

Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility

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Abstract

The refugee regime, built on the 1951 Convention relating to the Status of Refugees, has long excluded women from the international right to protection from persecution. The gender-blind parameters of the Convention have been exacerbated by the same qualities in the international legal system of which it is a part; state practices toward asylum-seekers; and the dichotomous construction of the refugee regime as a whole, which has produced and reproduced victimizing identities of refugee women. Advances today, such as the adoption of gender guidelines in a number of states, have been more symbolic in effect than transforming. New policy paths need to be evaluated to ensure that the next half-century of refugee protection does not duplicate the inequalities of the past.

Résumé

Le régime juridique encadrant la protection des réfugiés, bâti sur la Convention des Nations Unies de 1951 relative au statut des réfugiés, a longtemps servi à priver les femmes du droit international de protection contre la persécution. Les paramètres de la Convention, qui sont indifférents aux sexes, ont été intensifiés par les mêmes qualités se trouvant dans le régime juridique international dont elle fait d'ailleurs partie, par le traitement réservé aux demandeurs d'asile par les états et par la structure dichotomique du régime de la protection des réfugiés en général qui a produit et reproduit pour les femmes demandeurs d'asile des identités de victimes. Les progrès que l'on peut voir aujourd'hui, tel que l'adoption par un certain nombre de pays de programmes de sensibilisation aux spécificités sexuelles, sont plutôt symboliques et n'apportent pas de transformations réelles. Conséquemment, pour l'avenir, il

importe d'examiner de nouvelles initiatives en matière de politiques à suivre afin de s'assurer que le prochain demi-siècle de la protection des réfugiés ne perpétue pas les inégalités du passé.



Sex-specific violence and discrimination has never been treated with the same seriousness as other human rights abuses . . . If a person is murdered because of his or her politics, the world justifiably responds with outrage. But if a person is beaten or allowed to die because she is female, the world dismisses it as cultural tradition.

—Lori Heise
Crimes of Gender

Until very recently, if one spoke of domestic violence within mainstream refugee scholarship, it could safely be assumed that the reference was to the internal security concerns of a state—perhaps fears of domestic clashes in the wake of large flows of migration. One of the last actions of outgoing U.S. Attorney General Janet Reno was to overturn a 1999 Board of Immigration Appeals decision to deny political asylum to a Guatemalan woman who had been persecuted relentlessly at the hands of an abusive husband. The decision did not grant asylum, but rather ensured that the case was held over until new regulations, currently before the Department of Justice, can be decided upon.¹ If approved, the new regulations will facilitate the case of women fleeing gender-specific or gender-based persecution, including that of domestic violence.²

The last decade has seen a number of such advances in the policies of industrialized states, as increasing awareness

has taken root that women seeking asylum in the North have been marginalized. Advances in engendering the arena of international law in general, and the creation of minimum norms to circumvent arguments of cultural relativism, have begun to have a positive impact on the way in which asylum protection is constructed. However, change has been slow and has faced considerable opposition. For all the increased discourse on the issue, progress has been largely symbolic when measured against the practical impact it has had on the lives of refugee women.

It has recently been repeatedly observed in refugee studies that, in the international consciousness, the face of the universal refugee is overwhelmingly that of a woman, while paradoxically, the face of an asylum seeker in an industrialized country is that of a single male. The refugee regime, built on the 1951 Convention³ and shaped through state and international practice, has long excluded women, procedurally and substantively, from the international right to protection from persecution. This paper explores the essential principles of the Convention, and the way they have been formulated and interpreted in a manner that excludes women from protection. Although gender-blind in its conception, the Convention was sufficiently ambiguous in its definitions that protection could have been extended to women if the political will existed. The fact that it has been extended does not lie solely with the Convention, but rather with the nature of the international legal system; state practices toward asylum-seekers; and the dichotomous construction of the refugee regime as a whole, which has produced and reproduced infantilizing identities of refugee women.

In 1993 a UN Human Development report noted that “no country treats its women as well as it treats its men.”⁴ In the year 2000, the same UN report estimated that, worldwide, one in three women has experienced violence in an intimate relationship. This figure did not include those who have suffered from random sexual violence, in the context of war, or gender-specific violence such as female genital mutilation, dowry burnings, acid attacks, female infanticide, forced prostitution, and countless other such practices.

The treatment of women the world over through denial of economic and political rights, implicit acceptance of physical and sexual violence, and the enforcement of systemic violence such as the global feminization of poverty has been well documented. In spite of their numbers, or more accurately because of them, women’s experiences of persecution have been somehow viewed as “natural,” falling therefore outside the purview of international protection. Indeed, until recently, a woman’s ability to seek pro-

tection from her own state was tenuous. One writer has characterized the use of violence against women in underdeveloped states today as a “global holocaust,” a situation tantamount to “the systematic genocide of Third World women.”⁵ In the so-called developed world, rape in marriage has been recognized in English law only since the 1990s, and in the United States, where studies show that 10–14 per cent of women have suffered rape or attempted rape by their intimate partner, only half of the states recognize this as a crime.

With regards to women’s experiences as refugees, UNHCR and other aid organizations agree that 80 per cent of refugees and displaced persons are women and children,⁶ many of whom have experienced rape and sexual violence in their countries of origin before fleeing. These women are also in danger of experiencing such violence again while fleeing, in refugee camps, during resettlement, and during repatriation. In spite of such high levels of abuse, persecution, and vulnerability of the refugees seeking asylum in countries such as Canada, upwards of 75 per cent are men.⁷

The Inception and Evolution of the 1951 Convention

Prior to WWII, international agreements on refugees were limited to specific refugee groups, such as the Russians or Armenians, and dealt almost solely with the issue of identity documents.⁸ The 1951 Convention was the first attempt to provide a universal definition of refugees, and to extend to them international legal protection. Historically situated, the Convention inevitably reflected the concerns of Europeans at the time, and, more important, the specific concerns of its writers—white, educated, Western males. The persecutory groups covered in article 1 were those that reflected the experiences of the Second World War.

There has been some debate on the intentions of the fifth category of refugee—that of “a particular social group.” Many advocates for a more inclusive asylum regime argue that the final category was included as a means of ensuring that the instrument remained flexible to the needs of possible persecutory groups in the future. Deborah Anker notes, “A study of the *travaux préparatoires* of the 1951 Convention, where the term ‘particular social group’ first was injected into the definition of ‘refugee’, shows that the category was meant to protect groups and individuals that did not fall within the categories of race, religion, and political opinion. *Social group classification was meant to have flexible boundaries that would enable it to perform this function.*”⁹ Similarly, in a ruling in the United Kingdom, a judge noted, “In choosing to use the general term *particular social group* rather than an enumeration of specific social

groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.”¹⁰

The Convention’s flexibility could have enabled it to be a truly comprehensive instrument, but its ability to be inclusive in its protection was hampered from the start by a number of factors. The fact that the writers themselves were entirely male, Western, and educated hampered their ability to address the persecution fears of those from other experiential standpoints. More important, the rights protected by the Convention are chronicled in broader humanitarian law, thus making its interpretations contingent on evolving interpretations of human rights in general. These reflected international documents, however, and indeed the entire construction of international law, is itself premised on gendered foundations—thus entrenching this dysfunction into the Convention and its interpretation.

International human rights law at its outset took androcentric concerns and universalized them as “human” rights, thus shrouding them in an unquestionable aura of legitimacy. MacKinnon¹¹ argues that the liberal tradition out of which notions of international human rights was born is fundamentally gender blind. There is an assumption that it is not only universal, but that it is neutral because it has “scientific validity.” She critiques this tradition for presuming that law is “potentially principled, meaning predisposed to no substantive outcome, or manipulable to any ends, thus available as a tool that is not fatally twisted.” This kind of blanket faith in the inherent justice of law to determine neutral outcomes has been the largest obstacle to the acknowledgement of its exclusionary effect on women.

Who Has the Right to Define Refugee?

The definition of a refugee as spelled out in article 1 of the Convention has had a number of gendered implications. The persecution experienced by the individual must be causally connected to one of the five enumerated grounds¹² in order to invoke international rights and obligations.

As feminist critiques have noted, like much of Western thought, this definition is built on some important hierarchical categories of inclusion and exclusion. First, there is a duality created between a political (legitimate) asylum seeker and an economic (illegitimate) migrant that necessarily dictates who is excluded.¹³ The delineation is patently false when one observes, in the context of its relevance for women, the manner in which the political is filtered through economic persecution—such as the disproportional effects structural adjustment policies have on women.

Additionally, the relationship between economic oppression and other forms of persecution resists attempts to separate these categories. Women’s enforced economic vulnerability (they are disproportionately represented among the poorest in all countries) makes them vulnerable in other locations: in the job market, more women are coerced into the growing sex trade, or find exploitative jobs in export processing zones; in relationships, abuse is tolerated for lack of means to survive on one’s own; and women’s position denies them the power to be heard in society, or to be involved in the “public” sphere. The binary distinction between political rights and economic rights creates a hierarchy of persecutory practices.

The second important binary implicit in the Convention is the divide between the political and the private spheres. In enumerating political opinion as a nexus of persecution, Western interpretation has imposed its paradigm of the public/private split, in defining what constitutes the “political” realm. Western jurisprudence has read political opinion to mean actions and expressions of opinion that take place in the traditional “public” sphere—the sphere of the military, politics, and the market—dominated by men. Excluded is the woman-dominated private sphere—that space in which women experience the greatest threats to their personal security. This interpretation has further implications in that it denies women validity for the political views and actions that they express in the private sphere. As Jill Steans has pointed out, “Women are not without power in their non-political roles, nor are they non-political beings.”¹⁴ Although in some states, women’s relegation to the domestic sphere has prevented their formal involvement in political activities, they have continued to contribute or express their political beliefs through supportive actions, such as providing food and shelter for resistance members, and passing messages.¹⁵ Even when these actions are so threatening that they attract persecutory retaliation, some countries that provide asylum have recognized them as political opinion only.

At the time of the writing of the Convention, there was no single international instrument that dealt specifically with women’s rights. Any provisions in existing treaties that even alluded to the existence of women did so by invoking the sanctity of family “honour,” denigrating the violence to a besmirching of family pride.¹⁶ There were, therefore, few international instruments for the drafters of the Convention to draw upon in recognizing women’s experiences.

As a result of this vacuum, the Convention has been interpreted as an instrument that protects citizens from abuse by their state. As this is the arena of most concern to men—

citizenship being a historically male construct—it has ignored the location of women’s persecutory experiences, which take place overwhelmingly at the hands of non-state actors. The need to prove direct state responsibility or complicity fails to recognize the dual nature of a state’s obligations to its citizens. States have both a negative obligation not to violate a citizen’s rights, and a concomitant positive obligation to respect and protect such rights. Systematic patterns of abuse against one sector of society indicate a lack of political will to protect that group, and are tantamount to abrogation of international obligations. With this burden of responsibility evaded by the state, women have no other recourse but to seek international protection. Even today, when there is a growing understanding of the ways in which most states have failed to protect their women, thus perpetuating abuses, claims to refugee status that emanate from non-state actors will be denied in France, Germany, Italy, and Switzerland.¹⁷

State Practices

If the Convention and thus international law has omitted the experiences of women, state practice in the North has enshrined the exclusion of women from asylum determination. The rules for how one applies for asylum, the procedures for assessing claims, and the protection standards granted androcentricism have produced policies that appear to be gender-neutral, but the result is that the overwhelming proportion of asylees in the North are men.

Although no international instruments obligate a country to grant asylum, legal principles of *non-refoulement*, as well as the humanitarian intentions enshrined in the Convention, should ensure that those who flee truly fearsome situations are given a *fair opportunity* to be granted asylum. In practice, however, states tend to favour refugees who would be “easily assimilated” into their community. The result is that states in the North have taken steps to “stem the flow” of Southern refugees, even though this is the origin of 80 per cent of today’s refugees. Because of the double hurdle of race and gender, “migration of women from Third World countries [to Europe] has practically ceased.”¹⁸

Assimilation principles have also meant that refugees have been subjected to the same immigration criteria (for example, language and skills levels) as ordinary migrants. This has meant that, in many countries, patterns of receiving refugees are almost a mirror of regular migration categories. This emphasis on the “utility” of the refugees for the country that accepts them means that skill levels and labour demand strongly inform states’ receiving levels.¹⁹

Because opportunities for women to work outside the home, or indeed to get an education, are limited by social and economic factors in most parts of the world, this sidelining of humanitarian principles to fulfill labour demands subverts the intentions of providing protection, and places women at an unfair disadvantage.²⁰ As a result, the majority of women who enter countries such as Canada must enter as spouses of a primary applicant, destroying avenues for single women and relegating women to their accepted role as dependents.

This dependency role is further exacerbated by the absence in the Convention of any rights pertaining to the family. The closest the Convention comes to the domestic life of a refugee is in article 12, in which states are requested to acknowledge the personal legal status of a refugee. The omission of any clarification on the rights of a spouse has led most states to practise what is termed derivative status. In essence, a man is granted the category of asylum, and his wife is then given asylum status (or in many countries, a lower protection category such as residency), which is derived solely from her position as the wife. Setting aside the problematic identity issues here, the practice leaves women at the complete mercy of their partners. The impact that resettlement and forced migration have on increasing levels of domestic violence has been well documented.²¹ Derivative status compounds the vulnerability of women to isolation caused by the sudden dislocation, barriers of language, and adjustment to a new culture. Their ability to remain in the country of refuge is now entirely dependent on their maintaining their relationship, thus severely upsetting balances of power within the domestic domain.

The assumption that a male claimant is the principal claimant also leads to a *de facto* dismissal of a woman’s right to seek asylum at the point of procedural determination. Barbara Harrell-Bond²² notes that, in the U.K., it is only the husband’s credibility that is assessed for the purposes of determination, even by the couple’s own legal advisors. This is true even when both individuals are involved in the causes of flight. In these cases, the wife may have been better able to demonstrate the case, or may have been the primary target of the persecution. The case is often lost because of the pre-emptive assumptions made by those handling the case, thus putting the protection of both parties at risk.

Derivative status is facilitated and linked to automatic joinder—the practice of joining spouses’ claims into one case. This practice appears to occur in almost all receiving states, not by regulation but by default. The consequence is

that women are rarely given the opportunity to present an individual claim. The UNHCR has criticized the procedural default and argued, “If a female refugee is registered in the name of her male partner, and if only the husband’s situation is considered during a family’s request for asylum, then the specific needs, interests and opinions of the women will almost inevitably be ignored.”²³ While a request may be lodged for a separate claim, evidence in support of the request is generally required. This means that a woman who seeks to make a claim in private, on grounds of sexual persecution, must make that application while her husband is present, and disclose what she does not want to reveal to him.²⁴ A woman who has been sexually persecuted in a country where sexual topics are taboo, may not have even informed her husband of the situation, or may be forbidden from discussing it by a cultural norm such as a perceived way of protecting family honour. These incidences are not isolated, and one need only note that three-quarters of refugees worldwide are fleeing Islamist societies²⁵—a culture in which sexual taboos are particularly stringent—to realize the implications of violating a woman’s right to privacy in the determination process.

Application of the Convention in state practice has also been subverted in the pursuit of foreign policy objectives. For the first few decades of its existence, the Convention was defined in large part by the bipolar nature of the world political arena during the cold war. Since the document was used primarily to delegitimize the Soviet bloc by protecting Communist dissidents, the focus in categories of persecution was necessarily on religion, political opinion, and ethnicity.²⁶ The largest refugee-receiving country in the North—the United States—took until 1980 to revise its refugee policies beyond their parameters of protection for Eastern bloc asylees.

Foreign policy and political ends continue to dominate receiving rates. There is a notion that the acceptance of an ally’s citizens will undermine the legitimacy of the ally’s government, and hence the interstate relationship. In the United States, country of origin is the most important predictor of outcome in asylum applications, and one-third of all applications for asylum are approved if the applicant originates from a country hostile to the U.S., compared to only 4 per cent of applicants from “non-hostile” states. Another recent example of foreign policy primacy is in Germany where the relationship with oil-producing Iran has recently been given increased importance. The number of persons fleeing Iran has increased globally in the past two years—and here the number of women has been significant owing to their use as the first victims of political

Islam. Yet the number of Iranian refugees accepted by Germany has actually fallen to one in five. This compares with an almost 90 per cent acceptance rate in the United States and 100 per cent in New Zealand.²⁷

State-centric concerns and foreign policy goals play themselves out further in the use of Safe Country of Origin (sco) lists, which have had a detrimental impact on the asylum claims of women. sco lists chronicle the states unlikely to produce refugees, and claimants from such countries are fast-tracked through their determination process, because it has already been determined that the likelihood of their being granted asylum is minimal. Although utilizing lists of scos violates article 3 of the Convention which provides for individual determination *regardless of country of origin*, more and more states are adopting the practice, officially or unofficially. When the U.K. began the procedure in 1996, it joined nine other EU countries already doing so,²⁸ and it is likely that with the harmonization of policies in this region the practice will become even more widespread.

The criteria used to identify “safe countries” are in keeping with traditional male-specific notions of security in that they evaluate political stability almost exclusively in the public arena. In the U.K., criteria include the stability of the country, the existence of an independent judiciary, democratic institutions, and the acceptance rates of previous refugees from the country.²⁹ While lip service is paid to the state’s role in “respecting human rights” in general, when read in the context of the other criteria, it is doubtful if these criteria were intended to cover rights such as those expounded in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Criteria require only that a country be safe for the *majority* of its citizens. Pakistan and India were both on the United Kingdom’s initial white list³⁰ of safe countries,³¹ in spite of their having some of the most egregious and widespread examples of gender-based persecution, including dowry burnings, forced child marriages, female infanticide, and honour killings. Ethiopia likewise made the safe list—a country where the majority of girls are subjected to infibulation, the most severe form of female genital mutilation (FGM), which causes lifelong reproductive and overall health problems, chronic pain, psychological trauma, and in a third of cases, death.

Human rights advocates are frustrated by the fact that the sco list is, in effect, a self-fulfilling prophecy with little room for external influence. As decisions on countries are made largely on past acceptance levels of asylum seekers, there is a tendency to reject asylum-seekers from states already on

the “white list” in order not to force a review or an amendment of the list by changing the proportion of “recognized” refugees from so-called safe countries.³²

When past levels of refugees are weighted, it is highly unlikely that even states that systematically oppress and persecute their women will be considered refugee-producing countries. Persecuted women generally cannot leave their homes in the same way that, for example, a persecuted religious group may leave. Their economic, cultural, and social subordination, familial obligations such as dependent children, and in some cases inability to gain even a passport without male accompaniment, prevent women from leaving their countries. So while a country that persecutes its farmers who are able to flee would probably be recognized as a refugee-producing country, one that systematically abuses half its population would be considered a safe country.

This is not to say that those originating in a safe country are automatically denied asylum, but rather that “the most common effect of sco procedures is that asylum seekers are automatically treated as ‘without foundation’ and go through a truncated asylum determination process.”³³ In countries such as France, originating from an sco severely restricts one’s access to legal aid or representation,³⁴ making it even more difficult for women with lower levels of education and financial resources, who are dependent upon such assistance. For women who must fight a renewed battle with each case merely to be recognized under refugee law, the subtle prejudices of sco practices shift the scales of justice further away from their reach.

Once a claim has been lodged, it must then be assessed through the determination system of the receiving state. Procedural processes in most industrialized asylum countries are modelled on the Western legal arena—an arena that many women fleeing Southern states have never experienced. The quasi-judicial nature of determination processes can be a difficult, if not impossible, system for some women to manoeuvre. Illiteracy rates among women in states that traditionally produce refugees are high, and a violation of the right to education or participation in public life may have been one element of their persecution. If sexual violence forms part of the claim, even the most assertive of claimants may feel uncomfortable discussing the case with a male officer. In countries where such topics are taboo across gender lines, this critical element may be left out, condemning the case as a whole. Likewise, sexual violence is by nature difficult to prove, compromising women’s evidentiary assessments.

In general, the differential relationship that men and women have to the determination process is vast. One prac-

itioner detailed for a UN hearing how torture can affect men and women differently, even through to their asylum claim:

The first and foremost preoccupation [of victims of torture] is with their asylum claim. There is a noticeable difference between men and women in the manifestation of this anxiety, with exceptions of course. Men are often much more vocal and active in their anxiety, they change solicitors, seek letters, reports, ask to be brought forward in the queue. They cannot settle. Most women I have seen [over nine years of therapeutic work with survivors of torture] have just melted into the background after their arrival, especially if they have no children, or have left their children behind. They are frequently “befriended” by a lawyer who does nothing, and they stay in the room allocated to them for weeks, months on end, just putting time and distance between themselves and their shame.³⁵

In addition to the male and Western-oriented nature of determination procedures, the relative newness of gender cases means that women are fighting a new battle with each case, attempting to prove not only that they have been persecuted, but that the intentions of the 1951 Refugee Convention and state legislation recognize them as deserving protection. Consequently they are fighting harder battles than “traditional” determination cases, on a battleground that is not level.

The section above touches upon only a number of state practices that have adversely affected women. With increasing moves to the political Right in many Northern countries, calls for immigration reform have led to more and more initiatives to stem the flow of refugees who are viewed increasingly as bogus or economic migrants.

Jurisprudence has been inconsistent and arbitrary in response to appeals launched against denial of asylum based on gender. In some circumstances, the judgments could be described as farcical, if they didn’t have such tragic consequences. One example is the case of a Malian woman who fled her home out of fear that she was to be subjected to genital mutilation. She was denied asylum by a French court in 1992 on the grounds that she had not yet been mutilated.³⁶ It is doubtful that a claimant about to be hanged for his political activities would have had his asylum claim dismissed owing to his problematic state of continued aliveness!

Women and children: The Production and Reproduction of Infantilizing Identities in the Refugee Regime

The most common statistic encountered when researching refugee issues is that “80 per cent of refugees are women

and children.” Yet try to find a statistic disaggregated for women alone, and one is bound to run into speculation and ambiguities. The use of poorly constructed statistics has done little to inform the international community and aid agencies on the needs of women, and has done much to reinforce a view of women as infants, equal in agency capability to their children—hence the ability to collapse similar categories into a single conceptual category.

Enloe notes that the categorization of women eternally under the cliché *womenandchildren*³⁷ serves several purposes. It identifies man as the norm, against which all others may be grouped into a single leftover and dependent category. Second, it reiterates the notion that women are family members rather than independent actors—that any reference to them must also refer to their domestic role. Last, it allows for the paternalistic role of saviour to be played out, in that “states exist . . . to protect women and children.”³⁸ This is evident in the U.K., where Crawley³⁹ reveals that women who are granted protection are more likely than men to have been granted “Exceptional Leave to Remain” in the country on humanitarian or compassionate grounds. The status allows fewer privileges and protections than does Convention refugee status, and seems to connote a paternalistic relationship of protection for a “victim” rather than the Convention status granted to a recognized refugee who is assumed to have demonstrated agency.

The same institutions that have denied women asylum in the North, have consequently left them disproportionately in the South—dependent on foreign aid and denied the same opportunities as men to start over and become self-sufficient. This relegation has reinforced identities of refugee women and “sexist notions of women’s attachment to motherhood, the family and the home and men’s identity as breadwinner or worker, detached from the household, free to sell his labour in the open market; in other words, men leave home, and women don’t.”⁴⁰ Inherent in the term *refugee* has been an association with passivity and victimhood. As Indra observes, “Western . . . social problem-generated images of refugees as powerless victims of forces beyond their control are well entrenched.”⁴¹ The perpetuation of the “passive victim” element inherent in the term *refugee* is only reinforced and fortified by the same “passivity” assumed in the category of *womenandchildren*. The feminization of refugees in the South and their dependency on aid, add to traditional views that women must be provided for. This is exemplified succinctly in the term *burden-sharing*, which has become common parlance among the academic and policy circles of the North.⁴²

Hence refugees in the South, who are overwhelmingly women with their dependents, are a burden that must be evenly distributed among richer states.⁴³

The dichotomy between the North and South has itself been a gendered binary construct par excellence—the North having been constructed in discourse to be associated with the masculine through industrial development, as well as economic and military power. The South, on the other hand, is underdeveloped and thus more connected to nature—the prototypical symbol of the feminine.⁴⁴ When this bifurcated world vision is superimposed on an already gendered refugee regime, the result is the increasing feminization of refugees of the South, and the cyclical reinforcement of both a “refugee” as well as a “woman’s” traditional identities.

Constructed identities of helplessness have facilitated the tendency to make decisions on behalf of women in refugee camps, silencing women from expressing needs, and placing them in an even more vulnerable position. While women constitute the majority of camp dwellers, the use of health facilities, food distribution centres and other means of vital assistance is predominated by men. In 1984 a study in a refugee camp in eastern Sudan where three-quarters of the population were “women and children,” found that of the patients in the camp hospital, all were men.⁴⁵ Walker posits that the reasons that women cannot take advantage of facilities, even though they are often the ones most desperate for such care, may be due to a host of factors, which include inconvenient hours during which women are often needed to fetch water and firewood, the lack of female health-care workers, language difficulties, and culturally inappropriate care.⁴⁶ One could surely add to this that, as Elmadmad noted, the majority of today’s refugees are Muslim women,⁴⁷ and without provision made to work within the confines of their practices of seclusion, many of these women simply go untreated.

Equally important is how infantilization wastes the contribution that women could make to decision-making and their physical involvement in development of the camps.

The Evolving Refugee Regime: Increasing Gender-Awareness, but Where Are the Beneficiaries?

The growing acceptance of gender critiques in areas that range from law to development, has favourably affected refugee scholarship and application in recent years. There has been a proliferation of “gender guidelines” by states that seek to guide decision makers on asylum cases. As well, the way in which aid is provided in refugee camps in zones of mass migration has been revisited. It is important that

the issue of gender has become increasingly mainstream, but more important are the concrete differences that these policies have made.

The move to integrate women's protection needs into the refugee regime has been a late and slow starter. The first international recognition of the historic marginalization of women's asylum claims came with a 1985 UNHCR statement, which concluded that states "are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention."⁴⁸ In 1993, Canada adopted the first set of state guidelines on gender asylum cases (those that are either gender-specific or gender-based persecution). Other countries in the North slowly followed suit, and in theory the foundation for an international norm that recognizes gender as a nexus to persecution is being established.⁴⁹ Conceptual changes in how we define asylum protection have been an important first step, but it has been limited in scope as well as nature. Today gender-specific persecution is recognized in soft law in a handful of states,⁵⁰ and in binding legislation in only two.⁵¹ Soft law in itself is problematic because it relegates women to a standard of protection lower than that dealt with directly under the Convention. In countries such as the U.S., guidelines were poorly distributed and poorly utilized even five years after their conception, leading to their inconsistent application. In all countries with similar guidelines, adjudicators and judges have been careful to create very specific social groups (e.g., women married to Salvadoran generals who abuse them) in order to ensure that they do not create a precedent that would lead to a flood of gender claims.

While they are important when reconceptualizing asylum, gender guidelines have had nominal impact beyond the symbolic expansion of the definition of *refugee*. Limited application as well as limited awareness of the new policies have crippled any real redress for women. In Canada, the first country to implement such measures, the highest number of claims sought under the guidelines was 315 in 1995, and the number has steadily *decreased* thereafter.⁵² In the U.S., only 2.5 per cent of claims received in 1999 were from women who sought protection in part or wholly because of persecution on account of "particular social group."⁵³

Moreover, guidelines apply only to claims made at the port of entry to an asylum state, and do not apply to visa officers abroad. Owing to social, economic, and familial

constraints, women are the least likely to make it to the industrial countries of the North in order to claim asylum, therefore the number of cases in which the guidelines are invoked is minimal. This has been one of the key criticisms of the Canadian guidelines in particular: Macklin⁵⁴ notes that over three-quarters of refugees accepted each year to Canada are selected from overseas, thus placing them outside the jurisdiction of the recommendations.

The UNHCR's Women at Risk program (WAR), which Canada and Australia have adopted as a measure to address this flaw, seeks to facilitate the entry of vulnerable women directly from their own region. It is an important acknowledgement that in the world of refugees "it is unaccompanied women and lone female heads of household [who] are at the greatest risk of being subjected to sexual violence."⁵⁵ However, in practical terms, the WAR program has failed to make any real difference. Poor administration,⁵⁶ coupled with limited application, meant that between 1988 and 1991, 391 people were granted entry to Canada under this program. That is approximately 0.3 per cent of the total number of refugees admitted during this time.⁵⁷

Most ironic in the evolution of the refugee regime has been that women's cries for inclusion are being heard only as the number of asylum-seekers accepted into the North is being curtailed. In Canada, where refugee flows used to make up 15 per cent of immigration to Canada, in the past five to ten years they have comprised less than 10 per cent. In Europe, the UNHCR has noted with concern the trend to adopt increasingly restrictive interpretations of *refugee*, which, among other factors, has led to a decreasing proportion of applicants recognized as refugees under the Convention.⁵⁸ So while women may be making inroads in being recognized as potential asylum-seekers, their chances of actually being granted asylum, along with that of asylum-seekers in general, has concomitantly diminished.

Conclusion

A Board of Immigration and Appeals judge, giving his dissenting opinion in a decision that denied asylum to a severely abused Guatemalan housewife, asserted, "In *Kasinga* [an earlier case in which a Togolese woman was granted asylum from the practice of FGM], we determined that FGM exists as a means of controlling women's sexuality. So too does domestic violence exist as a means by which men systematically destroy the power of women, a form of violence rooted in economic, social and cultural subordination of women."⁵⁹

It has taken fifty years for the courts to begin to acknowledge the varying ways in which women experience perse-

cution differently from Convention interpretations. In all aspects of life—economically, socially, and politically—women have been relegated to a secondary status that increases their vulnerability to persecution and decreases their ability to seek state protection from such abuses. Because of the Refugee Convention’s historical groundings, as well as the Western male orientation of the international legal regime it reflects, women have been “interpreted out” of the institutions of refuge. State practice has confounded this further, erecting barriers that may appear gender-neutral, but in application have had devastating effects on women’s ability to seek adequate protection. For the majority of women who must make do with the refugee camps in their region, manifest gendered assumptions about issues of victimhood, agency, and a woman’s place in foreign cultures has reproduced limiting and infantilizing identities of refugee women.

Moves to engender the Convention itself through the use of gender guidelines and reinterpretations, as well as specific programs, have been limited and minimal in their impact, leading to the impression that they have at best tinkered with a screw in the machine, rather than reassessing the overall function of the machine itself.

If the refugee regime is to see its way into the new millennium in the spirit in which it was intended—the spirit of protection for those facing fear of persecution—it must recreate itself to reflect the experiences of the persecuted and to redress the imbalances it has allowed itself to entrench and naturalize over the fifty years of its existence.

Notes

1. Immigration and Naturalization Service, “Proposed Rules: Asylum and Withholding Definitions,” in *INS No. 2092-00; AG Order No. 2339-2000* (Washington, DC: Immigration and Naturalization, 2000).
2. Susan Sachs, “Reno Voids Denial of Asylum for Guatemalan Battered Wife,” *New York Times*, January 21, 2001.
3. The 1951 Convention on the Status of Refugees and the 1967 Protocol that amended it will be referred to hereinafter as the “Convention” or the “Refugee Convention.”
4. Audrey Macklin, “Opening the Door to Women Refugees: A First Crack,” *Development and Diaspora: Gender and the Refugee Experience*, ed. Helene Moussa, Wenona Giles, Penny van Esterik (Toronto: artemis enterprises, 1996).
5. Sima Wali, “Human Rights for Refugee and Displaced Women,” *Women’s Rights, Human Rights: International Feminist Perspectives*, ed. Julie Peters and Andrea Wolper (New York: Routledge, 1995).
6. Although the author has difficulty with the term *women and children*, as will be discussed in greater detail, most studies are disaggregated in this manner, making it difficult to give an empirical picture without using problematic categories.
7. Figures are for 1992. See Alison Marie Young, “Refugee Women and the International Refugee Regime: The Dynamics of Transition” (M.A. thesis, Acadia University, 1994), 2.
8. Maryellen Fullerton, “A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group,” *Cornell International Law Journal* 26 (1993): 507.
9. N. Kelly, “Gender-Related Persecution: Assessing the Asylum Claims of Women,” *Cornell International Law Journal* 26 (1993): 648.
10. Immigration Appellate Authority, *Asylum Gender Guidelines*, ed. Nathalia Berkowitz and Catriona Jarvis (London: Crown Copyright, 2000).
It is also true, however, that in its application, decision makers have been reluctant to utilize *particular social group*. As one U.S. court noted, “The legislative history behind the term is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently.” Immigration and Naturalization Service, *INS Website: Q&A*, online: Immigration and Naturalization Homepage <<http://www.ins.usdoj.gov/graphics/publicaffairs/questsans/RARule.htm>>.
11. Quoted in Christine Sylvester, “Homeless in International Relations,” *Feminism and Politics*, ed. Anne Phillips (Oxford: Oxford University Press, 1998), 57.
12. These are political opinion, race, religion, nationality, or membership in a particular social group.
13. Wenona Giles, Helene Moussa, and Penny van Esterik, “Introduction,” *Development and Diaspora: Gender and the Refugee Experience*, ed. Wenona Giles, Helene Moussa, and Penny van Esterik (Toronto: artemis enterprises, 1996), 25.
14. Jill Steans, *Gender and International Relations* (New Brunswick, NJ: Rutgers University Press, 1998).
15. Immigration and Refugee Board, “Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution,” (Ottawa: Government of Canada, 1993).
16. The Hague Convention respecting the Laws and Customs of War of 1907 mentions the need to respect “family honour and rights.” The Nuremberg Charter drafted after WWII did not mention rape or sexual violence as a crime, and of the four Geneva Conventions of 1949, only one referred to sexual violence. The reference is in the fourth Convention, which prohibits “attacks against women’s honour,” citing in particular rape, enforced prostitution, or any other indecent assault. Barbara C. Bedont, *Gender-Specific Provisions in the Statute of the ICC*, online: Women’s Caucus for Gender Justice <<http://www.iccwomen.org/resources/articleslinks.htm>> (date accessed: January 22, 2001).
17. United Nations High Commission for Refugees, “The State of the World’s Refugees, 2000” (Oxford University Press: UNHCR, 2000).
There is a risk that, with the harmonization of immigration policies in the new EU community, policies will be harmonized at the “lowest common denominator,” thus setting back any gains that have been made in some European countries for granting asylum on the basis of gender.
18. Wenona Giles, “Aid Recipients or Citizens?” *Development and Diaspora: Gender and the Refugee Experience*, ed. Helene Moussa

- Wenona Giles, Penny van Esterik (Toronto: artemis enterprises, 1996), 49.
19. *Ibid.*, 45.
 20. *Ibid.*, 46.
 21. Incidences of domestic violence have been found to increase in flight as well as in resettlement, as power balances shift within the family. This may also be caused by frustration or a need to reestablish patriarchal control in a new and threatening cultural context. See, for example, Susan Forbes Martin, *Refugee Women, Women and World Development Series* (London: Zed Books Ltd., 1991).
 22. Doreen Indra, ed., *Engendering Forced Migration: Theory and Practice*, vol. 5 of *Refugee and Forced Migration Studies* (New York: Berghahn Books, 1999), 58.
 23. Valerie L. Oosterveld, "The Canadian Guidelines on Gender-Related Persecution: An Evaluation," *International Journal of Refugee Law* 8, no. 4 (1996): 586.
 24. For a discussion of *automatic joinder* in a Canadian context, see David Matas, "Gender and Refugee Law" (paper presented at the Gender Issues and Refugees: Development Implications, York University, 1993).
 25. Khadija Elmammad, "The Human Rights of Refugees with Special Reference to Muslim Refugee Women," *Engendering Forced Migration: Theory and Practice*, ed. Doreen Indra (New York: Berghahn Books, 1999).
 26. Young, "Refugee Women and the International Refugee Regime," 33.
 27. Maryam Namazie, *Hambastegi* 89 (89) online: International Federation of Iranian Refugees <<http://www.hambastegi.org>>
 28. Henry Martenson and John McCarthy, "In General, No Serious Risk of Persecution: Safe Country of Origin Practices in Nine European States," *Journal of Refugee Studies* 11, no. 3 (1998).
 29. *Ibid.*, 307.
 30. A white list is the conventional term for an sco list.
 31. *Ibid.*, 308.
 32. *Ibid.*, 317.
 33. *Ibid.*, 314
- Although automatic denial of applications is not standard practice at present, U.K. Home Secretary Jack Straw announced in February a proposal for a three-tier system of sco's comprising "safe," "intermediate," and "repressive" states. Those from safe states would automatically be denied asylum, while those from intermediate states would carry the "presumption of safety," thus rendering the likelihood of protection minimal. Straw also called upon the EU as a whole to adopt a radical shift in its thinking about the Refugee Convention.
34. *Ibid.*
 35. G. Hinchelwood, "Medical Foundation for the Care of Victims of Torture." Cited in Immigration Appellate Authority, *Asylum Gender Guidelines*.
Immigration Appellate Authority, *Asylum Gender Guidelines*, ed. Nathalia Berkowitz and Catriona Jarvis (London: Crown Copyright, 2000).
 36. Joan Fitzpatrick, "International Norms and Violence against Women," *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 1994).
 37. The use of this term is pulled from the work of Cynthia Enloe on the treatment of women by the media during the Gulf War. Cynthia Enloe, "The Gendered Gulf," *Collateral Damage: The "New World Order" at Home and Abroad*, ed. Cynthia Peters (Boston: South End Press, 1992).
 38. *Ibid.*, 96.
 39. Heaven Crawley, "Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy," *Engendering Forced Migration: Theory and Practice*, ed. Doreen Indra (New York: Berghahn Books, 1999), 322.
 40. Giles, "Aid Recipients or Citizens?" 44.
 41. Indra, *Engendering Forced Migration*, xiv.
 42. Giles, "Aid Recipients or Citizens?" 54.
 43. The term *burden sharing* is contentious for a number of reasons, aside from the implications that it has on reinforcing the role of victim for women. The term is also politically disingenuous because it seeks to distance the Northern sphere from the "problems" of the South, without acknowledging its large share of responsibility for the environmental, economic, and political destabilization of poorer states.
 44. Steans, *Gender and International Relations*, 14.
 45. Bridget Walker, "The Question of Gender," *Forced Migration Review* 20 (1995).
 46. *Ibid.*
 47. Elmammad, "The Human Rights of Refugees."
 48. United Nations High Commission for Refugees, "Executive Committee Conclusion No. 39 Refugee Women and International Protection," (Geneva: UNHCR, 1985).
 49. Although headway is being made in adopting guidelines and promoting gender sensitivity, many officials—even at the highest levels—are deeply critical of what they view as a move away from the political intentions of the Convention and "over-liberal" interpretations. For example, only two months before adoption of the gender guidelines in the U.K., Home Secretary Jack Straw, commenting on the granting of asylum to two Pakistani women fleeing abuse, observed that there was "no way it can be realistically argued that that was in contemplation when the 1951 Convention was put in place."
Alan Travis, "Asylum Rules Eased for Women," *Guardian*, December 5, 2000.
 50. To date, the U.K., Canada, United States, Australia, New Zealand, and a number of European countries have guidelines or policy on gender persecution. Most recently the European Council on Refugees and Exiles (ECRE), issued its policy recommendation for harmonizing European immigration and asylum procedures, making favourable recommendations for gendered policy. In particular, it noted that "states do have duties in international law to prevent harm by non-state agents and that in situations where there is a violation of human rights then there is persecution. A family member can be considered just as much an agent of persecution as an armed opposition group." (See Canadian Council for Refugees, "Position on Interpretation of Article 1 of the Refugee Convention," online: <<http://www.web.net/~ccr/gendpers.html>> [last modified: September 2000]).

51. Sweden and South Africa. Both of these examples of binding policy are problematic, however. Sweden has chosen to recognize persecution because of “sex,” as opposed to the internationally recommended “gender.” This is problematic because legislation continues to treat the persecution of women solely as a characteristic of their essential biological difference, as opposed to a consequence also of their prescribed gender roles, as culturally defined. It also relegates this category to a standard of protection that is secondary to that given to Convention refugees. K. Folkelius and G. Noll, “Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act,” *International Journal of Refugee Law* 10, no. 4 (1998). In South Africa the Refugee Act came into effect only in 2000. Although it recognizes gender as a social group, and the country has drafted a set of guidelines for determination officers, there has yet to be one case heard on these grounds, and it is unlikely that the guidelines have ever been distributed to determination officers.
52. Immigration and Naturalization Service, *INS Website—Q&A*.
53. *Ibid.*
54. Audrey Macklin, “A Comparative Analysis of the Canadian, US and Australian Directives on Gender Persecution and Refugee Status,” *Engendering Forced Migration: Theory and Practice*, ed. Doreen Indra, *Refugee and Forced Migration Studies* (New York: Berghahn Books, 1999).
55. United Nations High Commission for Refugees, “UNHCR Sexual Violence against Refugees: Guidelines on Prevention and Responses (Extracts),” *International Journal of Refugee Law* (1995).
56. Young, “Refugee Women and the International Refugee Regime.”
57. Monica Boyd, *Canada’s Refugee Flows: Gender Inequality*, online: University of California, Hastings College of Law <<http://www.uchastings.edu/cgrs/law/articles.html>.> (date accessed: January 25, 2001).
58. United Nations High Commission for Refugees, “The State of the World’s Refugees,” 2000.
59. U.S. Committee for Refugees, *BIA Sends Mixed Message on Gender Persecution Cases*, online: U.S. Committee for Refugees <http://www.refugees.org/world/articles/bia_rroo_8.htm.> (last modified: 2000).

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