion of Ukraine prompted millions of people to flee for neighboring European countries.[42] If the trauma of fleeing war was not sufficiently tragic, Afro-descendant and Asian protection-seekers also faced racism in their searches for humanitarian relief. Most of the reports and testimonies came from Black Caribbean and African asylum seekers—including those who were long-time residents of Ukraine—who recounted and displayed for the world the dehumanizing treatment they faced while trying to board trains leaving Ukrainian cities.[43] Barred from trains despite the existence of available seats, officials told them explicitly that seats were reserved for white people, with white women and children receiving priority for boarding.[44] Video footage shows officials pushing Black would-be passengers away from train doors.[45]

As the refugee crisis intensified, journalists and Ukrainian officials alike made full-throated contributions to the idea that white refugees were deserving of special care via primetime news coverage, without so much as a hint of irony or shame.[46] Ukraine's deputy chief prosecutor declared, via the BBC, that the crisis left him emotional precisely because the people being killed in the war were "European people with blue eyes and blonde hair."[47] For his part, CBS correspondent Charlie D'Agata noted, on-air, his views that the Ukrainian refugee crisis in

[40] *See* Drew DeSilver, *After a Month of War, Ukrainian Refugee Crisis Ranks Among the World's Worst in Recent History*, Pew Res. Ctr. (Mar. 25, 2022), *at* https://www.pewresearch.org/fact-tank/2022/03/25/after-a-month-of-war-ukrainian-refugee-crisis-ranks-among-the-worlds-worst-in-recent-history (noting that over 3.7 million Ukrainians fled to other countries within the first month of the 2022 Russian invasion of Ukraine).

[41] *See* Achiume, *supra* note 9, at 58 ("The two-tier system of refugee protection sustained by the non-entrée regime enforces a racial hierarchy.")

[42] *See* Rachel Treisman, *The U.N. Now Projects More Than 8 Million People Will Flee Ukraine as Refugees*, NPR (Apr. 26, 2022), *at* https://www.npr.org/2022/04/26/1094796253/ukraine-russia-refugees (noting that as of the date of publication, over five million people had already fled Ukraine as a result of the Russian invasion).

[43] Rashawn Ray, "*The Russian Invasion of Ukraine shows Racism Has No Boundaries*," Brookings (Mar. 3, 2022), *at* https://www.brookings.edu/blog/how-we-rise/2022/03/03/the-russian-invasion-of-ukraine-shows-racism-has-no-boundaries. According to the article, "Videos show Black people being pushed off trains and Black drivers being reprimanded and stalled by Ukrainians as they try to flee."

[44] *Id.*

[45] *Id. See also* Ralph Wilde, *Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting*, OpinioJuris, (Mar. 17, 2022), *at* http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting (describing the "contrasting treatment" of Black and Brown people in Ukraine who sought protection as "of course telling").

[46] Ali, *supra* note 4.

[47] *See Ukrainian Official's Remark on People with "Blue Eyes and Blonde Hair" Being Killed Sparks Racism Row*, India Today (Feb. 28, 2022), *at* https://www.indiatoday.in/world/russia-ukraine-war/story/russia-ukraine-war-news-latest-racism-row-white-skin-blue-eyes-killed-1918857-2022-02-28.

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Kyiv "isn't . . . Iraq or Afghanistan. . . . This is a relatively civilized, relatively European . . . city."[48] Receiving states weighed in as well. Austrian Chancellor Karl Nehammer, an anti-immigration hardliner who adamantly asserted Austria's right to deport Afghani refuge seekers, said of receiving Ukrainian refugees: "It's different in Ukraine than in countries like Afghanistan. . . . We're talking about neighborhood help."[49]

Though the severity of Russia's breaches of international law was already sufficient to generate worldwide outrage on behalf of Ukraine, the global outpouring of popular solidarity for Ukrainians was thus infused with, and somehow enhanced by, heavily racialized rhetoric.[50] Moreover, Ukrainians' collective racial status was being upgraded due to the war. With the Western world providing Ukraine with the opportunity to formally join its ranks, Ukraine was joining the fraternity of whiteness, with the help of public rhetoric from journalists and officials who were invested in a hagiography of Ukrainian whiteness and the deservingness that comes therewith.

Such racial tiering has a long history within the law of refugees. Achiume recalls Chimni's work on refugee tiering as follows:

> He argued that international refugee scholars, even while critiquing the rise of the non-entrée regime, had also participated in its legitimation by peddling what he called "the myth of difference," according to which "the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe since the end of the First World War. Thereby, an image of a 'normal refugee' was constructed—white, male and anti-communist—which clashed sharply with individuals fleeing the Third World." In public discourse, Third World refugees were presented as opportunistic migrants intent on abusing a system designed only for worthy refugees.[51]

The Ukrainian refugee crisis demonstrates that the myth of difference still has currency within and amongst European and Western states. This ideology is also reflected in international law at large, according to James Gathii, who describes international law as "the product of a combination of the colonial project and anthropologically reified definitions of the primitive."[52] Gathii went on to say:

> It is this racialized primitiveness of the non-European that justified conquest and subjugation . . . deeply racialized discourses presumed the West was superior and civilized but were also predicated on assumptions of White supremacy, in which White was pure, neutral, and rational while the others were impure, abnormal, and degenerate.[53]

[48] *See* Ali, *supra* note 4 (quoting Charlie D'Agata).

[49] *See* Moustafa Bayoumi, *They are "Civilised" and "Look Like Us": The Racist Coverage of Ukraine*, GUARDIAN (Mar. 2, 2022), *at* https://www.theguardian.com/commentisfree/2022/mar/02/civilised-european-look-like-us-racist-coverage-ukraine.

[50] *See* notes 3–4 *supra* and corresponding text.

[51] Achiume, *supra* note 9, at 57.

[52] James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other*, 67 UCLA L. REV. 1610, 1641 (2021).

[53] *Id.* at 1641.

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Because majority-white and European nations have disproportionate power within the international law regime,[54] the belief in European superiority and white supremacy that permeates individual majority-white receiving states also permeates the refugee law regime.

B. Rhetoric, Racial Contracting, and Ukraine

Because equality and non-discrimination are central to the formal values of international human rights law, racism is commonly viewed as a scourge that international law should seek to eradicate. Indeed, the United Nations has publicly and formally committed to stamping out racism.[55] Yet, international law has always been undergirded by, and dependent upon racism, and with respect to international organizations and the enforcement of international laws, racialized hegemony is unfortunately a feature, not a bug. It gives liberal Western nations inordinate space to eschew the ostensible goals of international refugee law while simultaneously using asylum law and policy to renegotiate their racialized social contracts. A belief that the law of refugees is intended to ameliorate racial inequality without an understanding that it is also a racial ordering and reordering tool disempowers advocates for racial justice within the regime, who will continue to push for reforms instead of the transformations needed to reorient international refugee law away from such racial ordering and toward justice.

The Ukrainian crisis has exposed, for scholars and the public alike, the impact of widely held beliefs concerning white supremacy and humanity upon the provision of humanitarian protection. Racist rhetorical feedback between decisionmakers and talking heads concerning the superiority of white, European refugees over non-white, Global Southern refugees solidified systems of racial tiering that, while longstanding, were to be renegotiated such that it would be easily accepted and understood that the needs of white Ukrainian asylum seekers were more important than those of other refugees coming from other countries, or even those in Ukraine who were not white. The rhetoric traditionally used to contract for Ukrainian whiteness and the benefits thereof was deployed in the public square, from white innocence to white meritoriousness and deservingness,[56] with these messages designed to give white Ukrainians access to capital—including admission into receiving countries and the social capital attached to whiteness within their new homes thereafter.

Other countries have developed slightly more subtle means of using asylum policy to reinforce white supremacy. The United States, for example, regularly classifies Afro-descendant and Central American asylum-seekers as migrants so as to avoid responsibility for them under the Refugee Convention.[57] But even among Western powers, these more subtle means have

[54] *See id.* at 1613 ("Just as slavery dehumanized Blacks as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty."); ANGHIE, *supra* note 18, at 103 ("Sovereignty was therefore aligned with European ideas of social order, political organization, progress and development. . . . In contrast, lacking sovereignty, non-European states exercised no rights recognizable by international law over their own territory.").

[55] *But see* Anna Spain Bradley, *Human Rights Racism*, RACE, RACISM & L., at 7 (2019), *at* https://racism.org/articles/worldwide/human-rights/3146-human-rights-racism, wherein Anna Spain Bradley notes that "international law neither explicitly defines nor prohibits racism in a treaty," *id.* at 7, despite "outlawing racial *discrimination* (emphasis added) through a multilateral treaty in 1965." *Id.* at 2.

[56] *See* Achiume, *supra* note 9 and corresponding text.

[57] *See* Kaila C Randolph, *Executive Order 13769 and America's Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1, 21–29 (2017) (documenting the

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themselves become much less subtle in recent years, as politicians indulge in white ethnonationalist populism.[58] For example, the Trump administration altered policies to ban migrants of certain races, ethnicities, and religions, and to severely curtail grants of asylum altogether,[59] while also calling for increased immigration by white people from Europe.[60] The political goals are simple—increase proprietorship and contracting authority amongst white people within these states by denying non-white people's access to the territories, even when faced with dramatic humanitarian crises whose roots may be traced back to colonial domination by the refusing Western states.

IV. Conclusion: Toward Justice?

International refugee law as a tool for justice is a possibility, but not yet a reality. No legal system premised upon colonial or neocolonial oppression, and fueled by white supremacy, can effectuate a vision of justice that is anything other than a white supremacist imagination of a world order that guarantees legal formalism and economic liberalism for the express purpose of maintaining strict racialized geopolitical hegemony. If a legal regime designed to create a more just, anti-racist world order is actually desired, it will need to be created. And for such a regime to be effective, the existing regime must be dismantled. As with all enforceable agreements, the sociolegal agreement currently undergirding the laws of asylum and refuge must be dissolved before a new agreement can take force.

The solution is as simple as it is complex, and as practicable as it may be permanently infeasible: anti-Black racism must be acknowledged as a scourge within international law and geopolitics and targeted for immediate eradication within international law. Acknowledgement of the existence of a system of racial contracting and tiering upon which modern international affairs and law have been structured would do much to advance this project, as bodies of international governance could then commit to racial contractual rescission. Within the sphere of the law of refugees and displaced persons, this must include a recalibration of the Refugee Convention and its enforcement mechanisms in a way that does not allow racist national interests to trump the demands of humanitarian law.

longstanding "[d]e [f]acto '[n]o [a]sylum' [p]olicy for Central Americans," the disparate treatment of Cuban and Haitian refugees, and concluding that "All in all, the U.S. government has a long-standing history of excluding immigrants from entry into the country based on race and national or ethnic origin.").

[58] Robert Tsai has written that Trump "by seeking to restore a set of marginalized values through autocratic methods—has targeted immigration and refugee policy as the new front for eroding foundational principles" and that he has done so "for the purpose of returning to a highly selective 'country-of-origin' approach to immigration policy and to treat Hispanic and Muslim migrants differently from other immigrants, often based on vague assertions of group-based threat." Robert L. Tsai, *Immigration Unilateralism and American Ethnonationalism*, 51 Loy. U. Chi. L. J. 523, 526–27 (2020). *See also* Achiume, *supra* note 9, at 50 (noting that "In some cases, discriminatory application of the Convention is explicit and formal in its racialized exclusion of refugees from recognition and protection. For example, in the wake of arrivals in Europe of Syrian refugees in significant numbers, the United States and a number of countries in Europe pursued religious and country of origin bans that were plainly discriminatory against refugees fleeing Muslim-majority countries.").

[59] *See* Yael Schacher & Chris Beyrer, *Expelling Asylum Seekers Is Not the Answer: U.S. Border Policy in the Time of COVID-19*, Refugees Int'l (Apr. 27, 2020), *at* https://www.refugeesinternational.org/reports/2020/4/26/expelling-asylum-seekers-is-not-the-answer-us-border-policy-in-the-time-of-covid-19 (describing the U.S. use of 42 U.S.C. § 265 to expel refugees under the guise of protecting U.S. citizens from COVID-19).

[60] *See* Nurith Aizenman, *Trump Wishes We Had More Immigrants From Norway. Turns Out We Once Did*, NPR (Jan. 12, 2018), *at* https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did.

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One thing is certain: a system of asylum law that allows states' political and economic interests, including their racial contracts, to flout the principles of equality and non-discrimination formally undergirding them is no system at all—unless, of course, the system is oriented to gaslight refuge seekers into believing that remedies attached to their rights exist while simultaneously protecting the ability of states to reject would-be asylees based on their racialized identities. If the latter is, in fact, the system at play, then such a system continues to prove that it is very effective indeed.

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