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[En]gendering International Refugee Protection: Are We There Yet?

Heaven Crawley

This chapter takes stock of transnational developments in law and practice relating to gender asylum claims over the past twenty years in order to review the role of international human rights law (IHRL) in ‘gendering’ international refugee law (IRL) and the associated protection available to women asylum seekers. It has been argued that IRL has undergone an important transformation, catalysed by attention to women's issues in general, and particularly the development of what have been called new ‘gender asylum doctrines and procedures’.¹ Proponents of this view identify three main areas of human rights abuse against women as illustrative of the ways in which IHRL has been successfully brought to bear in gender asylum claims, namely, rape and other forms of sexual violence, female genital mutilation (FGM) and family violence.

This chapter argues that, whilst IHRL has the potential to reconfigure the relationship between gender and international refugee protection, it has not done so to date. This is partly because human rights law and discourse is itself gendered, privileging as it does ‘the family’ - often a source of intense and intimate violations of women’s human rights - as ‘the natural and fundamental group of society’. But it is also because IHRL has been brought to bear in gender asylum claims in ways that typically emphasise women as ‘victims’ of human rights violations rather than as holders of rights for whom access is negated by patriarchal institutions and structures. This framing of ‘women’ as ‘vulnerable victims’ of male violence not only creates a problematic hierarchy of oppressions but also ignores the ways in which gendered norms and power relations are politically and legally maintained.² This, in turn, results in an ongoing and problematic emphasis in IRL on the issue of whether women are ‘members of a particular social group’ (PSG). This approach has increasingly been used to protect (sometimes narrowly defined) groups of women subject to certain kinds of persecution and harm to the neglect of a wider understanding of gendered power relations in countries of origin.

1. The feminist critique of IRL

The failure of the international community to acknowledge and protect asylum-seeking women from gender-specific and gender-related forms of persecution has been well documented.³ Although the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol are ostensibly gender-neutral and do not distinguish

¹ See, for example, Deborah Anker ‘Refugee law, gender, and the human rights paradigm’ (2002) 15 *Harvard Human Rights Journal* 133; Deborah Anker and Paul Lufkin ‘Gender and the symbiosis between refugee law and human rights law’ (2003) *Migration Information Source* <<http://www.migrationpolicy.org/article/gender-and-symbiosis-between-refugee-law-and-human-rights-law>> accessed 16 February 2005

² Heaven Crawley *Refugees and Gender: Law and Process* (Jordan Publishing 2001); Alice Edwards ‘Transitioning gender: feminist engagement with international refugee law and policy, 1950-2010’ (2010) 29(2) *Refugee Survey Quarterly* 2; Jane Freedman ‘Women seeking asylum’ (2008) 10(2) *International Feminist Journal of Politics* 154; Nancy Oswin ‘Rights spaces: an exploration of feminist approaches to refugee law’ (2010) 3(3) *International Feminist Journal of Politics* 347.

³ *Ibid*; and also Jacqueline Greatbach ‘The gender difference: feminist critiques of refugee discourse’ (1989) 3(3) *International Journal of Refugee Law* 585; Audrey Macklin ‘Refugee women and the imperative of categories’ (1995) 17 *Human Rights Quarterly* 213.

between male and female refugees,⁴ the dominant interpretation of refugee law has evolved through an examination of male asylum applicants and their activities. It is men who have been considered the principal agents of political resistance and therefore the legitimate beneficiaries of protection resulting from persecution.

In this context, feminist jurisprudence has emerged as a systematic critique of the practice and profession of law, with its central theme that the law is a thoroughly gendered system that marginalizes women's interests and reinforces male domination.⁵ It has been argued that, when gender becomes central to the analysis of IRL, the latter dissolves into a normative struggle whose outcome is determined largely by power.⁶ This normative structure both reflects and reinforces existing gender biases within States and allows issues of particular concern to women to be either ignored or undermined.

In many respects, the failure to properly address the gender asylum claims of women is a product of a more general failure of IRL to recognise social and economic rights due to its emphasis instead on individual targeting and the deprivation of civil and political rights. This is despite the fact that social and economic rights may be violated for political reasons.⁷ However, it is also related to a larger criticism of human rights law and discourse, namely that it privileges male-dominated 'public' activities over the activities of women, which take place largely in the so-called 'private' sphere. Modern international law, including IHRL and IRL, rests upon and reproduces various dichotomies between the public and private spheres: a distinction is made between matters of international 'public' concern and matters 'private' to States that are considered within their domestic jurisdiction, and in which the international community has no recognised legal interest. Feminist legal scholars argue that such distinctions render gross violations of rights at the hands of individuals within the family and community largely invisible, such that what women do and what is done to them comes to be seen as irrelevant.⁸ Feminists have sought to mitigate this bias in the interpretation of the refugee definition by making women's experiences of persecution in the 'private' sphere more visible. They have highlighted the use of rape and sexual violence as a weapon of war, emphasised the particular structural dimensions that shape violence against women within the family and community, and drawn attention to oppressive cultural and ideological norms and practices that contribute to the harm experienced by women and which, they argue, should be identified as violations of women's human rights.⁹

⁴ To the extent that gender is revealed in these legal texts, the masculine language used suggests that the male refugee was in the mind of the drafters.

⁵ Hilary Charlesworth, Christine Chinkin and Shelley Wright 'Feminist approaches to international law' (2001) 85 *American Journal of International Law* 614.

⁶ Estel Strizhak and Catherine Harries *Sex, Lies and International Law* (Women's Commission for Refugee Women and Children 1993).

⁷ Gayle Binion, 'Human rights: a feminist perspective' (1985) 17(3) *Human Rights Quarterly* 509

⁸ Patricia Campbell 'Gendered human rights: the international community's failed response to the persecution of women' (2001) 29(1) *Politics and Policy* 121; Heaven Crawley 'Women and refugee status; beyond the public/private dichotomy in UK asylum policy' in Doreen Indra (ed.) *Engendering Forced Migration: Theory and Practice* (Berghahn Books 1999); Heaven Crawley 'Engendering the state in refugee women's claims for asylum', in Susie Jacobs, Ruth Jacobson and Jenni Marchbank (eds) *States of Conflict: Gender, Violence and Resistance* (Zed Books 2000); Andrew Byrnes 'Women, feminism and international human rights law – methodological myopia, fundamental flaws or meaningful marginalisation?' (1992) *Australian Year Book of International Law* 205; Patricia Campbell 'Gendered human rights: the international community's failed response to the persecution of women' (2001) 29(1) *Politics and Policy* 121.

⁹ Oswin 2010 (n2).

This critique has explained the differential treatment of women in countries of origin *and* countries of asylum through analysis of both the gendered contexts within which their experiences of persecution occur and the gendered legal structures through which these experiences are subsequently interpreted. It has produced three significant contributions to the field of IRL: firstly, a sustained and well-documented position that human rights violations experienced or feared by women should be recognised as ‘serious harm’ rising to the level of ‘persecution’; secondly, the argument, increasingly tested through case law, that the mechanisms of IRL should look beyond the institution of the State and its direct action and to take a broader systematic look at both State action *and inaction*;¹⁰ and thirdly, the proposal that the grounds enumerated in the Refugee Convention should be interpreted to incorporate women’s experiences arising from gendered power relations rather than seeking to add a further ground (of ‘gender’ or ‘sex’).

2. Bringing IHRL to bear on women’s claims for protection

Following years of neglect of the needs of refugee and asylum-seeking women, a new awareness and willingness to take account of gender in policy development and implementation emerged from the mid-1980s onwards. This was given considerable impetus by the office of the United Nations High Commissioner for Refugees’ (UNHCR) appointment in 1989 of its first Senior Coordinator for Refugee Women, whose remit it was to raise awareness of the particular issues facing refugee women and to develop training and policies in response. The history of how gender has come to be incorporated into the international refugee regime is outlined elsewhere and will not be reprised in detail here.¹¹ However, it is important to acknowledge that, whilst the feminist critique of IRL played an important role in this process, it both arose from, and fed into, a broader critique of IHRL that sought to highlight the particular harms experienced by women in a range of contexts.

As noted by Edwards, developments in international protection for women must be placed within a broader framework of advancements in IHRL including, in particular: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)¹² and its optional Protocol which were developed during the UN Decade on Women (1976-1985); the Declaration on the Elimination of Violence Against Women (1993)¹³ together with the Declaration of the World Conference on Human Rights that ‘women’s rights are human rights’; the Beijing Platform for Action adopted at the Fourth Conference on Women (1995);¹⁴ and jurisprudence arising from the International Criminal Tribunals for the Former Yugoslavia and Rwanda. These developments provided the context within which it became possible for UNHCR and others to raise awareness about the particular harms experienced by asylum seeking women and the failures of the international refugee regime to provide surrogate protection.¹⁵

¹⁰ Campbell 2001 (n8).

¹¹ See, for example, Edwards 2010, Freedman 2008 (n2).

¹² UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series 1249, 13 <www.refworld.org/docid/3ae6b3970.html> accessed 16 February 2015

¹³ UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104 <<http://www.refworld.org/docid/3b00f25d2c.html>> accessed 16 February 2015

¹⁴ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995 <<http://www.refworld.org/docid/3dde04324.html>> accessed 16 February 2015

¹⁵ Edwards 2010 (n2).

Over the past twenty years, these advances in the field of IHRL, together with the campaigning and advocacy efforts of women's organisations and refugee groups that highlight the experiences of women as asylum seekers, have resulted in important changes to policy and practice that have effectively served to legitimise the factual basis for gender asylum claims. In this respect, perhaps the most notable development has been the production of a number of national and international gender guidelines that specifically draw on IHRL to make claims concerning women's right to protection under international refugee law, and which aim to assist decision-makers in understanding the importance of gender in policies and procedures for refugee status determination (RSD).

In 2002, UNHCR issued guidance on the meaning of gender-related persecution that was intended to assist legal interpretation of the Refugee Convention by governments, legal practitioners, decision-makers and the judiciary, as well as by UNHCR staff carrying out RSD in the field.¹⁶ This guidance focused on promoting a gender-sensitive interpretation of the Convention and ensuring that RSD procedures would not marginalise or exclude gender-related experiences of persecution. The guidance built on other UNHCR documents addressing discrete aspects of gender-related persecution, including a number of recommendations made by the Executive Committee dating back to 1985 and the Guidelines on the Protection of Refugee Women which were first produced in 1991.¹⁷

Alongside these developments in the UN system there have been a number of initiatives on the part of individual States to draw the attention of decision-makers to the particular experiences of women seeking asylum. In 1993, the Canadian Immigration and Refugee Board issued its ground-breaking Guidelines on Refugee Women Claimants Fearing Gender-Related Persecution, which were developed after extensive consultation with interested governmental and non-governmental groups and individuals. Two years later, the United States (US) Immigration and Nationality Service (INS) also issued Considerations for Asylum Officer Adjudicating Asylum Claims for Women. The US Gender Guidelines give specific instruction to decision-makers to recognise rape and other forms of sexual violence as persecution and also acknowledge that women who are beaten, tortured, or subject to such treatment for refusing to renounce their beliefs about the equal rights of women may be considered for international protection. Other gender guidelines were subsequently produced in Australia, Sweden and the United Kingdom (UK).¹⁸

It is important to note that UNHCR, practitioners, activists and others involved in the production of gender guidelines have consciously built the foundations of gender asylum law on the edifice of international women's human rights law and the work of the international women's human rights movement.¹⁹ For reasons that are as much strategic as principled, they have argued that, in order to respond to women's experiences of persecution, refugee law needs to evolve through a process of interpretation that draws on the framework of IHRL, rather than be amended to incorporate new gender-specific provisions. The US Gender Guidelines, for example, specifically instruct that gender asylum claims 'must be viewed within the framework provided by existing international human rights instruments and the

¹⁶ The development of these gender guidelines by UNHCR is documented elsewhere (Edwards 2010; Freedman 2008 (n2)).

¹⁷ Heaven Crawley and Trine Lester *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe* Evaluation and Policy Analysis Unit Evaluation Report EPAU/2004/05 (UNHCR 2004).

¹⁸ See further below.

¹⁹ Anker 2002, Anker and Lufkin 2003 (n1).

interpretation of these instruments by international organisations’, whether or not the United States has ratified them.²⁰

Similarly, in the UK, the Refugee Women’s Legal Group (RWLG), which was established in 1996 by feminist lawyers, practitioners and academics concerned about the impact of changes in immigration law on women seeking asylum, consciously emphasised IHRL in the production its Gender Guidelines for Asylum Claims in the UK.²¹ The RWLG guidelines, which form the basis of guidance subsequently issued by the Immigration Appellate Authority (IAA) in 2000 and by the Home Office in 2004, draw on Hathaway’s framework within which persecution is defined as ‘the sustained or systematic violation of basic human rights demonstrative of a failure of State protection in relation to one of the core entitlements which have been recognised by the international community’.²²

According to the RWLG guidelines, a decision about whether an instance of harm, including harm which is gender-specific, amounts to persecution should be assessed on the basis of these internationally recognised human rights standards. A list of international human instruments which may be useful tools in interpreting the Refugee Convention is also provided.²³ This principle is reflected in the asylum policy instructions issued to initial decision-makers by the Home Office in 2004 and periodically updated.²⁴ For example, the most recent version states that:

In addition to the UK’s obligations under the 1951 Refugee Convention and the European Convention on Human Rights (ECHR), and the minimum standards for protection set by the EU Qualification Directive, there are international and national legal instruments which impose positive duties on the UK to eliminate discrimination and gender-based violence; these include for example the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by the UK in 1986, the ECHR as implemented by the Human Rights Act 1998 and the Gender Equality Duty introduced into the Sex Discrimination Act 1975 by the Equality Act 2006.²⁵

²⁰ See Karen Musalo ‘A short history of gender asylum in the United States: resistance and ambivalence may very slowly be inching towards recognition of women’s asylum claim’ (2010) 29(2) *Refugee Survey Quarterly* 46.

²¹ Refugee Women’s Legal Group (RWLG) *Gender Guidelines for the Determination of Asylum Claims in the UK* (ILPA 1998) <www.ilpa.org.uk/data/resources/4112/genderguidelines.pdf> accessed 16 February 2015

²² James Hathaway *The Law of Refugee Status* (Butterworth 1991) 112.

²³ RWLG 1998 (n20), paragraph 1.20. The list of human rights instruments to which the guidelines refers includes the Universal Declaration of Human Rights (UDHR) (1948), the 1926 Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, the 1949 Geneva Conventions on the Laws of War and the two Additional Protocols of 1977, the Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others (1949), the European Convention on Human Rights (ECHR) (1950), 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 (ICESCR) (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 Convention on the Rights of the Child (CROC) (1989), the UN Declaration on the Elimination of Violence Against Women (1993) and the UN Platform for Action (1995).

²⁴ Home Office *Gender Issues in the Asylum Claim* (Home Office 2010).

²⁵ *ibid.* paragraph 1.1.

The Australian gender guidelines similarly acknowledge the importance of interpreting gender asylum claims within the context of the international human rights framework for protection.²⁶

3. 'Women's rights as human rights' in the context of RSD

IHRL has been brought to bear directly on IRL principally through the production of gender guidelines within the UN system and in national jurisdictions that are intended to bring a gendered perspective to the determination of gender asylum claims within RSD systems. These guidelines have been a major vehicle for the articulation and acceptance of the human rights paradigm and have resulted in the development of case law which has delivered greater protection for women fleeing gender-related persecution in certain contexts and circumstances.²⁷ The relevant literature highlights three areas in this regard, namely rape and sexual violence, female genital mutilation (FGM) and domestic or familial violence.²⁸

3.1 Rape and sexual violence

Over the last twenty years, there has been increased awareness of the use of sexual violence not only as a weapon of war but also as a gender-specific form of harm inflicted on women (and men) in the context of political repression and unrest.²⁹ Sexual violence is a major and increasingly well-documented factor in forced migration, with serious physical, social and psychological consequences. Although such violence should be one of the least controversial examples of 'serious harm' in the context of a definition of persecution, the interpretation of sexual violence against women has often differed substantially from the interpretation of other forms of serious harm experienced by men due to the fact that in the past 'some decision-makers have proven unable to grasp the nature of rape by State actors as an integral and tactical part of the arsenal of weapons deployed to brutalise, dehumanise, and humiliate women and demoralise their kin and community'.³⁰

As noted by Anker and Lufkin, prior to the introduction of gender guidelines, even cases of rape and sexual violence that might otherwise have been considered to fit the traditional paradigms of refugee law were routinely dismissed in US and Canadian case law as 'private'. For example, when a Salvadoran woman whose family was active in a cooperative movement was raped by death squads while they shouted political slogans and hacked her male relatives to death, she was deemed the victim of private violence. Similarly, a US immigration judge denied asylum to a Haitian woman who was gang-raped because of her support for the deposed president, though the ruling was eventually overturned.

Anker and Lufkin argue that the articulation of the human rights paradigm within IRL has led to increased awareness of the politically-motivated uses of rape and sexual violence and a greater willingness on the part of decision-makers to acknowledge its consequences for those seeking asylum.³¹ They show that this has begun to have some impact on case law. For example, Canadian tribunals have expressly held that rape or threats of rape 'are degrading

²⁶ Susan Kneebone 'Women within the refugee construct: 'exclusionary inclusion' in policy and practice- the Australian experience' (2005) 17(1) *International Journal of Refugee Law* 7.

²⁷ Anker 2002, Anker and Lufkin 2003 (n1).

²⁸ *ibid.*

²⁹ Edwards 2010, Oswin 2010 (n2).

³⁰ Macklin 1995 (n3).

³¹ Anker and Lufkin (2003) (n1)

and constitute quite clearly an attack on the moral integrity of the person, and hence, persecution of the most vile sort', a phrase which echoes the description of rape in the Canadian gender guidelines.

3.2 Female genital mutilation (FGM)

There is also a growing (but still relatively small) body of law that recognises FGM as the basis for a refugee claim, much of which locates the harm feared within a human rights framework.³² The first country in the world to grant asylum because of FGM was Canada in 1994. In this case, *Farah*,³³ a woman fearing FGM if returned to Somalia was found to fear persecution due to her membership in 'two social groups, namely women and minors'. Gender was determined to be an innate and unchangeable characteristic. The authorities held that FGM violated numerous provisions of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), including the right to life and the prohibition against cruel, inhuman, or degrading treatment.³⁴

In the US, the oft-cited *Matter of Kasinga*³⁵ was filed in the mid-1990s when the campaign for 'women's rights as human rights' was in full swing and gender-based violence took centre stage as the focal point of efforts to change policy and practice in cases involving violence against women.³⁶ In this case, a 19 year old woman who fled Togo to avoid FGM was granted asylum by the US Board of Immigration Appeals (BIA), the highest administrative tribunal in the US immigration system at that time. The Board found that FGM is severe enough to constitute persecution and applied the holding of its seminal social group decision *Matter of Acosta*³⁷ to find that she was the member of a social group defined by gender in combination with other immutable and fundamental characteristics.³⁸ Musalo outlines the reasoning of the Board in some detail and notes that the decision implicitly overcame the interpretive barriers which had stood previously in the way of many gender asylum claims.³⁹

More recently, in the UK case of *Fornah*,⁴⁰ the House of Lords accepted that a woman who feared return to Sierra Leone because she would face gender-specific persecution in the form of FGM was entitled to recognition as a refugee because she feared persecution on account of her membership of a particular social group. Her appeal was allowed on the basis that women in Sierra Leone and, alternatively, uninitiated women who had not been subjected to FGM in Sierra Leone, were particular social groups. The Home Office had previously accepted that FGM constitutes cruel, inhumane and degrading treatment under Article 3 of the European Convention of Human Rights.

3.3 Domestic and familial violence

Finally, Anker and Lufkin highlight an emerging body of case law that addresses violence against women in the context of the family and community, suggesting that there have been

³² Oswin 2010 (n2).

³³ *Farah v Canada (MEI)* (1994) 3 July.

³⁴ Anker and Lufkin (2003) (n1).

³⁵ *In Re Kasinga* Int Dec 3278 (BIA 1996)

³⁶ Sara McKinnon 'Positioned in/by the State: incorporation, exclusion, and appropriation of women's gender-based claims to political asylum in the United States' (2011) 97(2) *Quarterly Journal of Speech* 178-200

³⁷ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)

³⁸ Musalo 2010 (n19).

³⁹ *ibid*

⁴⁰ *Fornah v. Secretary of State for the Home Department* [2006] UKHL 46.

shifts towards accepting violence within the family as persecution under IRL which again draw upon the principles embedded in IHRL.⁴¹

The problem of violence against women in the family, commonly referred to as ‘domestic’ violence, is enormous and multifaceted. Violence within the family, which is often supported or condoned by the wider community, includes physical, sexual and psychological abuse inside and outside the home. It is deeply intertwined with prejudices concerning women as inferior, as the property of their male relatives (husband, fathers, uncles, male siblings) and requiring women to be obedient and to sacrifice their needs to service men. In some contexts, it takes a specific form such as the so-called ‘honour killing’, dowry death or bride-burning and the custom of *sati*. All of these acts are manifestations of the prevalence of violence against women by family members and reflect varying degrees of tolerance of such violence by the State. They have typically been viewed with considerable scepticism with the refugee determination process.⁴²

Until the mid-1990s there was no little or discussion about whether women experiencing violence within the family and community were entitled to protection under international refugee law. However, just as campaigning efforts to challenge the privatisation of sexual violence have gone some way towards bringing cases within the scope of international protection, so too the feminist challenge to IHRL has resulted in an increased emphasis on the ways in which violence within the family can form the basis of a claim for asylum or may interrelate with other forms of persecution to explain the harm which a woman fears. This is particularly clear in cases involving gendered social mores and the concept of honour, where members of a woman’s family and/or community are commonly responsible for punishing women who fail or refuse to conform.

This scenario can be seen in the British case of *Shah and Islam*,⁴³ where the House of Lords held that the State could be held responsible for private or domestic abuse where such violence was either tolerated or condoned. Similarly, in Australia, the High Court addressed issues of persecutory intent and State action in the case of *Khawar*, which involved a woman from Pakistan who was subject to systematic abuse at the hands of her husband and had tried and failed to obtain police protection on several occasions.⁴⁴ According to McPherson and others, this case destabilised prevalent protection discourses that understand domestic violence as a ‘private matter’ between individuals.⁴⁵

Meanwhile in considering a case of severe domestic violence in Iran, *Re MN*, the New Zealand Refugee Status Appeal Authority concluded that a policy of gender discrimination and the enforcement of gender-based norms against women as a group in Iran was such as to permit a finding of persecution in the sense of a sustained or systemic violation of basic human rights.⁴⁶ The Authority went further still in *Refugee Appeal No. 76044*, which addressed honour killings in Turkey, by acknowledging that women can challenge prevailing power structures in a variety of ways, for example, by refusing an arranged marriage, ending

⁴¹ Anker and Lufkin (2003) (n1).

⁴² Crawley 2001 (n2).

⁴³ *Islam v SSHD; R v IAT ex parte Shah* [1999] INLR 144, Imm AR 293 (HL).

⁴⁴ *Minister for Immigration and Multicultural Affairs v Khawar* [2002] 187 ALR 574; 210 CLR 1

⁴⁵ Melanie McPherson, Leah S Horowitz, Dean Lusher, Sarah di Giglio, Lucy E Greenacre and Yuri B Saalman ‘Marginal women, marginal rights: impediments to gender-based persecution claims by asylum-seeking women in Australia’ (2011) 21(2) *Journal of Refugee Studies* 323.

⁴⁶ *Re MN* Refugee Status Appeals Authority, Refugee Appeal No. 2039/93 (1996)

a violent marriage, refusing to dress or behave in accordance with socially defined roles and mores - and if they suffer harm as a result, the broader definition of ‘political belief’ could result in their recognition as refugees under the Refugee Convention.⁴⁷

4. One step forward, two steps back...

Anker and Lufkin suggest that the fact that IRL has identified key forms of violence against women as core violations of their human rights is a significant aspect of its success in addressing gender asylum claims:

It [refugee law] has been able to do so by applying a human rights paradigm and building on the work of the international human rights community. *Making the relationship between refugee law and human rights law explicit creates opportunities for advances within both fields.*⁴⁸

Certainly, it is important to recognise these legal advances and to draw upon them where possible and appropriate to promote protection for women under IRL. Yet it is also crucial to acknowledge a significant, and growing, concern among feminist legal scholars that the gains made in relation to gender asylum claims over the past twenty years have been more limited than was anticipated. Developing this critique, the remainder of the chapter will suggest that, whilst IHRL has the potential to reconfigure the relationship between gender and international refugee protection, as Anker and Lufkin suggest, it has not done so to date and in fact may reinforce gender stereotypes that are ultimately unhelpful to women (and men) seeking international protection. The reasons for this are complex and inter-related.

4.1 Implementation gap

The treatment of gender asylum claims in law and practice cannot be seen outside the context of broader shifts in attitudes and policies concerning asylum-seeking.⁴⁹ There has been growing political concern across refugee-receiving States since the late 1990s about the scale of asylum flows and their composition, resulting in a series of legislative and policy changes to tighten access to procedures for RSD. These changes have been associated with the externalisation of border controls, increasingly restrictive entry procedures, the use of detention, dispersal and deportation to reduce the number of applications and control those who arrive, and restrictions in the availability of welfare to support asylum seekers whilst they await a decision about their future. Freedman suggests that reducing the numbers to whom refugee status is granted is an important part of this process.⁵⁰ This view is shared by Mullally, who maintains that the process of asylum adjudication in the US is tainted by immigration concerns that may become particularly accentuated in gender-based claims. This is due to the scale of patriarchal violence experienced by women globally, as well as concerns about ‘opening the floodgates’ to potentially huge numbers of people seeking international protection.⁵¹

⁴⁷ *Refugee Appeal No. 76044* [2008] New Zealand: Refugee Status Appeals Authority
<<http://www.refworld.org/docid/48d8a5832.html>> accessed 16 February 2015

⁴⁸ Anker and Lufkin 2003 (n1), emphasis added.

⁴⁹ Freedman 2008 (n2); Crawley and Lester 2004 (n17); Kneebone 2005 (n25).

⁵⁰ Freedman 2008 (n2).

⁵¹ Siobhan Mullally ‘Domestic violence asylum claims and recent development in international human rights law: a progress narrative?’ (2011) 60 *International and Comparative Law Quarterly* 459.

One of the consequences of this increasingly restrictive context is the existence of an ‘implementation gap’ in practice across the countries in which gender guidelines have been developed and introduced.⁵² In other words, the introduction of gender guidelines does not mean that gender has been ‘taken care of’. In Australia, conscious and consistent regard for gender-based claims is not yet evident.⁵³ Similarly, across the countries of Europe, there has been limited progress towards ensuring gender-sensitive asylum procedures or interpretation of the Refugee Convention. For instance, none of the 41 countries surveyed by Crawley and Lester in 2004 had officially adopted the UNHCR Gender Guidelines into their legislation or policy.⁵⁴ Just two countries had introduced their own guidance on the assessment of gender-related asylum claims, although a further eight had included some gender-related points within their general RSD policy or guidelines. Where progress had been made at the policy level, implementation was found to be inconsistent. One key example of this uneven progress is that authorities in less than half of the countries surveyed had explicitly recognised that sexual violence can be a form of persecution.

A more recent report on nine countries in Europe has also found significant inconsistencies in the interpretation of gender-based claims for protection despite the existence of European legislation including the Qualification Directive.⁵⁵ In the case of France, for instance, it has been observed that ‘discretionary power is exercised through gendered lenses that ignore the complexity of the experiences of women seeking asylum and instead reduces them to a series of stereotyped roles’.⁵⁶ This is made possible, in part, because of the number and range of agencies and individuals involved in the process. Whilst this problem is not unique to gender asylum claims, it seems likely to have been exacerbated by the very significant differences that exist in the incorporation of international directives and policies into national contexts.

4.2 Persistence of patriarchal norms

Barriers to gender asylum claims arise not just from administrative and procedural inconsistencies in RSD but from the patriarchal nature of international law itself. As noted at the beginning of this chapter, international law is a thoroughly gendered system.⁵⁷ As such, IRL constantly reconstructs and reconstitutes itself to maintain the (masculine) status quo. This process can be seen particularly clearly in gender asylum claims that challenge the gendered construction of the public/private dichotomy, including the *Matter of Kasinga* decision discussed above.⁵⁸ Although the case elicited considerable enthusiasm from refugee activists and scholars, who hoped that it would expand protection for women seeking asylum, others were critical of the fact-specific explanation and questioned its potential impact on future gender asylum cases. This has indeed proved to be the case.

The principles established in the *Matter of Kasinga* were brought into question by the BIA just three years later in the now well-documented *Matter of RA*.⁵⁹ This case concerned a Guatemalan woman, Rody Alvarado, who fled Guatemala in 1995 after suffering years of physical and sexual abuse at the hands of her husband who raped her repeatedly, beating her

⁵² Edwards 2010 (n2); Musalo 2010 (n19); McPherson et al. 2011 (n42).

⁵³ McPherson et al. 2011 (n42).

⁵⁴ Crawley and Lester 2004 (n17).

⁵⁵ European Parliament *Gender Related Asylum Claims in Europe* (Brussels 2012).

⁵⁶ Freedman 2008 (n2) 155.

⁵⁷ Charlesworth et al. 1991 (n3) 614-5.

⁵⁸ *In Re Kasinga* (n33).

⁵⁹ *Matter of R-A* (1999) Int Dec 3403, US BIA.

before and after, kicked her genitalia, causing her to bleed for eight days, forcefully sodomized her, pistol-whipped her and violently kicked her in the spine when she refused to abort their foetus.⁶⁰ When she protested, he often responded, 'you're my woman, you do what I say' or 'I can do it if I want to'.⁶¹ Despite her request for assistance the Guatemalan police would not, or could not, help her. On three occasions her husband was summoned by the authorities, but he failed to appear and the police took no further action. Twice the police did not respond at all to her calls for help, and a judge told Rody Alvarado that he would not intervene in domestic disputes. Her husband insisted that calling the police was futile because of his connections with them through military service. Rody Alvarado knew of no shelters or organizations that could help her, so she fled to the United States and sought asylum.

An Immigration Judge in the US found Rody Alvarado's account credible and granted her asylum. However, the government successfully appealed the decision to the BIA, which held that, even though she had sustained serious injuries at the hands of her husband, she had failed to establish that the harm she suffered was on account of either membership of a particular social group or political opinion. The BIA held that both the 'social visibility' and 'particularity' of the social group must be established in order to secure protection under IRL, thereby distancing itself from the earlier ruling in *Kasinga* by largely rejecting the relevance of the social context in determining nexus.

The decision in *Matter of RA* led to a long legal battle to vindicate the principle that women's rights are human rights, which was only brought to a conclusion ten years later in December 2009 when Rody Alvarado was finally granted asylum. Yet the case illustrates the problem that continues to face victims of violence within the family and community: it is regarded as a 'private' matter for which the State bears no responsibility, even where it has failed to protect the individual from serious harm rising to the level of persecution.⁶² The decision was widely criticised not least because of the negative implications that it had for a whole range of gender asylum cases involving persecution committed in the context of State impunity. There is no shortage of cases in the US and elsewhere in which either the lack of an enumerated ground and/or a lack of State connection serves to undermine the application based on family and community violence and thereby leads to a refusal.⁶³

Thus, whilst there have been some significant developments in IHRL relating to family violence, there remains inconsistency and ambivalence in terms of the way these cases are treated in asylum adjudication. Reflecting this, Mullally argues that refugee law is simply not keeping pace with the inclusion of domestic violence in the panoply of rights and positive obligations now recognised in IHRL:

Most notable in the case law on domestic violence in asylum cases is the limited reference to recent developments in international human rights standards on domestic

⁶⁰ Allison W Reimann 'Hope for the future? The asylum claims of women fleeing sexual violence in Guatemala' (2009) 157(4) *University of Pennsylvania Law Review* 1199; M S Cianciarulo 'Batterers as agents of the State: challenging the public / private distinction in intimate partner violence-based asylum claim' (2012) 35 *Harvard Journal of Law and Gender* 117; Musalo 2010 (n19); Mullally 2011 (n48).

⁶¹ Reimann 2009 (n57).

⁶² Jenny-Brooke Condon 'Asylum law's gender paradox' (2003) 33(1) *Seton Hall Law Review*; Cianciarulo 2012 (n57).

⁶³ S Zeigler and KB Stewart 'Positioning women's rights within asylum policy: a feminist analysis of political persecution' (2009) 30(2) *Frontiers: A Journal of Women's Studies* 115.

violence, and the standard of due diligence in particular. The worlds of refugee and human rights law continue to remain apart.⁶⁴

This problem is not limited to cases involving familial and community violence. There also appears to be a rising bar for establishing persecution in US asylum cases involving sexual and reproductive harm.⁶⁵ Analysing recent cases in the US, Marouf argues that adjudicators tend to apply a higher standard for physical harm in these types of cases and largely overlook non-physical harm including psychological harm and harm caused by deprivation of equality, autonomy and privacy. She notes particular patterns in cases involving FGM and the involuntary insertion of IUDs. The European Parliament has similarly noted that, despite legal precedents in some countries, not all States recognise FGM as a form of violence constituting persecution. For example, authorities in France, Malta and Romania do not always accept that FGM can amount to persecution and in Belgium asylum claims based on fear of FGM are reliant on an invasive annual medical examination.⁶⁶

Meanwhile, a recent comprehensive examination by Millbank and Dauvergne in Australia, Canada, the United States and the UK of cases based on forced marriage reveals what the authors describe as a ‘profound schism between human rights norms and refugee law’s protection’.⁶⁷ The choice of whether, and when, to marry has been acknowledged in several key international instruments including the UDHR, ICCPR and CEDAW as a fundamental human right and in this context it might be expected that the issue of forced marriage would find a direct fit in the framework of IRL. In reality this is not the case. Rather their study of forced marriage ‘demonstrates a stark disjuncture between refugee jurisprudence and human rights jurisprudence.’⁶⁸ Although forced marriage is explicitly acknowledged as a gender-related form of persecution in many of the national and international refugee law documents outlined earlier in this chapter, including the Canadian, Australian and UK guidelines, in practice those making asylum claims on this basis struggle to articulate the harm of forced marriage and to establish a nexus between the harm feared and an enumerated Convention ground.

4.3 Gendered nature of IHRL

It was noted earlier in this chapter that the feminist critique that gained momentum in the early 1980s was not directed exclusively towards IRL but rather at international law more generally, including IHRL. The relationship between IHRL and women’s rights has long been the subject of debate and has raised fundamental questions about the processes by which human rights are defined, adjudicated and enforced, as well as questions about the substance of what is thereby ‘protected’.⁶⁹ Byrnes, for example, accuses the mainstream human rights community and Human Rights Committee of all too often demonstrating gender blindness in

⁶⁴ Mullally 2011 (n48), 482-3.

⁶⁵ FE Marouf ‘The rising bar for persecution in asylum cases involving sexual and reproductive harm’ (2011) 22 *Columbia Journal of Gender and Law* 81

⁶⁶ European Parliament 2012 (n52).

⁶⁷ Jenni Millbank and Catherine Dauvergne ‘Forced marriage and the exoticization of gendered harms in United States asylum law’ (2011) 19(3) *Columbia Journal of Gender and Law* 898.

⁶⁸ Catherine Dauvergne and Jenni Millbank ‘Forced marriage as a harm in domestic and international law’ (2010) 73(1) *The Modern Law Review* 57.

⁶⁹ Rebecca J Cook ‘Women’s international human rights law: the way forward’ (1993) 15 *Human Rights Quarterly* 230; Binion 1993 (n7).

relation to a range of issues including issues of privacy,⁷⁰ the right to bodily integrity and the right of a person to fair and non-discriminatory treatment by the legal system. The Human Rights Committee, he argues, is not atypical but reflects a wider lack of importance given to issues of gender:

...by and large there is relatively little acknowledgment that gender is an important dimension in defining the substantive content of rights, in particular those rights that do not refer specifically to women or that embody a guarantee of non-discrimination.⁷¹

Writing in the early 1990s, feminist legal scholars argued that the marginalization of women's human rights was a function, in significant part, of IHRL's focus on direct State violations of individual rights which in turn embodies an acceptance of the division between the public and private spheres, a point made earlier in this chapter.

The relevant point here is that this situation has not changed in the intervening period: patriarchy prevails within both the content and structures of IHRL. Edwards gives the example of the torture prohibition which is still mainly applied and understood in the context of physical ill-treatment perpetrated by State or quasi-State officials against political dissidents or prisoners for the purpose of extracting information or forcing an individual to confess. But the public / private distinction can also be seen clearly in the conceptualization within IHRL of the patriarchal institutions – religion, family and the State itself – on which so many nations depend.⁷²

Article 16.3 of the UDHR, for example, proclaims that 'the family is the natural and fundamental group of society and is entitled to protection by society and the State'. Yet it is clear not only that women may be targeted by the State (and others) because of their relationships within the family (for example, in order to 'get at' political active fathers, sons and spouses or in order to regulate reproduction), but that the family can be the location of intense violations of a woman's human rights. To this extent, the description of the family as either 'public' or 'private' is misleading and simplistic: it is more accurately described as a collective unit which mirrors other power structures in society.⁷³ Regardless, this construction of violence within the family as 'private' and beyond the scope of IRL can be seen in cases involving so-called domestic violence, even where violence clearly rises to the level of persecution and where no State protection is available.

Others argue that IRL has not simply been interpreted and understood in ways that ignore or marginalize women's rights but has actually served to (re)produce the idea that the privileged status of men vis-à-vis women is somehow natural.⁷⁴ In other words, that an asymmetrical approach to sex discrimination is firmly cemented within the UN institutional framework and by extension the framework, institutions and systems of IHRL. According to Otto, 'women were invariably reproduced by international law as the dependents, property or extensions of

⁷⁰ Byrnes 1992 (n8) notes for example that Article 12 of the UDHR states that 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence' implying that a man's home is his castle within which he can act with impunity.

⁷¹ Byrnes 1992 (n8), 223.

⁷² Alice Edwards *Violence Against Women and International Human Rights Law* (Cambridge University Press 2011).

⁷³ Kneebone 2005 (n25), 33.

⁷⁴ Diane Otto 'International human rights law: towards rethinking sex / gender dualism and asymmetry' (2013) *Melbourne Legal Studies Research Paper* No.620

men and therefore in need of legal ‘protection’ rather than legal ‘rights’.⁷⁵ She argues that international humanitarian law, international labour law and early treaties prohibiting trafficking in women for the purposes of prostitution all portrayed women as vulnerable and familial by nature, whilst men were portrayed as protectors, supporters and saviours. This hierarchical scheme ‘took women’s inferiority to men as a given, and legitimated treating them protectively, rather than as bearers of rights’.⁷⁶ A similar point is made by Oxford, who argues that the fundamental problem with incorporating women’s human rights into an existing human rights framework is that theories, laws and ideas of what constitutes human rights follow an androcentric model. In other words, men’s experiences provide the framework for human rights and the baseline against which women’s experiences are assessed and ultimately judged.⁷⁷

According to a growing body of feminist scholarship, therefore, IHRL is based on an androcentric ‘male-as-norm’ model which privileges the family - often a source of intense and intimate violations of women’s human rights - as ‘the natural and fundamental group of society’. Edwards argues that, regardless of the efforts undertaken by feminists and others over the past two decades to make the case that human rights are women’s right, the reality is that human rights are, to a significant extent, men’s rights in the sense that the main treaties of IHRL contain norms that are predominantly applicable to men’s experiences and are focused around the fears of men rather than those of women. Women, she suggests, are still not yet full citizens for the purpose of benefiting from the protection available under IHRL. Men, it is suggested, are the standard of IHRL and if women are to be included at all they are seen as a deviation from that standard, as a ‘special case’. As a consequence, even if IHRL is brought to bear on IRL, women claiming protection must ‘fit’ their experience of violence into male-defined criteria, which in turn reflects a system that treats women unequally.⁷⁸

4.4 Depoliticisation of gender

This understanding of IHRL as inherently gendered goes some way to explaining its failure to fully reconfigure the relationship between gender and international refugee protection. But there is a second, even more important, but closely related, explanation that stems from the first: namely that women have come to be incorporated within IRL as ‘victims’ of human rights violations rather than as holders of rights whose experiences of persecution can only be fully grasped by understanding the gendered nature of rights available to women in specific geographical contexts.

There are several different aspects to this problem. The first is the tendency to equate gender with ‘sex’ which prevails within human rights theory and advocacy, including that directed specifically towards international refugee law.⁷⁹ The term ‘gender’ refers to the social construction of power relations between women and men, and the implications of these relations for women’s (and men’s) identity, status, roles and responsibilities.⁸⁰ Gender relations and gender differences are historically-, geographically- and culturally-specific, so that what it is to be a ‘woman’ or ‘man’ varies through space and over time. As

⁷⁵ *ibid.* 2.

⁷⁶ *ibid.* 4.

⁷⁷ Connie Oxford ‘Protectors and victims in the gender regime of asylum’ (2005) 17(3), *NWSA Journal* 18

⁷⁸ Zeigler and Steward 2009 (n56); Edwards 2011 (n65); Otto 2013 (n67).

⁷⁹ K Calavita ‘Gender, migration and the law: crossing borders and bridging disciplines’ (2006) 40(1)

International Migration Review 104; Crawley 1999 (n8).

⁸⁰ Crawley 2001 (n2).

Charlesworth notes, despite the emancipatory possibilities opened up by the language of gender (for both women and men), it remains common for feminists and those advocating for women's rights to use gender as a synonym for 'women' which undermines the idea that gender is a social and relational category and threatens to reduce women, once again, to biology.⁸¹

This process of decontextualizing women's experiences has been reinforced by the well-meaning but ultimately unhelpful tendency within IRL to represent 'women' as victims of male violence rather than holders of rights whose access to rights has been negated or undermined by patriarchal structures and institutions. In the area of refugee law and policy, unequal power relations abound. Yet those advocating for a more gender-inclusive application of IRL have (intentionally or otherwise) often reinforced and exacerbated gendered stereotypes. As this author has argued previously,⁸² one unintended but very serious effect of merely adding 'women' to existing analyses without an understanding of the differences between women arising from context is that they appear only as victims: refugee women are presented as uniformly poor, powerless and vulnerable victims of, for example, 'male oppression' or 'oppressive cultures, religions or traditions', while Western women are the reference point for modern, educated, sexually-liberated womanhood.

Building on this theme, Johnson explores the gender narrative of refugee representation by the UNHCR and how it intersects with political (non-) agency.⁸³ She argues that how we imagine particular categories of people determines how we engage with them, who we accept, who is able to participate and on what terms. Johnson notes that, whilst women are increasingly included in refugee regimes through policies, guidelines and other initiatives, they are included as a *broad and undifferentiated category* of victims, lacking agency and unable to determine their own futures. This positioning of women has played an important role in the discourses of victimisation and depoliticisation employed by UNHCR to reduce the threat perception of the refugees and generate support for a politics of humanitarianism. Kneebone similarly argues that Refugee Women are generalised into a category that is both dependent and in need of protection. Whilst this construction of the vulnerable Refugee Woman is useful as a tool for the mobilisation of support behind humanitarian intervention and refugee work, it reproduces and reinforces the idea that women from the global South are powerless and lack agency.⁸⁴ Others go further still, pointing out that the amalgamation of 'women-and-children' into one category of 'vulnerable' refugees has major impacts on the way in which gender is treated in issues of refugee protection.⁸⁵

There is growing evidence, therefore, that the focus on women's human rights has become counter-productive because it reinforces the naturalized moorings of sex/gender and supports concomitant conceptions of women (and men) that justify protective and imperial, rather than

⁸¹ Hilary Charlesworth 'Not waving but drowning: gender mainstreaming and human rights in the United Nations' (2005) 18 (1) *Harvard Human Rights Journal* 18. See also Otto 2013 (n71).

⁸² Crawley 1999, 2000 (n8), 2001 (n2).

⁸³ H Johnson 'Click to donate: visual images, constructing victims and imagining the female refugee' (2011) 32(6) *Third World Quarterly* 1015.

⁸⁴ Kneebone 2005 (n25). See also R Manchenda 'Gender conflict and displacement: contesting 'infantilisation' of forced migrant women' (2004) 39(37) *Economic and Political Weekly* 4179 who argues that what she describes as the 'infantilisation' of forced migrant women in international humanitarian discourse confers on women a presumed passivity that is naturalised in practice: '[h]er identity and her individuality are collapsed into the homogeneous category of 'victim' ... devoid of agency, unable and incapable of representing herself, powerless and superfluous'.

⁸⁵ Edwards 2010, Oswin 2010 (n2); Freedman (2010, 2011) Mullally 2011 (n48).

rights-based, responses to women's human rights violations.⁸⁶ The emphasis is firmly on women's victimhood and the correlate stereotyping of 'women' as passive victims, as objects rather than subjects of law. According to Edwards, feminist scholarship and activism can be criticised for feeding this essentialisation of women as victims of 'private' male violence. She and others argue that the attention on violence against women, particularly sexual violence and 'exotic' forms of harm, feeds into the stereotyping of both women and men. In this construction 'Third World Women' are constructed as 'victims' or 'others' in need of 'saving'.⁸⁷

At the same time there is emerging evidence that race and gender come together in particular ways to legitimate the protection of women fleeing certain types of harms and simultaneously exclude others. On the one hand certain types of harm, most notably domestic violence, are viewed by judges as being universal and therefore outwith the protection potentially available to women under IRL. On the other hand, a racialized series of *exotic assumptions* are articulated in relation to violence only or mostly experienced by 'other' women, most notably FGM and honour killings. Drawing on the work of Spivak,⁸⁸ Oxford suggests that these assumptions play out in scepticism about whether women should be protected against domestic violence because of the fear that 'everyone will want to come', whilst conversely there is a *prime facie* case where the harm feared is perceived to be 'exotic', signifying a cultural backwardness from which 'other' women can be rescued.⁸⁹ Whilst this may provide access to protection for *some* women who can legitimately be rescued from 'other' men and cultures, it can have exclusionary rather than inclusionary effects for those whose experiences are not consistent with this racialized narrative and instead require receiving countries to look inwardly at gendered power relations within their own societies. .⁹⁰

4.5 Problem of 'exclusionary inclusion'

The concept of 'exclusionary inclusion' was developed by Susan Kneebone in an attempt to explain, and make sense of, the ongoing difficulties experienced by women in securing protection under IRL against violations of their human rights.⁹¹ Writing with reference to the Australian context, Kneebone suggests that a major problem with the current dominant approach to gender asylum claims is that it constructs the Refugee Woman according to her vulnerability in a patriarchal society in which women are subordinate to men as victims, or potential victims, of sexual or other violence directed towards them as women. Kneebone, together with a growing number of feminist legal scholars, has argued that one of the consequences of this construction is that women and their experiences are incorporated into the refugee regime in a particular gendered way which serves ultimately to undermine the protection available to them.⁹²

Indeed, this is reflected in evidence that the trend towards 'protective' responses that assume women's vulnerability, dependency and need for 'special protections' has led to an over-emphasis on the construction of 'women' or specific groups of women as members of a

⁸⁶ Edwards 2010 (n2); Otto 2013 (n71); Oxford 2005 (n74).

⁸⁷ Edwards 2011 (n66).

⁸⁸ Gayatri Chakravorty Spivak 'Can the Subaltern Speak? In Patrick Williams and Lara Chrisman (eds) *Colonial Discourse and Post-Colonial Theory: A Reader* (Harvester Wheatsheaf 1994)

⁸⁹ Oxford 2005 (n78).

⁹¹ Kneebone 2005 (n25).

⁹² See also Edwards 2010 (n2).

‘particular social group’ (PSG). There has been considerable debate and legal argument over the past twenty years about whether or not ‘women’, or groups of women (variously conceived), are deserving of protection on this basis and several positive developments in case law in Canada, the US, Australia and the UK were noted earlier in this chapter. As a consequence, membership of a PSG has now become the default ground for women’s claims in many jurisdictions, even when one or more of the other grounds may be equally or more relevant.⁹³ Many of these cases are not legally binding or are factually-specific and are of limited precedent value for other gender asylum claims. Moreover an understanding of gendered power relations in countries of origin is often absent. As a result, the experiences of women are often framed in ways that are confusing, contradictory and can actually serve to undermine the real case for protection.⁹⁴

The successful construction of women as belonging in a particular social group in any given geographical context will depend on the prevailing narratives about women in general, about their countries of origin, and about the particular forms of violence they claim to have experienced (or fear).⁹⁵ As Mullally suggests, the risk of essentialising the position of women in a particular society runs through many gendered claims to asylum and this is particularly evident where women are constructed within the parameters of membership of a PSG. In these cases, women are constructed as the ‘victim’ subject, with limited attention paid to the historical, economic and other lines of difference that shape and define experience of gender discrimination and which fragment the category of ‘women’.⁹⁶

In practice, therefore, applications framing women’s experiences as members of a PSG often reflect a particularly static conception of gender that rests on, and ultimately replicates, the existing and paradigmatically masculine normative structures of IRL, strengthening the view of women as social and cultural actors but not political ones and ignoring the political (with a small ‘p’) context within which violence against women occurs.⁹⁷ This problem often arises from the (over)emphasis in RSD on the particular harms experienced by women and the associated failure to explore fully the principle of non-discrimination, the violation of which frequently provides an explanation for the reasons why such harms take place and therefore provide a nexus to one of the other enumerated Convention grounds.

5. So, are we there yet?

There have been some significant developments in IRL over the last twenty years which can be attributed, at least in part, to the efforts of refugee scholars, lawyers and practitioners to draw on IHRL principles and case law to ‘mainstream’ the protection of refugee and asylum-seeking women. In this context, IHRL has been harnessed to emphasize the structural rather than simply individual nature of experiences of violence and persecution. In so doing, it has brought certain forms of harm against women, most notably rape and sexual violence into the mainstream, and challenging the violation of women’s rights in the so-called ‘private’ sphere. But whilst the question of whether women whose human rights are violated should be recognized as refugees under international refugee law might appear uncontroversial, these advances appear ‘nascent, contingent and fragile’.⁹⁸ There continue to be multiple

⁹³ Edwards 2010 (n2)

⁹⁴ Freedman 2008 (n2); Campbell 2001 (n8).

⁹⁵ McKinnon 2011 (n34).

⁹⁶ Mullally 2011 (n48).

⁹⁷ Crawley 2001, Edwards 2010, Freedman 2008 (n2); Crawley 1999 (n8); Kneebone 2005 (n25).

⁹⁸ Anker 2002 (n1) 151.

impediments to the recognition of gender asylum claims, leading Millbank and Dauvergne to conclude that there is, at best, an ‘uneasy relationship’ between IRL and IHRL.⁹⁹

Some of the difficulties in bringing IHRL fully to bear are due to the narrow and increasingly restrictive application of IRL in the context of political and public concerns around migration and the growing emphasis on immigration controls. But they are also symptomatic of a more fundamental problem, namely, the ongoing failure of policy makers, lawyers and practitioners alike to fully comprehend the role of gender in shaping both women’s experiences of persecution and the (mis)interpretation of these experiences in the application of IRL.

Many advocates and campaigners believe that they have made progress within IRL, in part through drawing on IHRL to make the case that women’s rights are human rights. Yet they have typically advanced what Otto describes as a *conservative gender script* that typecasts women – often alongside with children and in the context of ‘private’ familial relationships - as victims in need of protection.¹⁰⁰ In so doing, they have both reflected and reinforced the sex / gender system which structures IHRL:

Carving out territory for refugee women within mainstream legal realms has been one way that feminists have successfully redressed their invisibility within refugee discourse. To do so, however, they have been required to paint a monolithic picture of these legal subjects as passive, dependent, vulnerable victims in need of protection.¹⁰¹

Despite (or perhaps because of) the stated objective of challenging stereotyped representations of women, this script gives disproportionate attention to certain kinds of harms, most notably sexual violence and ‘exotic harms’ such as FGM which provide an opportunity for refugee-receiving States to assert their credentials as defenders of women’s human rights often at the expense of recognising the politics of gendered power relations in countries of origin. The structural causes of women’s inequality and vulnerability to violence are not yet fully understood or reflected in IRL. Instead, women are predominantly conceptualized as apolitical subjects of male violence who must – under IRL as in life - rely upon the discretion of States to protect them.¹⁰² Thus, the space allocated to women within refugee rights discourse is both problematic and only marginally effective. Women continue to be seen as a deviation from the standard, as an exception to the rule, as somehow not quite fully human.

Drawing on the important points made by Otto,¹⁰³ it is clear that there is *potential* for IHRL to be brought positively to bear on IRL but that in order to so the feminist task of ensuring women’s access to rights mechanisms must be simultaneously accompanied by serious efforts to redefine them.¹⁰⁴ Lawyers and practitioners will need to challenge - rather than rely upon - protective legal representations of women, focusing instead on the relational nature of rights and the context within which they are defined, together with the relations of power that determine who defines rights and has access to them in particular contexts.

⁹⁹ Millbank and Dauvergne 2011 (n64).

¹⁰⁰ Otto 2013 (n71).

¹⁰¹ Oswin 2010 (n2).

¹⁰² Edwards 2010 (n2).

¹⁰³ Otto 2013 (n71).

¹⁰⁴ See also Oswin 2010 (n2).

In other words, what is required is a contextual analysis that includes gender, gender relations and gender equality and moves beyond discrete monolithic categories of 'men' and 'women' that flatten out the complexity and diversity of experience and depoliticize the specific circumstances under which violence and other threats to human security occur.¹⁰⁵ Gender and gender relations need to be understood as fluid; variable and multiple rather than unchangeable, static and singular. This would act as an important counterbalance to the dominant discourse of the Refugee Woman and open up new opportunities to protect women (and men), whilst avoiding the essentialising and depoliticising discourse that dominates so much of contemporary policy and practice.

¹⁰⁵ Crawley 2001, Edwards 2010 (n2).

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