

GENDER GUIDELINES FOR ASYLUM DETERMINATION

Researched for

**NATIONAL CONSORTIUM ON REFUGEE
AFFAIRS**

by

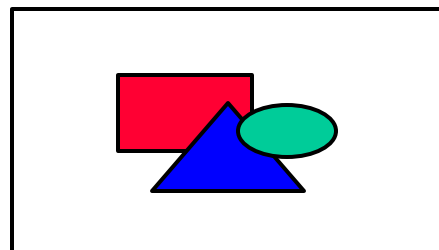
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Gender-Persecution Guidelines

The 1951 UN Convention relating to the Status of Refugees, and the 1967 Protocol, that followed it, form the foundation of international refugee law. However, created from the experiences of the post-WWII period, they continue today to reflect the concerns of that period – namely the need for protection from state persecution resulting from political beliefs or personal identity. As such, the universal assumption that the Convention has imparted is primarily that of the typical asylum seeker as a male dissident, tortured or imprisoned by the state for traditional political involvement.

This assumption of persecution and the traditional view of the asylum seeker as male has marginalized women and prevented them from utilizing their right to international protection. The reasons for women's inability to benefit from the 1951 Convention are two-fold. Firstly, women's political expression is often misinterpreted as personal conduct – defying or transgressing discriminatory laws or non-conventional political activities are seen as personal actions as opposed to political protests. The lack of recognition for women's political experiences prevents them from seeking asylum for persecution on the basis of those actions. Furthermore, the focus on state persecution ignores the primary arena of the persecution experienced by the majority of women – the private sphere.

Traditional refugee determination processes also fail women through the evidentiary procedures used in gathering and assessing testimony. This inherent bias towards asylum cases based on persecution based on political opinion, is evident in the practice by Western states of keeping a “white list” of countries assumed to be non-refugee producing countries. States are placed on this list after having been assessed on the merits of political freedom. A state's attitude towards its female citizens is not considered to be relevant. In the United States of America, 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 US, compared to only 4% of applicants from “non-hostile” states.

The need for a transformation both within refugee processes and in theorizing refugee issues is long overdue. In most refugee-receiving countries (including South Africa, Canada, the US, and Australia), the majority of refugees are young single men or men with families precisely because their persecution is easier to identify, and their experiences can be related to those of traditional notions of refugee protection. However, the reality of refugee demographics worldwide show that 80% of today's 27 million refugees and displaced persons are women or children. This is in stark contrast to South African figures for 1998, which revealed that the percentage of United Nations High Commission for Refugees-assisted female refugees in South Africa was only 17,8%. According to the “Gender Policy Statement”, recently released by the Department of Justice, it is estimated that *women constitute about 5% of the persons who have been formally granted refugee status in South Africa.*

By relying solely on political analyses of asylum applications, determination processes privilege the male experience of persecution, and assess women's claim

according to and in comparison to these male-centered and traditional political standards. The right to equality in the South African Constitution, when applied to refugee determination procedures, requires that women who fear for their lives and security be assessed according to their own specific and unique circumstance inherent to their gender. In the context of South African refugee statistics (as well as those of most other refugee-receiving states), where the very low number of women seeking asylum is overwhelmingly disproportionate to the actual number of women refugees worldwide, the failure to account for and incorporate women's experiences within the determination procedures amounts to widespread infringement of their right to equality.

The need for a comprehensive gender policy aimed at refugee processes goes beyond merely adding gender persecution to traditional definitions of persecution, or changing asylum laws. With the implementation of the Refugees Act of 1998, there is an opportunity to reform determination processes to reflect the realities of current refugee populations. It is important that this valuable opportunity is not lost through a lack of appropriate implementation tools.

The following guidelines recognize that the greater part of persecution experienced by women can be defined according to conventional refugee grounds of political, religious, or racial persecution, once the notions of political involvement are redefined. These guidelines will thus suggest alternative approaches to traditional interpretations of categories of persecution. However, there is a further category of persecution that often cannot be covered by the above categories, and that is persecution *because of gender*. South Africa is in the unique position of having included gender within the definition of "social group" in the Refugees Act. Most states which have recognized gender persecution have chosen not to amend existing legislation, but rather to provide non-binding guidelines on how gender may be incorporated into the category of "social group" persecution. By including the category of gender within its legislation and giving it legally binding status, South Africa has made a real commitment towards the recognition of women's rights and gender equality.

The purpose of these guidelines will therefore be to deconstruct assumptions concerning the "universal" refugee, give further definition to the specific clause of the Act relating to gender persecution, promote sensitivity and alternative approaches to evidentiary hearings for women's cases, as well as to create a blueprint by which to evaluate such cases. The goal of these guidelines is to try to reflect the totality of human experiences, and to extend the *opportunity* for protection to all asylum seekers on the basis of gender equality.

A BRIEF OVERVIEW OF GENDERING REFUGEE POLICIES

While the violation of women's rights is universal and long-standing, the recognition of the need to create international protection mechanisms for women is relatively recent. In particular, the assertion that refugee determination processes should be expanded to include the experiences of women has occurred at an international level only within the last two decades.

- In 1984, the European Parliament and the Dutch Refugee Council passed similar resolutions stating that the concept of a particular social group could apply to groups of women who transgressed moral and ethical principles in their society and who were victims of cruel and degrading treatment as a result.
- In 1985, the Executive Committee of the UNHCR 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.”¹
- The UNHCR Executive Committee ruled in 1990 that severe discrimination as outlined and outlawed in CEDAW could form the basis for the granting of refugee status.²
- In 1991, the UNHCR released its “Guidelines on the Protection of Refugee Women.” Included were suggestions for the reforming of legal procedures to include recognition of gender persecution, as well as appropriate interview techniques when investigating claims of this nature.
- In 1991, the French Commission for Appeals of Refugees became the first judicial authority to recognize female circumcision as a form of persecution under the terms of the 1951 UN Convention. However, they did not grant the applicant refugee status, as they claimed she had not “exhausted all available local remedies.” This decision nevertheless set a precedent for countries with similar refugee processes around the world. The debate over internal remedies, although an important part of refugee law, has since been seen to be less crucial in gender persecution cases, where the circumstances are often different to those of a traditional refugee scenario.
- In 1993, the UNHCR Executive Committee adopted a further resolution on the evidentiary procedures used by states for determination purposes. The resolution noted that asylum seekers who had suffered sexual violence should be treated with particular sensitivity, and recommended the establishment of training programs designed to ensure that those involved in the determination process were adequately sensitized to issues of gender and culture.
- In March 1993, Canada became the first country to produce a comprehensive set of guidelines on the inclusion of gender as a “social group” under the 1951 Convention. The guidelines were reviewed and updated in 1996, and today act as a guide for other countries addressing this issue.
- The Canadian precedent was subsequently followed by a number of other countries, including the US, Australia, and most recently the United Kingdom. Most countries, however, have chosen not to amend existing legislation to include

¹ United Nations High Commissioner for Refugees “Executive Committee Conclusion No. 39 Refugee Women and International Protection, 1985.”

² UNHCR “Executive Committee Note on Refugee Women and International Protection, 1990.”

“sex” or “gender” as a social group, but rather to issue non-binding regulations on how officials might evaluate claims of gender persecution. South Africa remains the only country to circumvent the debate surrounding membership of a social group by including gender as an asylum applicable category within the Refugees Act of 1998.

- In the Beijing Declaration and Platform for Action, states agreed to “consider recognizing as refugees those women whose claim to refugee status is based upon the well-founded fear of persecution...including persecution through sexual violence or other gender-related persecution.”
- The 1998 Report of the UN Special Rapporteur on Violence against Women noted that “States party to the 1951 Refugee Convention are urged to adopt guidelines with respect to gender-related asylum claims.”

DEFINITIONS OF RELATED TERMS

Refugee

The 1951 Convention defines a refugee as any person who “as a result of ... and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.”

Gender

Gender refers to the social construction of power relations between women and men, and the implications these relations hold for the identity, status, roles and responsibilities of women (and men). Gender is fundamentally concerned with the inequalities of power within all spheres of society. In order to appropriately carry out their responsibilities, interviewers must clearly understand the relationship between gender and refugee experiences. Most specifically, they must grasp the difference between the refugee experience of persecution *as* a woman and the refugee experience of persecution *because* they are women. For example, in the first category woman who are raped because of their political beliefs, in the second category, women who are stripped of their vote because they are women.

Following the example set by the Canadian guidelines, it has been widely accepted that female refugees’ experiences of persecution fall into four broad categories.

1. Women who fear persecution on the same Convention grounds and under similar circumstances as men. This includes women persecuted for their identity – national, racial or social – or their particular beliefs. Women in this category are also often persecuted *as* women (raped, for example, because of their involvement in a political or opposition party); the nature of the harm feared may thus be

different from that feared by a man, even though the reasons for the harm are similar.

2. Women who fear persecution solely because of reasons relating to kinship. The age-old method of *cherchez la famille* ('search the family') means that harm is done to women as a form of revenge against their (male) family members, or they may be used as "hostages" to entrap other members of the family. They may also be persecuted for views imputed to them by virtue of familial association. For example, it might be assumed that the spouse of a political activist holds the same views as her husband.
3. Women who fear persecution resulting from conditions of severe discrimination on grounds of gender, and who are at the risk of systematic violence at the hands of private citizens because the state is either unable or unwilling to protect them.
4. Women who fear persecution as a result of transgressing religious, customary or social mores. The practices themselves may be based on an assumption of the inferior status of women, which can manifest in discrimination severe enough to qualify as persecution (for example, Female Genital Mutilation, Sutee (burning of widows) or dowry burnings); or transgressions may be met with punishments so disproportionately severe as to amount to persecution (for example, in countries such as Iran where women can be flogged for wearing lipstick, or Afghanistan, where they can be stoned or even killed for going out unaccompanied by a male relative).

Persecution

Few states have taken the step of precisely defining "persecution" or "well-founded fear of persecution" within their domestic legislation. The UNHCR has advised that "From article 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution."³

However, persecution within the context of the Refugee Convention has two elements: firstly, establishing "serious harm" (or threat thereof), and secondly the inability or unwillingness of a state to offer protection to the individual.

It is often difficult to establish state responsibility for sexual crimes, even in the context of war situations, as the nature of the crime leads automatically to the assumption that this was a "personal crime" as opposed to a state-sanctioned tactic. The use of rape as means of warfare is a growing practice which has until recently been dismissed as random actions by individuals. Today, however, international bodies are recognizing the true nature, brutality and intent of such crimes. Acknowledging rape as a tool of power and a means to achieving a political end is a step forward in reconceptualizing the persecution of women. Although it may not always be possible to draw a direct line of responsibility to the state (although in the case of Iraq, it emerged subsequent to the Iraqi invasion of Kuwait that there actually

³ Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. (Geneva; 1971) para. 51.

existed an official office in the civil service for the rape and torture of women⁴), the widespread use of rape in war is premised on the implicit assumption that this is acceptable to and even sanctioned by the state. The tribunals for war crimes in Rwanda and Yugoslavia have both condemned rape as a crime against humanity, and a UN panel in 1994 ruled that rape related to ethnic cleansing constituted a “war crime and *legally constituted genocide*.”

For the majority of women, however, abuse and violations occur not at the hands of the state or during times of war, but at the hands of private individuals and within their communities. Such persecution has regularly been sidelined by the argument that the element of state responsibility required to appeal for international protection does not exist in cases of private abuse. This argument fails to recognize the dual nature of a state’s responsibility to its citizens. States have both a negative obligation not to violate a citizen’s rights, as well as a concomitant positive obligation to respect and protect such rights. Systematic patterns of abuse against one sector of society are indicative of a lack of political will to protect that group, and are tantamount to abrogation of international obligations. With this burden of responsibility evaded or refused by the state, women have no other recourse but to seek international protection.

Jurisprudence surrounding state responsibility for private human rights abuses is growing. In 1988, the Inter-American court ruled that: “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”⁵

The UNHCR has also commented that “[w]hen discriminatory practices or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”⁶

Evidence of conscious inaction by the state amounts to complicity. This can be found in a number of areas. These can include official legislation (for example, not recognizing rape in marriage, or relegating women to the status of legal minors), lack of police response to requests for assistance, and openly displayed or marked reluctance to assist or investigate, prosecute, or punish transgressing individuals. All such actions constitute state complicity if they deprive women of effective legal protection from abuse.

The existence of legislation which seems to protect women should not be used as evidence of state protection in and of itself, if it can be proven that abuses continue

⁴ “Rape in the Service of the State: Power and Patriarchy in Iraq”, Kanan Makiya (The Nation, 1993), cited in Schenk, Todd Stewart “A Proposal to Improve the Treatment of Women in Asylum Law: Adding a ‘Gender’ Category to the International Definition of Refugee,” Indiana Journal of Global Law Studies (1994).

⁵ Velasquez-Rodriguez case (case 7920, judgement of 29th July 1988) in Ursula A. O’Hare “Realizing Human Rights for Women,” *Human Rights Quarterly* 21 (1999) pp.365.

⁶ UNHCR Handbook, para. 65.

unchecked. For example, in the case of Sudan, where the most widespread practice of infibulation in the world occurs, a law was passed in 1974 criminalizing this most extreme form of FGM. However, it has not been enforced due to the pervasiveness of the practice and the way in which it is interwoven into the entire socio-cultural system.

Laws in and of themselves are insufficient to prevent mistreatment of women if there is no political will for enforcement. There are a number of reasons why national governments might not enforce legislation that protects women. These include the fact that sexual discrimination is viewed as “trivial”, that abuse of women is seen as a cultural or private issue, that women’s rights are not fully recognized as human rights, and that the abuses are seen as too pervasive to confront.⁷ If they lead to non-enforcement, all these reasons nevertheless constitute passive complicity and acceptance of the abuse by the state. As such victims have no internal recourse for their persecution, asylum on such grounds would be necessary.

International Framework of Rights

South Africa has in its Constitution recognized fundamental inalienable rights for all persons. Those that are of particular relevance to women are the right to dignity (s.6), the right to be free from *all forms of violence from either public or private sources* (emphasis added) (s.12(1)(c)), the right not to be tortured in any way (s.12(1)(d)) and the right not to be treated or punished in a cruel, inhuman or degrading manner (s.12(1)(e)). Also relevant is Section 12(2), which asserts the right to bodily and psychological integrity, including the right to make decisions concerning reproduction and to security in and control over the body.

There are many forms of harm that constitute torture or cruel, inhuman or degrading treatment that are specific to, or more commonly affect women. These include suttee, dowry deaths, forced marriages, “temporary pleasure” marriages, sexual violence in all forms, FGM, marital-related harm, forced abortions, forced sterilizations and so forth.

Whether an instance of harm, including harm that is gender-specific, amounts to persecution should be assessed on the basis of South Africa’s Constitutional provisions, as well as internationally recognised human rights standards.

The UN Declaration on the Elimination of Violence Against Women defines violence against women as “any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” As this interpretation represents an internationally recognized consensus on the definition of gender-based violence, it provides a useful framework for the interpretation of gender persecution according to South African legislation. Gender-specific violence does not differ in significance from beatings, torture or other forms of violence that are commonly held to amount to persecution.

⁷ Bunch, Charlotte “Women’s Rights as Human Rights: Towards a Revision of Human Rights” in *Human Rights Quarterly* (1990).

Other instruments that may be of assistance in evaluating a claim of gender persecution include (but are not limited to):

- The Universal Declaration of Human Rights (1948)
- The Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution in Others (1949)
- The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)
- The Convention on the Elimination of All Forms of Racial Discrimination (1965)
- The International Covenant on Civil and Political Rights (ICCPR) (1966)
- The International Covenant on Economic, Social and Cultural Rights (ICESR) (1966)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)
- The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984)
- The UN Declaration on the Elimination of Violence Against Women (1993)
- The UN Platform for Action (1995)
- The African Charter on Human and Peoples Rights (1981)

INTERVIEW PROCEDURES FOR GENDER PERSECUTION CASES

It will be necessary to use a variety of gender-sensitive techniques to obtain information from women during the determination process. This means utilising all methods to ensure that women feel safe in telling their story, whether this entails counsellors and interpreters being present, or enlisting testimony from cultural experts.

In many cultures, rape and sexual assault are still perceived as failure by a woman to protect her sexual integrity. Self-blame, shame and anxiety about loss of virginity or marital integrity may heighten a woman's unwillingness to discuss the matter.

The most vital provision that must be made for assessing gender-persecution claims is the use of female interpreters and interviewers. Reluctance on the part of women to discuss their experiences is often aggravated by the presence of a male official, particularly if the traumatic events being related were perpetrated by a male or men in official positions of authority.

At present, the determination process entails an initial hearing by a refugee determination officer in which the claimant is interviewed. This official records the evidence and assesses the credibility of the case for determination by a panel. In the short term, if training is unavailable for all officials, it is advised that claims based on gender-persecution be heard by a select group of women officials who have received appropriate training. Alternatively, the assessment could be heard directly by the refugee determination panel. However, this would be less ideal, given that every effort should be made to ensure that women are provided a safe environment in which to tell their stories; obviously, the presence of numerous people may

overwhelm individual women and mitigate against the creation of such an environment.

All interviews should begin with express assurances of confidentiality. Failure to do this will seriously discourage the disclosure of intimate details. Any information gathered in the course of the application process should not be disclosed (for example, to other members of the woman's family) or used for any purposes other than determination without specific written consent of the women concerned.

Officials should be required to schedule an adequate amount of time for such interviews. This will better enable them to establish a rapport with the claimant and facilitate the sharing of difficult experiences.

Interpreters play an important role in the determination procedures. There is also a need for the interpreter to be trained in gender sensitivity. It is important that the interpreter does not come from a group hostile to the woman. Interpreters should not be chosen merely because they speak the same language as the asylum-seeker, and should be subject to evaluation and spot checks for accuracy.

The hearing officer should begin the interview by providing any relevant information about the determination process to the claimant, as well as giving a brief explanation of asylum categories. Women may have a different perception of torture, which they may not equate with the types of harm they fear (for example sexual violence, forced abortions, or female genital mutilation). Inadequate knowledge of their options could adversely affect the determination process for many women.

Provision of alternative means of providing testimony

Many women who have experienced sexual violence come from cultures in which family honour is based on sexual purity. If rape is culturally seen as the fault of the victim, admitting to such an experience might result in excommunication from the family or community. For this reason, women may be reluctant to tell the full story or disclose details relevant to the case, particularly in the presence of a male family member who may be unaware of their experiences. For this reason, all interviews should take place in strict privacy and away from other members of the family, regardless of whether the woman is the primary claimant or not.

In addition, many women have been abused by those in positions of authority and therefore may be afraid to share their stories. Therefore, provision should be made if necessary for alternative means of presenting testimony. Following on the Canadian experience, such alternatives could include presenting testimony by means of affidavits, videotapes, or to a hearing officer specifically trained to deal with violence against women.

Asylum applications by families or groups in which the woman is not the primary applicant

In line with UNHCR recommendations, provision should be made for husbands and wives to have separate hearings when filing for refugee status, and for both partners to contribute information to the assessment. There is often an implicit assumption that a family's request for asylum stems from the persecutory experiences of the men. This negates the possibility that women may have legitimate grounds to lay claims of their own. Women may have had experiences of which their families remain unaware, as sexual violence is a source of humiliation in any culture; moreover, in those societies where a woman is considered to be responsible for her own sexual protection, the punishment for experiencing sexual violation could be ostracism or death. As the UNHCR has noted, "[i]f 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 woman will almost inevitably be ignored."⁸

It is important that when a woman applies for asylum as a dependant, she be informed *in private*, and in terms that she understands, of her right to make an independent application for asylum at any stage. She should also be advised to consult with a lawyer before doing so.

The existing practice of giving derivative refugee status to the partner and children of an asylum applicant is problematic. In South Africa, where most applicants have been men, derivative status is traditionally given to their wives. This situation leaves these women entirely dependent on their partners. Evidence concerning "sponsored" wives in Canada points to an increase in domination and domestic abuse by husbands well aware of the new power and status the refugee determination process grants them over their wives.

In some countries, women are routinely questioned to corroborate the testimony of their husbands. This practice should be guarded against, as it assumes that in all cultures men discuss military or political activities with their partners. In certain contexts, this is an inappropriate assumption that may serve to discredit a legitimate claim.

Gender and cultural sensitivity

All officials should be made aware of cultural as well as gender differences in communication. Interviewers should also be supplied with a basic knowledge of the cultures of claimants in order to prevent cross-cultural misunderstandings while assessing the credibility of a claimant's evidence. For example, while Westerners generally read a lack of eye contact as indicative of dishonesty, women from conservative cultures are often socialized to be submissive and will therefore avert their eyes in the presence of authority. In such cultures, direct eye-contact with a stranger may be seen as "bold", "cheeky" or a means of signally sexual availability.

⁸ UNHCR, *The State of the World's Refugees: In search of solutions* (Oxford, New York: Oxford University Press, 1995).

Officers should also be trained to recognize symptoms of rape trauma syndrome or post-traumatic stress disorder. These symptoms include persistent fear, loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame (it is common for abuse victims to accuse themselves of complicity in the abuse), and memory blocks or distorted flash-backs. Such symptoms will affect and even distort how a woman responds during an interview, and negatively interpreting or misunderstanding these signals can lead to the discrediting of a legitimate claim. It is equally important not to judge testimony by the level of emotion displayed. A lack of overt emotion does not necessarily mean that a woman is not distressed by what has happened to her.

Questioning during the interview

The type of questions and the manner in which they are asked are likely to determine the information given. Unless the right questions are asked, it is unlikely that a woman will be able to describe her experiences. Questions should be phrased in an open-ended, non-confrontational and non-judgmental way so as to put women at their ease. This will enable the official to gather the maximum amount of information.

Active listening is a counseling tool effective in making interviewees feel more comfortable and willing to share their stories. Active listening skills include:

- reflective listening (paraphrasing what a woman has said and asking for confirmation) (“So you are saying that when you went to the market, you were beaten? Is that what happened?”);
- not talking at the same time as the interviewee, interrupting her, or cutting her off;
- not making judgmental comments. (“Why were you out after dark anyway?”)

It is also important that interviewers:

- maintain composure if the woman becomes emotional or upset;
- ensure minimum distractions;
- ensure that any interpreting is an accurate reflection of the testimony (this could simply involve listening closely to the woman’s intonation, or the length of the translation, and checking that they “match”).

Questions asked should take into account and reflect the non-traditional roles that women often play in political protest. Because of the social constraints of most cultures, women’s political protest and activism may include, but are not limited to, community activism, providing food, nursing or shelter, taking messages, or hiding people. Activities such as these have in the past been incorrectly ascribed to the realm of “personal conduct” when in fact they constitute alternative political action. Here the interviewing officer should consider the *perception of the perpetrator* as the deciding factor. Actions which may be interpreted as personal conduct in one arena may be interpreted very differently in another, and it is not in the end the actual belief or actions of the asylum seeker that must be assessed, but the interpretation and perception of the perpetrator. For example, Nazi troops occupying France during World War II often shot local women and their families for providing food, bandages and a night in the barn for downed Allied airmen. Such activities, although “domestic” and different from the clandestine activities of the Resistance, were seen as “political” (and punishable) by the occupying forces.

The above recommendations should be considered in all cases where an interview is scheduled for a woman applicant. It is not possible to know what the purported grounds for asylum will be prior to the initial interview.

Additionally, women may not be aware that their gender-related experiences constitute valid criteria for an asylum claim and may pursue a claim of lesser merit and strength because it resembles more “traditional” refugee claims. For this reason, hearing officers should attempt to elicit a wide range of experiences as well as give a brief explanation of status determination processes and any other information that may be relevant.

Obviously not all claims put forward by women are specifically gender-related. Women frequently claim fear of persecution on grounds similar to fellow male citizens. In general, however, the nature and level of vulnerability is different for women. Therefore, even where asylum is sought on the basis of race, political affiliation, or religion, all efforts should be made to enable a woman to relate her full story.

ASSESSMENT OF CLAIMS

The need for a more comprehensive understanding of political persecution

The different position of women vis a vis the refugee determination process must be recognised. Strictly patriarchal societies (which are also those societies most likely to condone or perpetuate gender-persecutory practices) will by their very nature limit the interaction women have with the public sphere. Women in such societies are therefore less likely to be publicly active in religious, political, or nationalist organisations – the very criteria used to determine asylum. This exclusion of women from public life does not mean that women are not persecuted; rather this marginalisation itself may be an element of discrimination severe enough to constitute persecution in and of itself.

For women who do become politically involved, conventional activities such as attending protests, writing publications and joining political parties may not be possible in their society or culture. Their political activities are more likely to take the shape of less conventional interactions, such as providing community services, food and shelter to activists, delivering messages, and so on. These activities are rendered political by the context in which they take place and the goal they seek to achieve. The support women often provide for more traditional kinds of political activity is both important and often more risky than traditional political involvement, as the women can be more severely punished than their male counterparts, as they challenge not only a political status quo, but also transgress social and cultural mores which preclude women’s involvement in such issues.

Expressions of resistance to gendered oppression or institutionalized discrimination are political actions, and persecution for expressing such beliefs, or refusing to accept an inferior station in society thus constitute persecution on the grounds of political opinion. Thus a woman who asserts her independence by laying claim to certain rights – whether they be the right to be sexually active, to exercise reproductive rights, or to refuse cultural practices – is taking an inherently political stand.

Such a reconceptualisation of political activities will mean that in many cases, gender claims will be able to be assessed on political grounds. In the case of refusal to comply with a cultural practice, the act of refusal may be viewed as a political one if the majority of citizens support the practice. In many instances, the act of refusal can be construed as the assertion of a feminist ideology in a context that does not welcome such an ideology. If women refuse a community's social mores, they may be considered feminist, and therefore political. An example of this would be the refusal by some Iranian women to wear a veil as a means of expressing opposition to the Islamic Fundamentalist state (persecution by religion must also recognise the right *not to practice a specific religion*).

Internal Flight Alternative

In addition to the assumption of state responsibility, the granting of asylum is premised on the assumption that the state as a whole has failed to provide protection, and that the abuse is not a regionally located incident. The element of internal flight alternative (IFA) is a fundamental premise of the 1951 Convention, which asks whether it would have been reasonably possible for the applicant to flee to another area of their country of origin where there would be no possibility of further persecution. Although IFA should be equally applicable in cases of gender claims, officers must weigh the theoretical possibility of IFA more carefully in the cases of women, exhibiting sensitivity to the fact that in many cultures, internal flight may well be less possible for women than it is for men. For example, a woman who has been sexually violated may not be able to return to her community for fear of ostracization. Others may live in states where it is unacceptable for a woman to live without the guardianship of a male, or to engage in work in order to support her. In cases such as these, an IFA would be unlikely, and the evidence should be assessed as such. The UNHCR warns against over-exacting IFA assessments and states rather that "a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."⁹

It has been suggested that an asylum adjudicator should take into account four key questions in examining the option of IFA.

1. Did the claimant attempt to flee within her own country? Why or why not?
2. Could she have received meaningful protection in another part of her country?
3. Would internal flight have had a significant impact on the quality of life for herself, her children, or other members of her family?
4. Do any barriers exist to obtaining protection for the type of conduct she is fleeing?¹⁰

Adjudicators should be supplied with a working knowledge of specific country practices, as well as barriers to IFA that exist within these countries.

A "well-founded fear" of persecution

⁹ Office of the U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1980).

¹⁰ Goldberg, Pamela "Asylum Law and Gender-Based Persecution Claims," *Immigration Briefings* (1994).

The term “well-founded fear” is used when a claimant demonstrates that there is a “reasonable” or “serious possibility” that they would be persecuted if returned to their country of origin. The term has been somewhat more difficult to define in relation to gender-persecution cases. The argument is made that proving well-founded fear of rape, FGM, suttee, or other such practices is difficult, as the assessing officer is entirely reliant on the testimony of the applicant. However, this argument carries little weight, as all cases of persecution rely primarily on testimonial evidence of the victim, and unless the victim retains physical evidence of the persecution, such cases are difficult to corroborate or prove. This does not constitute grounds for dismissing gender-persecution cases, which must be assessed with the same weight of probability given to other asylum cases. In the case of a Sudanese woman who fears that her daughter will be circumcised, officials should consider the cultural context in the same way they would consider the political or human rights environment of a country that produces refugees. As 90% of young girls in Sudan are infibulated, the probability of such a case being credible is overwhelmingly high. The US Ninth Circuit Court has held that a one in ten chance of being killed because of political opinion is sufficient to meet the statutory test for asylum due to a well-founded fear of persecution. Although documentary evidence of rape, domestic abuse, and sexual violence is difficult to compile and thus prove (particularly in cases where the state is actively or passively complicit), such cases should be treated according to the same standards as political cases.

Additionally, when assessing evidence and establishing a standard of proof, officials should be made aware that there is often no physical evidence in cases involving sexual violence, and that abusers will often choose specific methods of inflicting harm precisely because they do not leave marks.

Cases of non-Convention persecution with legitimate fear of serious harm

Where a woman is found not to meet the requirements of the 1951 Convention for refugee status, but could be at risk if returned to her country of origin, or where there are other compassionate or humanitarian circumstances, the applicant should be given permission to remain. This practice is outlined in a number of international instruments, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states in Article 3(1) “No state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he [sic] would be in danger of being subjected to torture.”

With many sex-specific practices such as rape and FGM clearly fitting the definition of torture, the onus falls on the state to protect women where there is reasonable suspicion that her removal to the country of origin will result in her being subjected to such ill-treatment.

Repatriation assessments

Once approved, refugee claims are regularly re-evaluated in order to determine whether circumstances have changed sufficiently in the country of origin to warrant repatriation of the refugee. This procedure will have to be approached differently in the case of gender-persecution claims. The passing of laws against certain sex-specific

practices by a state is insufficient evidence of change if such laws are not enforced or do little to protect women in their country of origin. The possibility that a woman might be ostracised for fleeing her community in the first place should also be considered.

Gathering of external information in the assessment of claims

A data-base relating to the status of women in any given state should be compiled and kept at the Department of Home Affairs and made available to officials dealing with gender claims, who must be provided with adequate and up-to-date information. This is of particular importance in assessing the credibility of claims.

Such data-bases should include information on the following.

- The position of women before the law (including but not limited to succession-related laws, marital and divorce laws, access to abortion and birth control, and any laws relating to the punishment of sexual offences and violence against women).
- Political rights of women.
- Social and economic rights of women (including the right to an education or career, the status or quality of life of vulnerable groups of women such as widows, laws concerning dress and demeanour).
- Statistics on the pervasiveness of violence against women, what forms they take (such as suttee, honour killings [execution of female relatives because they have “shamed” their families, usually through illicit sexual liaisons or pregnancies], dowry deaths), as well as the specific measures (if any) adopted by the state to protect women and the effectiveness of these measures.
- The potential consequences for women who return to their former communities, as well as information on the treatment of women living apart from their husbands or kin in the country of origin. This information could be used to assess the internal flight alternative.
- Any and all practices, whether cultural or otherwise, which impact negatively on women (female genital mutilation, suttee, and so on), as well as details of the consequences faced by women who challenge societal norms of behaviour, especially those regarding virginity, divorce and arranged marriages. Information on the consequences of flouting cultural norms (such as dress codes) should also be included.

While this data-base will be a necessary aid in assessing claims, it should also be noted that most crimes perpetrated against women are generally ignored by states and information is therefore likely to be limited.

Where it is difficult to obtain evidence relevant to a woman’s claim, it may be necessary to conduct further research, including sources such as:

- articles, newspapers, reports issued by non-governmental organisations or other relevant community organisations;
- on-line information available on the Internet or sources such as the UNHCR’s RefWorld on CD-ROM;
- local experts on both the region and/or the gender issues involved.

Monitoring of implementation and follow-up procedures

It is recommended that South Africa follow the example set by the Canadian guidelines in requiring that in cases where a claim of gender persecution is denied by the panel, that this decision be accompanied by written reasons. Such a measure is important for two reasons. Firstly, it allows the state to monitor all such claims, as well as the consistency of decisions, particularly in cases where there is a deviation from the recommendations of the guidelines. Secondly, it forces a measure of transparency in such matters, and gives additional force to the applicable sections of the Refugees Act.

ADDRESSING ARGUMENTS AGAINST THE INCLUSION OF GENDER AS A SOCIAL GROUP

Cultural Relativism

“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.”¹¹

Cultural relativism is often cited as a reason for ignoring the claims of gender persecution. In the light of internationally accepted human rights instruments, such as CEDAW, these claims have little foundation. Article 5(a) of CEDAW obliges state parties to “take all appropriate measures (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Implicit in this article is an obligation to protect women from practices premised on assumptions of inferiority or traditional stereotypes. Practices such as FGM, suttee, bride burnings, forced marriages, rape, and domestic violence are not only a violation of liberty and security of person, they are clearly dangerous and degrading to women and an expression of the inherently inferior standing which women hold in many societies.

The right to safety, dignity of life, and freedom from cruel, inhuman or degrading treatment or punishment are not culturally derived, but stem from the common humanity of the individual. The argument for cultural relativity values the right of the community, tribe or state above the right of women to life, bodily integrity, and most of all, choice. It should be noted that asylum law does not actively seek women to rescue – it merely gives them a means by which to assert their rights and escape such violations. As Chairman Mawani of the Canadian Immigration and Refugee Board noted in the press release that accompanied Canada’s Guidelines, “This is not simply a matter of imposing Western standards on other countries. It is a matter of respecting internationally accepted human rights standards.”

¹¹ Heise, Lori Crimes of Gender (World Watch, March/April 1989) p.13.

]Floodgate argument

So far, each state that has chosen to recognise gender-persecution within its refugee determination processes, has had to contend with the argument that such an inclusion would open a “floodgate” swamping those countries with applicants. South Africa has been no exception. However, this fear has little foundation, for a number of reasons.

The floodgate argument is premised on the assumption that the category of women as a specific group is too large and ambiguous, and that by opening up this category and accepting refugees on this basis, millions more will present themselves, as violence against women is endemic and universal. However, there is nothing in the concept of refugee or in the Convention definition that allows for the exclusion of a claim on the basis that it is a persecution shared with large numbers of others. As stated by the former Canadian Refugee Status Advisory Committee: “A person is a refugee whether he is persecuted alone, or persecuted with others. A person need not be singled out for persecution in order to be a refugee. Each claim must be assessed separately.” Furthermore, they ruled that “immigration considerations must not be brought to bear on the application of the refugee definition. The possibility that, if one person is given refugee status, many others might also be entitled to claim refugee status, is not relevant to whether a claimant is a refugee.”¹²

In the US, the floodgates argument has been dismissed by the Immigration Appeal Board, which argued that the definition of social group “must be given a broad and liberal interpretation in order to protect groups who do not necessarily have political, religious, or racial ties at the root of the persecution.”¹³

The existence of large numbers of persecuted women does not and cannot disqualify a woman from being a claimant. The only relevant factor must be that it is possible to differentiate their situation from that of the general population. Just as gendered violence is endemic and universal, the existence of political violence is also endemic the world over, yet the fear of large numbers of possible political refugees does not preclude recognition of their plight.

South Africa is not the first country to implement such guidelines and the experience of other states adopting similar guidelines attests to the fact that the “floodgate” does not “open.” According to UNHCR statistics, the percentage of women asylum seekers in Canada remained relatively stable across the five year period from 1989 to 1993. Women comprised approximately 34-39% of asylum seekers, a figure that includes the period after the implementation of Canada’s gender guidelines.

The reason for the relatively small impact of gender guidelines is largely due to the social and political constraints potential asylum seeking women face. Socially, some cannot leave the home without a male relative, drive a car, or travel abroad without their husband’s written permission. Economically, the constraints are even more pervasive. Few women are able to afford to flee their country. For those that can, however, there must be a basic state obligation to offer the possibility of protection.

¹² Minister of Employment and Immigration, “New Refugee Status Advisory Guidelines on Refugee Definition and Assessment of Credibility” (1982).

¹³ Re Reguena-Cruz, IAB (4/8/1986).

Lastly, accepting gender persecution as grounds for asylum *does not imply that all such applicants would be granted asylum*. Recognizing women's experiences merely affords equality of *opportunity*. It does not in any way impinge on state sovereignty or require a state to accept more refugees. It is simply a means of reforming the determination process to more accurately and equitably include the experiences of those who form the majority of the world's displaced persons and refugees.

RECOMMENDATIONS PERTAINING TO THE PROPOSAL FOR "REFUGEE RECEPTION CENTRES"

The recent proposal by the Department of Home Affairs to establish "reception centres" for refugees is fraught with specific implications for women refugees. Paramount among these concerns is the safety of women within such centres, which although given a different label, will most probably resemble traditional refugee camps, and will therefore face the same difficulties these camps have generated. These issues include health risks, heightened vulnerability and risks for women living at close quarters with strangers, and the probability of increased violence against women.

Protection and security are the most basic responsibilities the international community bears towards refugees. For women, this protection is doubly important as women are most vulnerable to abuse and violence (particularly in situations of war and flight). In the context of survival within countries of asylum, many women find that upon arrival, they actually face increased insecurity in their host country as a result of procedures used to process and house refugee claims. In addition to the threat of violence from strangers now living in close quarters, there is the increased threat of violence from those within the family. According to the UNHCR, recent studies of camps in other parts of Africa have demonstrated that domestic abuse skyrockets in camps, as men feel frustrated by their inability to work and provide for the family. This, coupled with feelings of being incarcerated and helpless, as well as social mores that permit violence towards women leads to high levels of domestic violence.

The centres, as well as any proposed assistance programs, can have a direct and negative impact on women if they do not take into account the specific needs of female refugees. For example, the placement of physical facilities (such as washing facilities) can lead to an increase in the likelihood of security problems. The risk of violence is heightened by the herding together individuals fleeing situations of intense fear and stress. Many refugees suffer from symptoms of post-traumatic stress disorder, which can be exacerbated by feelings of incarceration and helplessness induced by the conditions of camps or centres. The UNHCR has noted that "prolonged stays in camps can lead to a breakdown in law and order."¹⁴ Such lawlessness is likely to present a greater danger for the most vulnerable elements of society – namely women and children.

The lack of provision made for health care in the Department's proposal is also problematic, as it will remove an important and primary front-line of protection for

¹⁴ UNHCR, Guidelines on the Protection of Refugee Women. (UNHCR, Geneva; 1991) pp.48.

women. It is often health-care workers who detect abuse within places of settlement, when women who are affected seek medical care.

If the proposed reception centres are set up, every effort must be made not to replicate the mistakes made in traditional camps, which expose women to greater risks of abuse. As far as possible, the recommendations outlined in the UNHCR's Guidelines on the Protection of Women Refugees pertaining to physical planning and assessment procedures, as well as service provision should be followed. Specific care should be taken in addressing the protection needs of women separated from their families, unaccompanied girl children, disabled women and elderly women. Staff at the centres should ensure that there are women staff members available at all times and that adequate security and lighting is provided.

CONCLUSION

South Africa stands in the unique position of being able to present the global community with a crucible for the development of humane and far-sighted refugee law and policies. Our Constitution and the Refugees Act grant us the potential to be at the cutting edge of debates and issues pertaining to refugee rights.

However, we are still burdened by a past of flagrant human rights violations, and, as a nation, much of our cultural heritage is profoundly patriarchal. Women and children who carry apartheid's legacy face a future in which their rights still need to make the shift from moral and legal principle to everyday practice. There is a degree of irony in woman refugees seeking asylum in a country that has the abysmal distinction of being one of the most dangerous places in the world for a woman to live.

By applying appropriate gender guidelines to the cases of refugee women, and training officials in gender sensitivity, we will not be assigning women refugees "special privileges" or "handling them with kid gloves", but broadening the level of awareness of gender issues in our society as a whole, thus enriching it. By acting out of the spirit as well as the letter of our laws and Constitution by considering the specific needs of women and children, including refugees, we will be transforming our nation for the better.

We run the very real risk of presenting women refugees from countries in which they are seen as inferior to men, and are threatened with a broader range of harm than their male compatriots, with officials and a culture that are deeply patriarchal, and that further dehumanises women who are already vulnerable. It is essential that we do not add to the oppression so many women already endure through the asylum seeking process. Instead, officials can contribute to the smooth and equitable running of this process by broadening their own cultural horizons and putting gender-equality principles into practice. In the long term, this can only benefit us all.

GENDER GUIDELINES FOR OFFICIALS INTERVIEWING **ASYLUM-SEEKERS**

Officials should be aware that women may experience the full range of persecution or risk or threat of persecution that men do (persecution due to race, political affiliation or activity, religion, etc), as well as being at risk for specific forms of harm.

It is vital to understand that women may be persecuted AS women, or BECAUSE they are women. In the first category, they may be at risk for “convention” reasons (because of their political activities or religion, for example, as set out in the 1951 Refugee Convention), but be vulnerable to specific kinds of harm, such as rape or sexual torture. Rape in particular is on the rise as a form of warfare (this has been seen in the Iraqi invasion of Kuwait, in Rwanda, and in the former Yugoslavia). Rape during war or times of civil unrest can no longer be assumed to be the random acts of individuals.

In the second category, women can be persecuted solely because of their gender. Various cultural practices that affect women take place in societies in which women are considered inferior to men. In many of these societies, women have no right to education, careers, and are legally and economically disempowered. This can lead to conditions that are dangerous to women specifically because they are women. Cultural practices that place women in danger include female genital mutilation, widow burning (the practice of *sati*), dowry murders, forced marriages (particularly those involving very young girls), honour killings (the execution of women believed to have “shamed” their families) and so on. Social, legal and economic discrimination against women can put them at risk if the punishments for breaking these rules are severe; for example, beating a woman because she does not follow a dress code, or stoning her for working among men.

It is important to bear in mind therefore that women seeking asylum will not always fall into the traditional categories of asylum seekers.

The following must be borne in mind when dealing with women asylum seekers.

- It should not be assumed that women are seeking asylum simply because their spouse or another male family member is doing so; they might need asylum in their own right, and for very different reasons
- However, remember that women may be persecuted because of their association (through family or marriage) with men who are under threat; for example, they may be at risk of harm simply because they are the wife or daughter of a political activist.
- Don't assume that because a woman cannot answer questions about her husband or male relative's political activities, that his claim is invalid. Women, especially those from societies in which they are seen as inferior to men, are often ignorant of details of their partner's political involvement, and should not be automatically expected to corroborate these details.
- Remember that women may well be deeply politically involved, but may not describe themselves this way because their duties differ from those of male activists. For example, women often carry messages or provide food, shelter and medical care to men involved in more conventional political activities. Even if

these women do not describe themselves as politically involved, the question is whether their actions place them at risk.

- Women who seek asylum (especially those from societies in which women have low social standing) may not understand their rights as potential refugees, and might put forward weak claims for refugee status while failing to reveal information that strengthens their case. The interviewing official must explain their standing and the grounds on which they can seek asylum. Women should be encouraged to seek legal advice before proceeding with a claim.
- Officers should be sensitive to cultural issues, and educate themselves about the states or regions from which the asylum-seekers come, including the status and risks to women in those areas. Never assume that Western standards apply to all cases; applying African standards may also be inappropriate in some cases.
- Don't assume that because the country of origin has laws against the kinds of harm a woman fears that she is not at risk. In the Sudan, for example, female genital mutilation has been made illegal, but its rates of FGM remain the highest in the world, and the new law has had little or no effect on the practice. States may put laws in place, often for window-dressing, that they have neither the will nor the power to enforce. Murder is a crime in states in which honour killings and widow or dowry burning are common, yet such cases are rarely prosecuted.
- Don't assume that interpreters are open to women's experiences. Even if they speak the same language, they may come from a group that is hostile to or disapproving of women. Some may be shocked if women try to speak of sexual violence or matters such as female genital mutilation, and might be reluctant to repeat details to the interviewer.
- Most women who have been raped or sexually traumatized find it extremely difficult to talk about. Talking to a stranger is even worse, and a male stranger worst of all. Moreover, many women who are brutalized by authority figures or state forces (such as the police or army) might be terrified of officials or men in uniform as a result.
- Women who have experienced violence may have post-traumatic stress syndrome. Officials should be able to recognize the signs of this condition, which include numbness and detachment. A woman who describes traumatic events without apparent emotion is not necessarily fabricating or "making things up."
- Be aware that women may be at risk from members of their own families. This is particularly true of FGM, widow and dowry burning, honour killings, and forced marriages, almost all of which are carried out within the family or close community. Refugee women, especially those with low standing in their own cultures, are also at heightened risk of spousal abuse, battering and rape.

During the interview itself:

- Female interviewers and interpreters should interview women. If this is difficult to arrange at first, female officials must be appointed. They must be used if sexual violence is suspected. (But don't assume that all women are gender-sensitive; female interviewers and interpreters should receive the same training in gender awareness as male officials.)
- Allow enough time for women to tell their stories at leisure and hopefully build some rapport with the interviewing official. Women who are rushed will find it even harder to talk about painful topics.

- Adopt non-threatening interview techniques. Do not bark out questions or use intimidating body language (standing over women who are sitting down, for example).
- Avoid judging by your own cultural standards. It is easy to misread body language, particularly that of women from repressive societies. Tense or recoiling posture and refusal to make eye contact might indicate modesty, submissiveness or fear of authority; do not assume that they mean dishonesty or evasiveness.
- Allow women privacy during the interviews. These should not take place in a public room with others coming and going. Also allow women to speak alone; many women will be too ashamed to discuss delicate issues (such as sexual violation or FGM) in front of male relatives or partners.
- Do not pry for intimate or sexually explicit details. Your role is to assess the degree of risk to the asylum seeker, not to gather all the painful details.
- Ask open-ended questions. Begin by seeking innocuous information (“Where are you from?”) and move gradually to more charged questions (“What was it like there?” “What was it like for you?” “Did you feel safe?” “What kinds of things were happening that made you want to leave?” Try to structure the interview so that the woman volunteers information, and don’t ask specific questions (such as “have you been raped?”) unless trust has been established.

The South African Constitution is most progressive in banning discrimination in all forms. It is the duty of officials to honour the spirit and the letter of our democratically founded Constitution, including when dealing with asylum seekers.

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