

## Where are the women? Gender discrimination in refugee policies and practices

*NAHLA VALJI, LEE ANNE DE LA HUNT and HELEN MOFFETT write that there is a need to reframe theories underpinning refugee rights and legislation in order to afford women refugees more protection*

*There is possibly no one more vulnerable than the refugee woman. Every means of support gone - her livelihood, the home she built, her dowry, her flock of goats or sheep, the well she dug, her household gods and shrine, the garden and crops she tended, the neighbours she talked to over the fence, her extended family, very often her husband and male relatives - disappeared into the maw of civil war, fled ahead of her, hauled away by security police or the militia. She does not know whether or not she is a widow, what happened to the family's savings, whether her parents are still alive - even what prayers to say. She is very often solely responsible for the care and support of her surviving children, at the very moment that her capacity for feeding them is taken away. She may already have been raped; she may be pregnant or HIV-positive as a result. Every minute of every day, she experiences such overwhelming stress that her basic functioning is at risk; yet she has to make crucial, possibly life-saving decisions on a daily basis. Should she sell her bangles for food and a doctor for the baby, or keep them to bribe the guards at the border? Should she slaughter the last remaining chicken in the sack, or wait a little longer? Should she allow her 11-year-old son to carry messages for a vigilante gang in exchange for food, knowing he could be shot if caught? Her seven-year-old daughter to beg and pilfer in the market? She must cope with all this, and at the back of her mind, the constant fear of sexual violence - to which she is now more vulnerable than ever before.*

The above is a snapshot of the life of a typical refugee woman in Africa today. But this woman, and the millions like her, are rendered almost invisible by the United Nations refugee instruments<sup>1</sup> and domestic refugee status determination processes. Refugee demographics worldwide show that approximately 80 percent of

an estimated 27 million refugees and displaced persons today are women or children (Anker, 1995). Yet this percentage stands in stark contrast to statistics that reveal that in 1998, for example, only 17,8 percent of United Nations High Commissioner for Refugees (UNHCR)-assisted refugees in South Africa were female (UNHCR: 1998). Also, according to the 'Gender Policy Statement', recently released by the Department of Justice, it is estimated that women constitute only five percent of those who have been formally granted refugee status in South Africa ([www.doj.gov.za/policy/gender02.html](http://www.doj.gov.za/policy/gender02.html)).

This troubling disparity is not restricted to South Africa only. Although it is known that the majority of refugees are women (UNHCR, 2001), as a general rule, refugee women have not been afforded anything like the protection offered refugee men in refugee-receiving countries throughout the globe, particularly in the developed world. Until the last decade, refugees were considered male almost by default; refugee women and children were recognised only as part of a 'family package'. Gender considerations - including the realisation that women might be at especial risk - are relatively new.

There is clearly an urgent need to reframe the analysis underpinning refugee rights and legislation from a gender perspective; a thorough overhaul of procedures that explicitly or implicitly discriminate against women asylum seekers is also long overdue. In this *focus* we argue 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. We suggest alternative approaches to traditional interpretations of categories of persecution, and argue that there is a further category of persecution that often cannot be covered by the above categories - persecution because of gender.

### Blind to the plight of women: shortfalls of traditional conventions and procedures

There is no doubt that the existing conventions have played a role, however inadvertently, in marginalising women refugees. The 1951 United Nations (UN) Convention Relating to the Status of Refugees and the 1967 Protocol that followed it, form the foundation of international refugee law. However, as has been regularly pointed out in the literature (Shacknove, 1985; Collinson, 1993), these conventions were forged in the

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fail women**

crucible of post-World War II Europe, and were further shaped by the Cold War agenda. Today, they continue to reflect the principal concerns of that period - namely the need to protect individuals from state persecution resulting from political beliefs or personal identity. Unfortunately, these and other assumptions underpinning international instruments consolidated both the official and the popular notion of the typical asylum seeker as a male dissident, tortured or imprisoned by the state for traditional political activities.

This traditional view of the asylum seeker as male, together with narrow and fairly rigid interpretations of what constitutes persecution, has had the effect of denying women their right to international protection. The legacy of the 1951 Refugee Convention resulted in a mindset whereby women's political involvement is often misinterpreted as personal conduct: defying or transgressing discriminatory laws, or engaging in non-conventional political activities (such as nursing or providing food) are viewed as personal or 'domestic' actions as opposed to political protests. This lack of recognition afforded women's political involvement stands in the way of their seeking asylum for persecution on the basis of those actions. Furthermore,

the focus on persecution by the state ignores the primary arena of persecution experienced by the majority of refugee women - the private sphere.

The procedures<sup>2</sup> used in gathering and assessing testimony in traditional refugee determination processes also fail women. The practice in many western states of keeping a 'white list' of countries assumed to be non-refugee producing countries has been critiqued for a variety of reasons, but the most compelling for our purposes is that states are placed on this list regardless of their record concerning human rights abuses on the basis of gender. In other words, gender practices that are discriminatory or even dangerous to women are mostly considered irrelevant in determining whether or not a country can produce authentic refugees.

In most refugee-receiving countries, especially in the developed world, the majority of asylum seekers and refugees are young single men or men with families<sup>3</sup> (UNHCR, 2001). This is certainly the case in South Africa. Our particular refugee regime is one that 'advantages' the refugee who is male, mobile, unencumbered by children, and who has some financial resources or prospects (savings, job skills, and so on). So far, government plans to place asylum seekers into camps<sup>4</sup> are meeting with resistance from humanitarian and legal bodies; however, the relative 'freedom' that asylum seekers in South Africa still enjoy has the effect of further disadvantaging women refugees. In fact, most of the women refugees who might be expected to seek asylum in South Africa (eg women from the Democratic Republic of the Congo) are in refugee camps elsewhere on the subcontinent. Women refugees are often forced to settle in such sub-optimal environments, where they and their children are sometimes at grave risk (of harassment, violence, sexual assault, unsanitary conditions, epidemics) simply because they are not as mobile, comparatively independent and well-resourced as male refugees.

Like many other countries, the South African regime is also more inclined to look more favourably on refugees whose experiences reflect those of traditional

notions of persecution on political grounds. This both privileges the male experience of persecution, and discriminates against women's experiences of persecution by evaluating the latter according to male-centred 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 the specific and unique circumstances related to their gender. Given our refugee statistics, where the very low number of women seeking asylum is overwhelmingly disproportionate to the actual number of women refugees in the African subcontinent, the failure to account for and incorporate women's experiences within the determination procedures amounts to systematic infringement of their right to equality.

### 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 refugees 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 societies and who were victims of cruel and degrading treatment as a result. In 1991, the UNHCR released its 'Guidelines on the Protection of Refugee Women' (UNHCR, 1991). Included were suggestions for reforming legal procedures to include recognition of gender persecution, as well as appropriate interview techniques when investigating claims of this nature.

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 United States, Australia, and most recently the United Kingdom. Most countries, however, have chosen not to amend existing legislation to include 'sex' or 'gender' as a social group, but rather to issue non-binding regulations on how officials might evaluate claims of gender persecution.<sup>5</sup>

South Africa is in the unique position of having included gender within the definition of 'social group' in the Refugees Act, 130 of 1998. Most states that have recognised 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, in theory at least, towards recognising the rights of women refugees.

### The legal definition of a refugee

The South African Refugees Act incorporates the definitions contained in both the United Nations and Organisation for African Unity (OAU) refugee conventions - definitions which are implicitly gendered.

Article 1(A)(2) of the 1951 UN Convention Relating to the Status of Refugees, 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.*

**The violation of women's rights is universal and long-standing**

Article I(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa broadens the UN definition and states:

*The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*

Although the extended OAU definition does not require an individualised fear of persecution, it is widely believed by refugee lawyers and NGOs that South African refugee status determination officers reject applications where the asylum seeker does not come from what the Department of Home Affairs believes is a 'refugee producing country' (de la Hunt, 2002:21). This term,

**Harm is done to women to punish male family members**

*is used to describe the political stability of a country as opposed to its ability or willingness to protect the most vulnerable elements of its population. This is particularly problematic for women whose persecution may not be 'political' (in the traditional sense with which the word is mostly used) but of a cultural or gendered nature (Valji, 2000:20).*

### What constitutes persecution?

Although few states have taken the step of precisely defining 'persecution' or 'well-founded fear of persecution' within their domestic legislation, status determination bodies and courts have generally accepted that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group constitutes persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution.

However, persecution within the context of the 1951 Refugee Convention must contain two elements: first,

establishing 'serious harm' (or threat thereof), and second, the inability or unwillingness of a state to offer protection to the individual.

Following the abovementioned example set by the Canadian guidelines, it is becoming more widely accepted that women refugees' experiences of persecution fall into four broad categories (Wallace, 1996).

1. Women who fear persecution on the same 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 (for example, are raped). In other words, they may be harmed in different ways to men who participate in the same activities or who share the same identity.

2. Women who fear persecution solely because of reasons relating to kinship. The age-old tactic of *cherchez la famille* (search the family) means that harm is done to women to punish (male) family members, or they may be used as 'hostages' to entrap other members of the family. They may also be persecuted for views held by male members of their family. 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, honour killings 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).

When considering the persecution of women, it is vital to acknowledge sexual violence as a form of persecution and to include it in the instruments. However, formal recognition (specifically of rape as a war crime - see below) has only recently been forthcoming, with both unofficial and official policy continuing to reflect the assumption that rape is an arbitrary act of harm, not a form of persecution. This is not acceptable. Women's vulnerability to sexual violence as a form of persecution must be recognised and addressed, as opposed to fatalistically accepted. It is a truism universally (and sadly) acknowledged, that whatever violations or abuses men fear in an insecure world, women fear doubly. The atrocities that accompany war, genocide, unlawful imprisonment, or torture are always worse for women. Sexual violation is not the first dread that springs to a man's mind when he is arrested for political activism, or when he hears a twig snap outside, or when the front door is kicked in at two o'clock in the morning. Men are of course, subjected to sexual abuse and rape within the context of other rights violations; one thinks of the notorious rape of TE Lawrence, when he was taken prisoner and tortured by a local Ottoman colonial despot in North Africa during World War I. But this is not an extra tax of fear a man has to pay every time he is threatened by political or other instability.

It is, however, often difficult to establish state responsibility for sexual crimes, even in the context of war situations, as the intimate nature of such crimes leads automatically to the assumption that these are 'personal crimes' or random acts by individuals as opposed to state-sanctioned tactics. Today, however, international bodies are recognising the true nature, brutality and intent of such crimes. Acknowledging rape as an abuse of power and a means to achieving a political end is a step forward in reconceptualising 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 existed an official

office in the civil service for the rape and torture of women) 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.<sup>6</sup>

Recently, disturbing allegations in the press have begun emerging from Zimbabwe, suggesting that rape and sexual torture are being used as a form of political punishment; vigilante groups are targeting women whose male relatives support the opposition, or who live in villages that question the government party line. There are reports that these women are gang-raped specifically to teach their communities 'a lesson' not to oppose ZANU-PF members or policies (*Sunday Times*, September 1, 2002). If these reports are true, then these would be clear grounds for seeking asylum on the basis of persecution. The question does arise as to why such applications are not being made. This most likely has to do with the widespread perception that sexual violence does not constitute persecution or torture. Although it is probably the oldest war crime there is, the official recognition of rape as such is less than a decade old.

**It is difficult to establish state responsibility for sexual crimes**

### Persecution by non-state actors

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 there is no state culpability (which is required in appeals for international protection) in cases of private abuse. This argument fails to recognise the dual nature of a state's responsibility to its citizens. States not only have a negative obligation not to violate a citizen's rights, but a positive obligation to respect and protect such rights (*Islam v Secretary of State for the Home Department; R*

*v Immigration Appeal Tribunal, ex parte Shah House of Lords, 25 March, 1999*). 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. If this burden of responsibility is 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 in the case of *Velasquez-Rodriguez* (case 7920, July 29, 1998) 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 (O'Hare, 1999:365).*

**Evidence of conscious inaction by the state amounts to complicity**

In other words, evidence of conscious inaction by the state amounts to complicity. This can be found in official legislation (for example, not recognising 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 these actions constitute state complicity if they deprive women of effective legal protection from abuse. The existence of legislation that 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 unchecked. For example, murder is a crime in countries in which honour killings, widow burnings and dowry murders are rife - yet such crimes are rarely prosecuted. Laws alone are insufficient to prevent mistreatment of women if there is no political will to enforce them. There are a number of reasons why 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 recognised as human rights, and that the abuses are seen as too pervasive to confront (Bunch, 1990). If they lead to non-enforcement, these reasons constitute passive complicity and acceptance of the abuse by the state. As such, victims have no internal recourse for their persecution, the granting of asylum on such grounds would be appropriate.

### **Application for asylum and assessment of claims**

#### **The need for a more comprehensive understanding of political persecution**

It is important that the different position of women *vis a vis* the refugee application and status determination process 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 and within 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 claims. 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 women can be more severely punished than their male counterparts, as their actions 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 institutionalised 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 rethinking and broadening of what constitutes political activities will mean that in many cases, claims based on gender will be able to be assessed on political grounds. In the case of refusal to comply with a cultural practice, the act of refusal could be viewed as a political one, or seen as the assertion of a feminist ideology in a hostile context. An example of this might be the refusal by some Iranian women to wear a veil as a means of expressing opposition to the Islamic fundamentalist state (formal recognition of persecution on the grounds of religion must also include the right not to practice a specific religion).

#### **Discrimination in the application process**

The application process also needs attention in cases where asylum applications are made by families or groups in which the woman is not the primary applicant. All too often, officials assume that women are merely present as appendages to male applicants. According to recommendations made by the UNHCR (UNHCR Guidelines: 1993) provision should be made for husbands and wives to have separate hearings, and for both partners to contribute information to the assessment. Because of the assumption that a family's request for asylum stems from the persecution experienced by the men, the possibility that women may have legitimate grounds to lay claims of their own, is ignored. 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 guidelines (1995a) 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.*

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 (de la Hunt, 2002). This situation leaves these women entirely dependent on their partners. Media reports in refugee-receiving countries in the North point 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 - who, for example, are unable to leave abusive partners without risking loss of their standing as refugees. Another example of the above is the 'no recourse to public funds' law in the United Kingdom, which stipulates that in cases of divorce, refugee women may not claim State benefits and must leave the receiving country within a certain time period.

**Women should be informed of their right to make an independent application for asylum**

#### **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 (Heise, 1989:13).*

Cultural relativism is often cited as a reason for legitimately sweeping aside claims of gender persecution. In the light of internationally accepted human rights instruments such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), this argument has 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.*

**Cultural relativism is often cited as a reason for legitimately sweeping aside claims of gender persecution**

Implicit in this Article is an obligation to protect women from practices premised on assumptions of inferiority or traditional stereotypes. Practices such as female genital mutilation, bride burnings, forced marriages, rape, and domestic violence are not only a violation of liberty and security of person; they are clearly dangerous, are degrading to women and an expression of the 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 is not a western cultural principle; it arises from universal recognition of 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.

### The '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 (made by anti-immigration lobbies within governments and civil society) 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 (Neal, 1988). However, there is nothing 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 [or she] 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 (Minister of Employment and Immigration, 1982).*

A woman cannot and should not be disqualified from claiming refugee status simply because large numbers of women experience persecution in their lives. The only relevant factor must be whether it is possible to differentiate their situation from that of the general population of the country of origin. 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.

The experience of states such as Canada and the United States adopting similar guidelines attests to the fact that the 'floodgate' does not 'open'. According to UNHCR statistics (UNHCR, 1995b), 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 percent of asylum seekers, a figure that includes the period after the implementation of Canada's gender guidelines. The



implementation of the South African Refugees Act (1998) in 2000 has certainly not resulted in a flood of woman applicants.<sup>7</sup>

The reason for the relatively small impact of gender guidelines is largely due to the social and political constraints potential asylum seeking women face. Some cannot leave their homes without a male relative accompanying them, 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.

Lastly, accepting gender persecution as grounds for asylum does not imply that all such applicants would be granted asylum. Recognising women's experiences merely affords equality of opportunity. It does not in any way 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.

## Conclusion

The South African Constitution, one of the most equitable in the world in terms of its commitment to gender equality, and the Refugees Act together present us with the opportunity to be at the cutting edge of debates and issues regarding 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 shift from being recognised in moral and legal principle to everyday practice. There is a degree of irony in woman refugees seeking asylum in a country that has the unfortunate distinction of being one of the most dangerous places in the world for a woman to live.

In this *focus* we have deconstructed assumptions about the 'universal' refugee, and enlarged on the inclusion

of gender persecution in the Refugees Act. We have also suggested shifts that need to take place in application and assessment procedures that will more appropriately reflect this country's commitment to the principles of equality and dignity, as we challenge the gendered assumptions about who is a refugee.

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## Notes

1. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

2. In certain jurisdictions, determinations are made on the basis of oral hearings, either inquisitorial or adversarial. In others, decisions are made on files, which include transcripts, or notes from an initial interview. See page 71 for guidelines drafted to assist status determination officers in South Africa.
3. In most receiving countries in the undeveloped world, refugees arrive in large groups and are housed in camps. Status determination is seldom done on an individual basis and such refugees are often referred to as *prima facie* refugees.
4. In 1999 the Department of Home Affairs announced plans to set up two 'Refugee Reception Centres'. According to their proposal, asylum seekers would be compelled to remain in these centres pending the outcome of their applications for asylum.
5. Documents such as UN resolutions and the UNHCR Handbook on Status Determination are seen in common law jurisdiction courts as 'soft law', as opposed to 'hard law' (domestic legislation or binding treaties). Guidelines, or non-binding regulations, are similarly regarded as 'soft law'
6. This is entrenched in the Rome Statute, which established the International Criminal Court (Article 7).
7. No application based on gender has been brought before the Refugee Appeals Board. The authors are aware of one case brought by a West African woman who fled her country to avoid an arranged marriage. Her claim has yet to be determined.

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## 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 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.
- Do not assume that because a woman cannot answer questions about her husband or male relative's political activities, that her claim is invalid. Women, especially those from societies in which they are seen as inferior to men, are often ignorant of details of their partners' 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.
- Do not 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 (FGM) has been made illegal, but the incidence of FGM remains 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.
- Do not 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 traumatised find it extremely difficult to talk about their experience. Talking to a stranger is even worse, and a strange man worst of all. Moreover, many women who are brutalised 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 recognise 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 do not 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 issues.
- 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 gory details.
- Ask open-ended questions. Begin by seeking innocuous information (eg 'Where are you from?') and move gradually to more charged questions (eg '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 do not ask specific questions (such as 'Have you been raped?') unless trust has been established.
- Use active listening techniques.
- Never ask judgmental questions (eg 'Why weren't you wearing a veil?').
- It is never appropriate to imply that a woman ought simply to avoid the behaviour (eg a sexual or romantic relationship) that places her at risk for persecution (a death sentence for adultery, for instance).

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.

**The guidelines were compiled for the National Consortium for Refugee Affairs in 1999 by Lee Anne de la Hunt and Nahla Valji.**