

United Nations
Division for the Advancement of Women (DAW)
Consultative Meeting on
“Migration and Mobility and how
this movement affects Women”
Malmö, Sweden
2 to 4 December 2003

Seeking Protection:
Women in Asylum and Refugee Resettlement Processes

Prepared by

Kathleen Newland*

* The views expressed in this paper, which has been reproduced as received, are those of the author and do not necessarily represent those of the United Nations.

Seeking Protection: Women in Asylum and Refugee Resettlement Processes

Kathleen Newland, Co-Director, Migration Policy Institute

Issue Paper for the United Nations Division for the Advancement of Women, Expert Consultation on Migration and Mobility and How this Movement Affects Women, Malmo, Sweden, 2-4 December, 2003

Millions of women are on the move today fleeing from violence and persecution, in search of protection of their most fundamental human rights. The majority remain within their own countries; most of the rest stay in neighboring countries in refugee camps or local communities. A small minority seek protection farther afield, either as asylum seekers or through refugee resettlement processes. This paper addresses the issues that confront this minority of women refugees and asylum seekers. Although few in number compared to the total of refugee and internally displaced women, the issues they confront are fundamental to the protection of women's human rights.

In order to be accepted for asylum or refugee resettlement, each individual case (which may be a single individual or a family group) must be examined and adjudicated on the validity of their refugee claim. For resettlement, a further set of hurdles must be surmounted, to convince the selectors that resettlement is a necessary and suitable solution for the case in question.

Women and girls face particular forms of persecution that give rise to a need for international protection, but they also face particular obstacles in seeking and gaining asylum. Some of the major obstacles have to do with

- *access* to asylum procedures,
- *recognition* of the harm they have suffered (or fear suffering) as rising to the level of persecution,
- *acknowledgement* that forms of persecution specific to women inhabit the sphere of public responsibility, and
- *qualification* for refugee status on the basis of the kind of persecution they have experienced.

In selecting refugees for resettlement, many women and girls are often quite literally invisible to those who do the selecting because they do not inhabit public spaces, do not appear on registration lists as individuals rather than members of family groups, and are inhibited from interacting with strangers. A number of countries, however, have incorporated special categories into their resettlement programs to overcome these obstacles to women's access.

Gender and Refugee Law

The 1951 Convention relating to the Status of Refugees does not protect people against all kinds of harm, even if it is serious enough to amount to persecution. A “nexus” must exist between the harm done and one of five reasons specified in the Convention: race, religion, nationality, membership of a particular social group or political opinion. As is often pointed out, the Convention does not specifically mention gender¹ or sex as reasons for persecution that would qualify a person for refugee status.² Some commentators have suggested that gender should be added as a “sixth ground” of persecution.

More persuasive legal reasoning, however, argues that sex and gender are already integral to the Refugee Convention, because the Convention is based on the principles of equality and non-discrimination that are fundamental to United Nations human rights instruments and endeavors.³ In particular, the Convention bases refugee protection on the particular characteristics and circumstances of the individual, and the sex of an individual is one of the primary characteristics that, because of the way that gender structures the social relationships in a particular context, determines whether she or he is likely to be persecuted, for what reason, and how. Indeed, according to Roger Haines’ authoritative paper for the Global Consultations on International Protection of the UN High Commissioner for Refugees (UNHCR), adding sex or gender as a sixth ground to the Convention runs the risk of implying that gender need not be treated as intrinsic to all of the five grounds that are named in the Convention. Haines writes:

The failure of decision-makers to recognize and respond appropriately to the experiences of women stems not from the fact that the 1951 Convention does not refer specifically to persecution on the basis of sex or gender, but rather because it has often been approached from a partial perspective and interpreted through a framework of male experiences. The main problem facing women as asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.⁴

International refugee protection is meant to substitute for the protection of the state. It is not enough for a person to have good reason to fear persecution on one of the five grounds in her own country to have a claim to international protection as a refugee. She must also demonstrate that her own government is unable or unwilling to protect her against the harm that is threatened or experienced.

¹ Gender signifies the social and cultural construction of relations of power based on sexual difference, and as such are integral to the identity, status, and roles of men and women. See Heaven Crawley, *Refugees and Gender: Law and Process*, (Bristol: Jordans, 2001).

² The 1951 UN Convention relating to the Status of Refugees defines a refugee as “any person who... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, member 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...” (Article I(A)2)

³ See Roger Haines, “Gender-related Persecution” in *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection*, Erika Feller, Volker Turk and Frances Nicholson, eds. Cambridge, England: Cambridge University Press, 2003.

⁴ *Ibid.* p. 327.

The most difficult circumstances for women to establish persecution and the need for international protection have been those in which the instruments of persecution are consonant with traditional or historical practices—such as forced marriage, spousal battery, genital mutilation, honor killings and so forth—that are deeply discriminatory or even inherently persecutory but are seen as lying within the private sphere. The state often fails in its duty to protect women from such violence, particularly when it is directed against them within a family or community context because they have transgressed religious or cultural norms. Such persecution on account of religion or nationality often goes unrecognized in international refugee adjudications. Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to endeavor 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 of men and women.”

The ways that women experience persecution often differ from the ways men experience it. They may be persecuted because of their sex—because, as women, they are seen, for example, as symbolic bearers of the honor and power of their family or clan or ethnic group, which is being targeted for persecution on one of the five grounds. Women reproduce the group both physically and socially; violation of women is often a symbolic as well as a literal assault on the group, a strategy to humiliate and demoralize the targeted group. Their own views, beliefs, or actions may not be known or considered relevant by their persecutors, as only their kinship or affiliation matters. This pattern has, perversely, sometimes made it difficult for women to establish a nexus between their persecution and one of the five enumerated grounds, although “imputed” political opinion or nationality may be accepted.

Violence within the family is one of the most controversial emerging areas of refugee law. Violence committed by spouses or domestic partners, fathers, brothers, etc. is the most common form of violence against women, and the failure of the state to protect women is a clear failure of “national protection”. Yet it has been difficult for women seeking asylum on these grounds to establish, in particular, a “nexus” with Convention grounds of persecution. Yet there is an emerging body of jurisprudence that places domestic violence in a human rights framework and argues that women subject to it in certain circumstances constitute a “particular social group”.⁵

In addition to being selected for persecution for reason of their sex (gender-related persecution), women and girls are also persecuted in ways uniquely sexual (gender-specific persecution)—such as rape or sexual slavery. (It is important to note that men are also subject to gendered forms of persecution, including rape.) Rape and other forms of sexual assault have too often been dismissed as “normal” behavior, particularly in wartime. Recent jurisprudence, however, especially in the International Criminal

⁵ *Matter of R-S-*, Interim decision 3403, 2001 BIALEXIS (AG 2001; BIA 1999). See Karen Musalo and Stephen Knight, “Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States”, in *International Journal of Refugee Law*, Vol. 13 No. 1/2.

Tribunals for former Yugoslavia and Rwanda, have acknowledged the use of rape as a weapon of war, a war crime, and a crime against humanity. This should help to dispel the lingering notion that rape inhabits the private, domestic sphere. Gender guidelines issued by a number of governments and by UNHCR have made clear that sexual violence is no different from any other form of physical violence when it is used as a means of persecution.

The government of Canada was the pioneer in issuing gender guidelines. Its guidelines, updated in 1996, state that:

- The fact that violence against women is universal is irrelevant in determining whether it constitutes persecution. The real issues are whether the violence—experienced or feared—is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection
- An objective standard as to what constitutes permissible conduct by the agent of persecution towards women may be determined by reference to international human rights instruments such as the Universal Declaration of Human Rights, CEDAW, the International Covenant on Civil and Political Rights, etc.⁶

Access to asylum procedures is a major problem for many women facing persecution. Beyond the legal issues discussed above, the barriers to access may be logistical, informational, cultural, or psychological. It may simply be more difficult for a woman to reach a location where she can claim asylum, as women tend to be less mobile than men and have less control over resources. In addition, they are more likely than men to be solely responsible for children—and the logistics of traveling with children are more complicated than traveling alone.

More women than men are illiterate; those who have some formal education have, on average, fewer years of schooling. It may therefore be harder for them to get information about how and where to apply for asylum, or even to learn what their options are. In some cultures, women are prohibited from interacting with strangers, including governmental authorities. This can be an obstacle not only to asking for asylum, but also in gaining legal assistance in doing so.

In cases where women are traveling with male relatives, it is not uncommon for the male to be treated as the “primary” asylum seeker, even if it is the women’s experiences that might more clearly fit the requirements for a grant of asylum. They may be asked, not about their own experiences, but about those of their male relatives. In many cultures, men do not routinely discuss their activities with their wives or other women of the household. The lack of familiarity may prejudice the claims of both the women and man in a family group.

Severe difficulties often arise for women in asylum hearings (or refugee status determination hearings) if they have experienced sexual violence. Many women are reluctant to speak about their ordeals, particularly to male interviewers or through male

⁶ Immigration and Refugee Board, Canada, “Women Refugee Claimants Fearing Gender-Related persecution” updated, November, 1996.

interpreters, or in the presence of other family members. Rape is commonly viewed as a source of shame. UNHCR's Gender Guidelines recognize that "Rape, even in the context of torture, is seen in some cultures as a failure on the part of the women to protect her virginity or marital dignity. She may be shunned by her family and isolated from other members of the community."⁷ Having to recount her experience may become another source of trauma. The guidelines emphasize the importance of having female interviewers available in privately held hearings, with knowledge of the asylum applicant's culture and the circumstances prevailing in her country of origin.

Women's exposure to danger does not necessarily cease when they reach a country of asylum. Single women and girls, as well as women heads of household may continue to be vulnerable to exploitation and abuse. For this reason, it is important that the option of resettlement to a third country is equally available to them as to men. Yet women face special obstacles in access to resettlement programs, as they do in access to asylum.

Resettlement and "Women at Risk" categories

Resettlement offers a solution to immediate protection concerns in the country of first asylum. It is meant to offer lasting protection to refugees, particularly those unable to pursue either of the two other recognized "durable solutions:" local integration or voluntary repatriation. Many resettlement countries have special categories used specifically for emergency cases or particularly vulnerable persons, one of which is called "women at risk."

UNHCR's definition of women at risk is "...those women who have protection problems, and are single heads of families or are accompanied by an adult male who is unable to support and assume the role of the head of the family. They may suffer from a wide range of problems including expulsion, refoulement and other security threats, sexual harassment, violence, abuse, torture and different forms of exploitation. Additional problems such women face could derive from persecution as well as from particular hardships sustained either in their country of origin, during their flight or in their country of asylum. The trauma of having been uprooted, deprived of normal family and community support or cultural ties, the abrupt change in roles and status, in addition to the absence of an adult male head of family, renders some women, under certain circumstances, more vulnerable than others."⁸

As UNHCR's definition notes, the particular protection concerns of women that give rise to women at risk programs are not limited to the country of origin or to women seeking asylum, but may be relevant in a country of first asylum as well. It is in this latter situation that women at risk programs seek to provide certain women with a durable solution – third country resettlement – to their concerns.

⁷ UNHCR, "Guidelines on the Protection of Refugee Women," Geneva, July 1991.

⁸ UNHCR Resettlement Handbook, July 2002, Section IV, p.13.

Aside from being in immediate physical risk in countries of first asylum from fellow refugees and/or members of the host community, women refugees face particular problems both in refugee status determination procedures and in meeting many resettlement countries' eligibility criteria. For example, women may fall under UNHCR's mandate as a result of their husband's claim or through group determination procedures, both of which may result in some countries not recognizing the individual woman's refugee status. Women are also less likely to have adequate "socio-economic profiles"⁹ (meaning they may lack education, have poor or no job skills, have many dependents and/or lack a male breadwinner) for countries that select refugees for resettlement based in whole or in part on self-sufficiency and/or integration potential.

As stated in the UNHCR Resettlement Handbook, the aim of women at risk resettlement programs is to "enhance resettlement eligibility for refugee women otherwise ineligible under the general selection criteria of resettlement countries and to obtain priority processing and accelerated departure."¹⁰

Below are countries that resettle women at risk and the various definitions used to indicate eligibility:¹¹

In the **US**, women at risk fall under the highest priority category for resettlement. The US also designates women "forced to abort a pregnancy or to undergo involuntary sterilization or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program" as "deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion."

Sweden has a special subcategory within "persons in need of protection" which includes "persons who risk persecution due to gender-related reasons or on grounds of homosexuality."

Australia's definition of women at risk includes "female applicants subject to persecution or registered as being of concern to UNHCR; are living outside their home country; do not have the protection of a male relative; are in danger of victimization, harassment or serious abuse because of their sex."

Benin includes women at risk as one of seven categories for resettlement, using the following explanation: "When they are deprived of the support of their spouse, family or communities of origin, some women refugees are subject to serious threats to their physical and/or psychological safety (rape, sexual harassment, violence, exploitation, torture, etc.) which increases their need for legal and physical protection." Like Benin,

⁹ Ibid., p.14.

¹⁰ Ibid., p.15.

¹¹ All definitions are from the respective country chapters of the UNHCR Resettlement Handbook, July 2002.

Burkina Faso includes women at risk as one of seven categories for resettlement, using a similar definition: “persons who have lost a vital support mechanism for the safeguard of their dignity as women or for whom it is impossible to lead a normal socio-economic life.”

Canada pioneered the Women at Risk category in 1988 and includes women at risk as part of the “Refugees with Special Needs” section of its resettlement program. Canada defines women at risk as women “without the normal protection of a family who find themselves in precarious situations and whose safety is in jeopardy in countries of first asylum... Women at risk may also be women who are living in unstable conditions and for whom resettlement in a third country offers the only solution.”

Chile and Iceland both have distinct women at risk categories for resettlement, which rely on the same definition: “Women facing serious physical and/or psychological threats (rape, sexual harassment, violence, exploitation, torture, etc.) lacking the traditional protection of their families or communities.”

New Zealand’s women at risk subcategory “covers refugee women who are without the support of their traditional family protectors or community and are at risk in their country of refuges. These women would usually be outside the normal criteria for acceptance by resettlement countries and are in need of protection from gender-related persecution such as abduction, sexual abuse and exploitation.”

The remaining resettlement countries, Denmark, Finland, Ireland, the Netherlands and Norway, do not have distinct women at risk categories in their resettlement programs.

Women at risk programs take different forms in different countries, ranging from prioritization of their applications in the US, New Zealand and Australia, for example, to being one of only a few categories of people even considered for resettlement in Benin and Burkina Faso. In countries with “self-sufficiency” or “ability to establish” requirements for resettling refugees, women (and their families) who fall under the “at risk” category may be given more flexibility in demonstrating potential for self-sufficiency. The Canadian program, for instance, recognizes that “women in these circumstances may not otherwise meet general admissibility criteria and may require additional assistance to establish successfully in Canada...[B]ecause of their perceived low skill levels, [such women] may have been passed over for resettlement by Canada or other resettlement countries.” Therefore, “the ability to successfully establish will be assessed by Canadian visa officers on a ‘sliding scale,’ that is, the greater the need for protection or the more immediate the danger the less weight will be placed on establishment considerations. In cases of refugees in urgent need of protection or vulnerable, ability to establish criteria will not be applied. In other words, women at risk may be accepted despite having limited settlement prospects.”

One striking feature of women at risk programs is the prevalence of the eligibility requirement that states that the woman concerned must have lost the protection/support of her family or community. This “extra layer” of exposure to harm is not required in

general resettlement criteria, and appears neither in the Refugee Convention nor in most other subcategories such as survivors of torture or refugees with medical needs. It could be seen as regarding women as dependents, reliant on others for their protection, and ignores the all-too-common fact that in many cases women are endangered *by* the actions of their families or communities. Women should be considered for resettlement on the basis of their vulnerability for any reason in countries of first asylum (which may exist apart from their family status) and lack of prospects for another durable solution. Women at risk programs may help resettlement countries to overcome their difficulty in identifying women and girls eligible for resettlement, but the lack of a male relative or community support should not be an additional requirement applied only to women.

Without the special women at risk categories and programs, refugee women and girls have often been overlooked in selection procedures for resettlement. In some cases, women and girls lack registration documents in their own names, and so become bureaucratically invisible as individuals. Women and girls may also be absorbed within gendered roles that leave no room for their identification as individual protection cases, sometimes in stark contrast to the ways boys and men are treated. The story of the “lost girls” of Sudan is one such case in which the human rights abuses to which refugee girls may be subject is neglected [See Box].

The “Lost Girls” of Sudan

One case that clearly illustrates how easily female refugees can fall through the cracks of resettlement programs is that of the “lost girls” of Sudan. By now, the story of the “lost boys” of Sudan is well-known: thousands of children fled fighting in Southern Sudan during the late 1980s and embarked on a multi-year trek across Eastern Africa in search of protection. They eventually ended up in Kakuma refugee camp in Kenya where, after several years, the US agreed to resettle many of them. However, of the 3700 Sudanese children resettled through the “Lost Boys” program, only 89 were girls. As a result, there are hundreds or even thousands of “lost girls,” still living in Kakuma, who have been absorbed into foster families, sold as brides, kidnapped, or are being used as domestic servants or worse.

Why were the boys resettled and the girls left in one of the harshest refugee camps in the world? One explanation, according to UNHCR staff and an investigation by journalist Tara McKelvey, is that upon arrival in the camp, the boys were placed in group homes where they had minimal adult supervision and were able to maintain their personal and collective identities. The girls, on the other hand, were pushed into foster homes, marriages and the daily routine of women’s work in the camp. They quickly “disappeared” as individuals or a distinct caseload. The boys were also counseled by aid workers upon arrival in the camp – something considered unnecessary for the girls since they were supposedly in a “nurturing” family environment. Besides the fact that it was largely the counselors’ lists that were later used to identify resettlement candidates, the

fact that the boys maintained their individuality even *after* arrival in the camp made it easier to identify – and identify *with* – the boys and find a solution for them.¹²

As UNHCR has noted, “[o]ne of the most fundamental problems, paradoxically, is the widespread attitude of looking at women merely as ‘hapless’ refugees and concentrating on their vulnerability rather than developing their strengths.”¹³

--Erin Patrick, MPI

Conclusion

In the last fifteen-to-twenty years, analysis of the forms of persecution to which refugee women and girls are particularly subject has progressed, and advocacy on their behalf has produced some major advances in policy and jurisprudence. Gender guidelines are in place for several national refugee programs and for UNHCR. They emphasize the importance of designing and implementing refugee and asylum programs to be cognizant of the ways in which gendered roles and expectations affect women’s access to protection of their fundamental human rights. The international refugee regime is meant to be non-discriminatory and universal in its application. Conscientious application of well thought out gender guidelines would go far toward making this aspiration real.

¹² UNHCR, “Why the Difference?” *Refugees Magazine* No. 126, 2002 and Tara McKelvey, “Where are the ‘Lost Girls?’” Published by www.slate.com, accessed October 3, 2003.

¹³ UNHCR, *op.cit.*.

Selected Source List

General:

Anker, Deborah and Paul T. Lufkin, "Gender and the Symbiosis Between Refugee Law and Human Rights Law," *Migration Information Source*, 1 March 2003.

Anker, Deborah, "Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question," *Georgetown Immigration Law Journal*, 2001.

Crawley, Heaven, *Refugees and Gender: Law and Process*, Bristol: Jordans, 2001.

Haines, Rodger, "Gender-Related Persecution," in Feller et al, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge UP, 2003, pp.319-350.

McKelvey, Tara, "Where Are the 'Lost Girls'?" posted on www.slate.com, 3 October 2003.

Musalo, Karen and Stephen Knight, "Unequal Protection," *Bulletin of the Atomic Scientists*, November/December 2002, pp.57-61.

Musalo, Karen and Stephen Knight, "Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender in the United States," *International Journal of Refugee Law*, Vol. 13, No.1/2, 2001, pp.51-70.

Spijkerboer, Thomas, *Gender and Refugee Status*, Aldershot: Ashgate Publishing Ltd., 2000.

Wax, Emily, "A Brutal Legacy of Congo War; Extent of Violence Against Women Surfaces as Fighting Recedes," *Washington Post*, 25 October 2003.

Government Guidelines on Gender and Asylum:

Department of Immigration and Multicultural Affairs of Australia, "Guidelines on Gender Issues for Decision Makers," July 1996.

Immigration Appellate Authority of the U.K., "Asylum Gender Guidelines," Crown Copyright November 2002.

Immigration and Naturalization Service of the U.S., Office of International Affairs, "Memorandum: Considerations For Asylum Officers Adjudicating Asylum Claims From Women," 26 May 1995.

Immigration and Refugee Board of Canada, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Immigration Act*, Guideline 4: “Refugee Women Claimants Fearing Gender-Related Persecution: Update,” 25 November 1996.

UNHCR Guidelines and Publications:

UNHCR, “Guidelines on the Protection of Refugee Women,” Geneva, July 1991.

UNHCR, *Resettlement Handbook*, Geneva, July 2002.

UNHCR, “Gender-Related Persecution,” Position Paper, January 2000.

UNHCR, “Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/01), 7 May 2002.

UNHCR, “Guidelines on International Protection: “Membership of a particular social Group,” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/02), 7 May 2002.

UNHCR, “Women: Seeking A Better Deal,” Special Issue of *Refugees Magazine*, No.126, 2002.

UNHCR, Division of International Protection, “Gender-Related Persecution: An Analysis of Recent Trends,” *International Journal of Refugee Law*, Special Issue 1997, pp.79-113.

UNHCR Executive Committee, “UNHCR Policy on Refugee Women,” 20 August 1990.

UNHCR Executive Committee, Conclusion No. 39, “Refugee Women and International Protection,” 1985.

UNHCR Executive Committee, “Note on Refugee Women and International Protection” (EC/SCP/59), 28 August 1990.

NGO Reports:

Lawyer’s Committee for Human Rights, “Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers,” 2002.

Refugee Women’s Legal Group (UK), “Gender Guidelines for Determination of Refugee Status in the UK,” July 1998.

Women's Commission on Refugee Women and Children (US), "UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation," May 2002.