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WOMEN REFUGEES; DOES THE UNITED STATES PROVIDE ADEQUATE PROTECTION?

By Karen Musalo

The issue of women's rights as human rights, long neglected by the international human rights community, has been brought into the foreground by a series of world events. The tragic and highly publicised use of rape and forcible impregnation by the Bosnian Serbs as a war strategy in the former Yugoslavia dramatically focused world attention on the violations of women's human rights. The successful organising and advocacy of women at two world conferences, the Fourth World Conference on Women, which took place in Beijing in 1995, and the World Conference on Human Rights in Vienna in 1993, also focused sustained attention on the issue. At the Vienna Conference, governments formally recognised that the "human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights."¹

Until these very recent developments, women's human rights were largely considered outside the area of concern of the international human rights community. The historic exclusion of women's human rights from the mainstream human rights movement resulted from perceptions that violations of women's rights implicated private rather than governmental action, and had to do with culture and tradition, which put them off-limits to criticism from the international community. These perceptions have been challenged by women from diverse cultures and countries. They have forcefully made the point that culture cannot excuse practices which violate fundamental rights. They have also challenged the public/private distinction, pointing to the countless situations in which governments are complicit in human rights violations committed by private actors by failing to provide even minimal state protection.

The perceptions that have been responsible for the slow recognition of women's human rights as a legitimate human rights issue have implications for the protection of women refugees. The situations of persecution from which women flee have often been characterised as personal, rather than political, and therefore not a basis for refugee status. Women who fear rape during conditions of armed conflict, or who flee to avoid forcible sterilisation or abortion, or domestic violence have been considered outside the sphere of protection of the international refugee framework. The same exclusion from protection has been the norm regarding women who resist the practice of female genital mutilation ("FGM," which is also referred to as female circumcision), a physically and psychologically damaging practice which maims women for life. Only recently have perceptions regarding women refugees who flee such human rights violations begun to change, in tandem with changing concepts regarding women's human rights in general.

Canada was the first country to directly address the issue of refugee women in an attempt to make its adjudicatory process

more responsive. In 1993 the Canadian Immigration and Refugee Board issued "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution." The Guidelines counselled that when deciding the claims of women applicants, the decision-makers should take international human rights standards regarding women into consideration. As discussed in more detail below, refugee must establish that the harm they fear is related to their race, religion, nationality, political opinion, or membership in a particular social group. The Guidelines recommended a protection-oriented approach in determining the connection between the feared harm, and the five enumerated grounds. The Guidelines also advised adjudicators to be more sensitive to the gender specific harms which women may suffer, i.e., rape or sexual violence, and to be aware of the difficulty associated with revealing such facts in the context of an asylum application.

In 1995 the United States Immigration and Naturalization Service (INS) issued "Considerations for Asylum Officers Adjudicating Asylum Claims from Women." The Considerations provide guidance for the INS' first tier of asylum adjudicators² and is modelled somewhat on the Canadian guidelines. Although it is a step in the right direction, it has failed to effectively address two key aspects of U.S. asylum jurisprudence which have resulted in failed protection for women asylum applicants. These aspects are the unfortunate trend in the U.S. to ignore international human rights norms in the adjudication of refugee cases, and the misplaced reliance on requiring proof of the persecutor's intent in determining whether the harm is related to the race, religion, nationality, political opinion, or social group membership of the victim.

The International Refugee Protection Framework and U.S. Interpretation

The United States adopted the international definition of refugee when it ratified the 1967 Protocol Relating to the Status of Refugees.³ In the wake of World War II, the international community drafted the 1951 Convention Relating to the Status of Refugees⁴ to address the post-war European refugee crisis. The 1967 Protocol Relating to the Status of Refugees incorporated the Convention's provisions, but removed geographical and date restrictions which limited the Convention's applicability to the post-war European situation. The Convention and Protocol form the cornerstone of the international refugee protection regime.

The Convention defines a refugee as an individual who has been persecuted in the past or has a well-founded fear of persecution in the future "for reasons of" race, religion, nationality, political opinion, or membership in a particular social group. The Convention encourages State signatories to provide protection to refugees, although such protection is within the discretion of

the State. In addition, the Convention provides for the right of non-refoulement for the individual who faces a threat to life or freedom "for reasons of" the same five enumerated grounds. State signatories are prohibited from deporting individuals who meet the requirement for non-refoulement.

Thus, pursuant to the Convention, to obtain recognition as a refugee, or the protection of non-refoulement, an individual must establish a type of harm (persecution for recognition as refugee; a threat to life or freedom for non-refoulement) and a nexus between the harm and his or her race, religion, nationality, political opinion or membership in a particular social group. There is an additional requirement that the individual establish a certain degree of likelihood of the threatened harm occurring. A full discussion of this likelihood requirement is not necessary for the purposes of the present discussion.

Although the U.S. incorporated the language of the Refugee Convention into its domestic Refugee Act, it has interpreted and applied its provisions in an increasingly formalistic and anti-humanitarian manner. For the most part, the U.S. has rejected international human rights norms as a relevant factor to consider in deciding refugee claims, and it has adopted an unreasonable evidentiary standard for proving the nexus between the threatened harm and the enumerated grounds. In order to prove the nexus, the applicant must prove the persecutor's intent or motivation. The decision of a federal court of appeals in *Campos-Guardado v Immigration & Nationality Service*⁵ is illustrative of the failure of protection caused by the proof of intent requirement, and provides a particularly graphic example of denied relief to a woman who suffered tremendous trauma, including rape and sexual violence.

The applicant in *Campos-Guardado* was brutalised during a visit to her uncle, who was the chairman of a local agricultural co-operative in El Salvador, during the civil war. During her visit, several individuals arrived at the house shouting political slogans. These individuals forced Ms Campos-Guardado and her female cousins to watch as they brutally killed her uncle and male cousins. The assailants then raped Ms Campos-Guardado and her female cousins. Subsequently, Ms Campos-Guardado encountered one of her assailants who threatened to kill her if she revealed his identity. She suffered a nervous breakdown, and made the decision to flee El Salvador and seek protection in the United States.

The federal court of appeals denied relief to Ms Campos-Guardado. The court's decision does not discuss whether rape is the type of harm which constitutes persecution. It wouldn't have mattered in any event, because whether the court considered rape to be persecution or not, the court ruled that Ms Campos-Guardado had failed to establish its nexus to one of the five enumerated grounds. Ms Campos-Guardado had argued that the brutal killings and rape were politically motivated, given the slogans the individuals were shouting, and the position of her uncle in an agricultural co-operative, which was political in the context of the civil war. Notwithstanding her arguments, the court ruled that Ms Campos-Guardado had

failed to prove that the intent of the individual who raped her was to punish her for her actual or attributed political opinions. Given the all-too-common attitude that rape is personal rather than political, it seems that nothing short of a clear statement of political animus from her persecutor would have satisfied the courts.

The U.S. requirement of proof of intent to establish nexus has been criticised by the Office of the United Nations High Commissioner for Refugees (UNHCR) which has expressed concern that it has resulted in the denial of relief to persons suffering "serious human rights abuses."

The problem of failed protections occasioned by the requirement of proof of intent is exacerbated by the increasing divergence of U.S. asylum jurisprudence from international human rights standards. In *Matter of Chang*⁶, a precedent case, the Board of Immigration Appeals explicitly rejected the relevance of international human rights norms in the adjudication of refugee claims. *Matter of Chang* involved a claim to asylum based on resistance to China's enforcement of its one-couple one-child policy through involuntary sterilisation of both men and women. The *Chang* decision noted that it was irrelevant whether "involuntary sterilisation was demonstrated to be a violation of internationally recognised human rights" because the applicant failed to show that the Chinese government had a persecutory intent. According to the Board of Immigration Appeals, the government's intent was simply to effectuate its population control measures, and the fact that it did so by violating internationally protected rights was irrelevant to the determination of asylum eligibility. The implication of such a ruling for a myriad of cases involving the violation of other internationally recognised women's human rights is all too apparent.

The U.S. Considerations on Women's Asylum Claims Fail to Remedy the Failure of Protection

As discussed above, the strict evidentiary requirement for establishing nexus, and the rejection of international human rights norms have been significant factors in failed protection for women refugees. Although the INS should be given credit for issuing its Considerations on Women's Asylum Claims, it must be recognised that they do not effectively remedy the failure of protection. First, they fail to adequately address the issues of nexus and the relevancy of human rights standards. Second, the Considerations are non-binding, and are directed only to Asylum Officers, who make up the first tier of decision-makers. The Considerations would have had greatly increased impact had they been issued as regulations binding on all tiers of decision-makers.

Campos-Guardado and *Matter of Chang* were both decided prior to the issuance of the Considerations. This author has had access to the opinions in four cases decided by three immigration judges⁷ (one judge decided two cases) since the Considerations. The decisions of only one of the three judges, Immigration Judge Paul Nejelski, demonstrate an enlightened approach; the decisions of the other two are all too consistent with the approach in *Campos-Guardado* and *Matter of Chang*.

Judge Nejelski granted relief to a Jordanian woman fleeing thirty years of domestic battering, and to a Sierra Leonean woman who had been the victim of female genital mutilation, as well as domestic violence. In both cases he avoided a formalistic application of the nexus requirement, easily finding that both women could premise their claims on social group membership. The Jordanian woman was a member of the social group of women who challenge the traditions of their society, while the Sierra Leonean woman was in the social group of women who attempt to assert their autonomy. In both cases he had no difficulty finding that the respective governments had failed to provide protection to the women applicants.

The approach taken by Judge Nejelski was not adopted by his brethren, Immigration Judges Gossart and Ferlise. Immigration Judge Gossart denied relief to a woman applicant from Sierra Leone. Similar to the woman in Judge Nejelski's case, she had suffered female genital mutilation, and wanted to protect her daughters from it. Judge Gossart ruled that her opposition to female genital mutilation could not be a successful basis for her claim, because the applicant could simply change her mind and acquiesce to it. The judge made such a ruling notwithstanding the fact that the INS' own documentation centre issued a report listing the following as adverse health consequences related to FSM: "scarring, infertility, painful sexual intercourse, long and obstructed labour, chronic uterine and vaginal infections, HIV infection from contaminated instruments, bladder incontinence and the obstruction of the flow of menstrual blood."⁸ He also ignored the fact that the practice has been broadly condemned by the international community.⁹

Immigration Judge Ferlise denied relief to a young Togolese woman who fled to escape the imminent infliction of FGM, as well as a forced polygamous marriage, into which she had been sold.¹⁰ The young woman had been raised by an enlightened father, who had protected her and her four sisters from being mutilated, and from being forced into marriages not of their choosing. When the applicant's father died, his family took guardianship of the seventeen year old applicant, sold her into a marriage with a man more than twice her age, and made arrangements for her to be mutilated. With the help of her mother and sister, she escaped after the marriage ceremony, but before the infliction of FSM. Judge Ferlise denied relief, ruling that since FGM was the norm in her society, there could be no persecutory intent. Although the INS Considerations could have been helpful in this case, Judge Ferlise explicitly rejected their guidance, stating that since they do not apply to immigration judges, he need not consider them. Ms Kasinga has spent more than a year in INS detention while her case is on appeal to the Board of Immigration Appeals. The decision of the Board will be a significant indication of how serious the U.S. is about protecting the rights of women refugees.

Conclusion

The world is finally waking up to the fact that women suffer violations specific to their gender, and for reasons related to their gender, but nonetheless these abuses are human rights violations. They are not a matter of only private concern because they take place with the tacit approval of governments

which are unable or unwilling to provide protection. This recognition must inform refugee adjudication. Canada has been a leader in this respect, being the first nation to develop protection-oriented gender Guidelines. The United States has taken a small step, with the issuance of its Considerations, but this step has not taken it far enough. As the decisions by Judges Gossart and Ferlise demonstrate, women who suffer severe human rights violations are still considered to be outside the sphere of protection. The United States must remedy its approach, and integrate human rights considerations into its refugee adjudication process. It must avoid an overly formalistic approach which so often results in failed protection for women refugees.

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NOTES

1. Vienna Declaration & Programme of Action, Part I, para.
2. In the US there are four tiers of adjudicators: asylum officers, immigration judges, the Board of Immigration Appeals, and the federal courts.
3. 606 U.N.T.S 267
4. 189 U.N.T.S 150
5. 809 F. 2d 285 (5th Cir. 1987)
6. Int. Dec. 3107 (BIA, May 1989)
7. The decisions of immigration judges are unpublished, therefore, there are no formal citations to these decisions.
8. INS Resource Information Alert Report.
9. The UN General Assembly adopted the Declaration on the Elimination of Violence Against Women, which explicitly states that "female genital mutilation and other traditional practices harmful to women" are forms of violence against women. In addition, the International Federation of Gynaecology and Obstetrics, as well as the American Medical Association, have called for its abolition.
10. The author is attorney of record for the applicant in this case.