

The Politics of Gender Asylum in the U.S.:
Protection of Women Asylum Seekers in the Context of Global
Inequalities

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Abstract

This thesis examines the recent development towards more gender-sensitive interpretations of refugee status in international and national asylum laws and policies within the context of contemporary and historical global power relations. I analyze the changes in the language that can be found in the international UNHCR guidelines for the protection of women asylum seekers, U.S. national guidelines for assessing gender-related asylum claims, and recent U.S. court decisions assessing the gendered claims of women. Among the court cases that I analyze, I focus on the 2005 Mohammed case due to its problematic court decision and legal interpretations. Finding the Western countries' instrumentalization of the international refugee protection system crucial for understanding the contemporary asylum system, the thesis connects the historical conditions with the way in which the protection of women refugees from "cultural" gendered violence has been articulated in asylum politics in the U.S. My overall findings are that the international law, governmental organizations and liberal women's human rights NGOs have shaped the international and national legal protection of (women) asylum seekers in such a way that it reproduces the global inequalities in its representation of "Third World" women and their culture; that it uses women asylum seekers fleeing from violence for the purpose of exercising Western cultural superiority; and that it covers up still the restrictive and racist Western asylum politics towards immigrants and asylum seekers.

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Introduction

In the year 2006, the Croatian government granted its first asylum ever, and it was given to a woman from Sudan who was fleeing gender-based persecution, that is, female genital mutilation (FGM), among other things.¹ She is the first asylum seeker whose application was accepted in contemporary Croatian history after independence in 1991 and after more than 400 asylum claims had been declined. As a feminist and a peace studies student, I was interested in this case since it seemed to have something of a “hidden story” in it about the concept of asylum. Internationally and nationally, asylum is a political concept. Namely, I was interested in how and why the Croatian government, in the strongly pro-European stage of joining the EU, acted so “progressive” in granting protection to a person fleeing gender-based violence, whereas only a few countries in the world have accepted this novelty in international refugee case law today called gender asylum, and while at the same time the protection of women against gender-based violence within the country in many ways exists only on paper. The fact that among all the cases of women (and men) claiming asylum in Croatia, this particular claim appeared to be the only credible one opens up the question of what role this gender asylum plays for asylum systems of Western countries within a context of unequal international power relations and hegemonic cultural discourses.

Women’s human rights conferences and conventions² have contributed greatly to the recognition of gender-based persecution as a legitimate claim for international refugee protection under the UN’s definition of refugee. Gender-sensitive asylum regulations entered international law, and consequently national asylum laws, under the influence of both the

¹ The Croatian Ministry of Internal Affairs (MUP) granted its first asylum on December 15th, 2006, to a claimant on the grounds of religious persecution and female genital mutilation. MUP explained that this decision has been made due to the international and national legal practice, listing states like Canada, the U.S. and others, that recognized violations of women’s rights as the grounds for accepting the asylum claim. (www.mup.hr/2579/1.aspx)

² Such as the Convention of All Forms of Discrimination Against Women in 1979, Declaration on Elimination of Violence Against Women in 1993, the UN’s World Conference on Human Rights in Vienna that recognized gender-based violence as a specific form of violation in 1993, the Beijing Platform for Action adopted by the Fourth World Conference on Women in 1995 and finally, the ICTFY’s (International Criminal Court for Former Yugoslavia) recognition of war rape as torture and persecution in 2000.

international women's movement and local activists like refugee advocates. In the mid 1990s, asylum was granted for the first time in the USA, Canada and Sweden to women fleeing from female genital mutilation. These states, responding to the UNHCR's recommendations, also issued guidelines for dealing with gender based asylum claims for its officers. The UN's "Guidelines on International Protection: Gender Related Persecution" (May, 2002) today function as a recognized legislative recommendation for all UN member states. In the year 2005, in the *Mohammed* case, the U.S appeals court ruled in favor of granting asylum to Khadija Mohammed exclusively on the grounds of gendered persecution, that is FGM. More precisely, the asylum was not granted on the grounds that the claimant expressed opposition to practices of the dominant regime, but "on the fact that the victims are female in a culture that mutilates the genitalia of its females."³

Advocates in the U.S. who work for the legal improvement of the status of women refugees have, more or less, welcomed these recent trends in the U.S. asylum policy. Others, coming both from the academic right and academic left and writing critically about the gender asylum, argue for different reasons that substantial problems can be found in these recent tendencies. The academic right opposes the extension of the asylum concept to women fleeing patriarchal surroundings by stating that asylum is exclusively a political refuge for those seeking positive change in their countries of origin.⁴ In my thesis, I position my self within the relevant body of literature by criticizing this instrumentalizing approach towards the concept of political asylum which has been inherited from the Cold War rhetoric, but agree, for different reasons, that asylum is and should be a political concept, and because it is political, it should include a variety of women's gendered political claims. On the academic left, as I see it, Inderpal Grewal argues that strategies of introducing the gender-sensitive

³ *Mohammed v. Gonzales*, No. 03-70803 (9th Cir., Mar. 10, 2005), 3081.

⁴ See Dan Stein, "Gender Asylum Reflects Mistaken Priorities", *The Human Rights Brief*, The Center for Human Rights and Humanitarian Law, Washington Collage of Law, <http://www.wcl.american.edu/hrbrief/v3i3/stein33.htm>. (last accessed on May 30, 2007).

policies in asylum law need to be aware of nationalistic manipulations, such as the use of Third World women, represented as victims of religious and cultural backwards societies, for legitimizing the “superiority” of Western-based feminist and human rights discourse.⁵

In my thesis, I will focus on the development of the concept of gender-based violence, or gender asylum in the international and US refugee protection systems. I ask how international and national asylum laws have accepted gender-based violence as a basis for claiming asylum. How is the persecution of women asylum seekers elaborated in legal texts, and to what extent has the multiplicity of their oppression been addressed? I will try to answer these questions by analyzing the vocabulary of protecting women from “different” cultures on three different levels: in the 1995 US national guidelines, in the 2002 UNHCR’s gender refugee guidelines and in recent U.S. court cases.

In this particular field of research on the protection of women in the international and national asylum laws, the majority of academic work seems to be concentrated on the legal gaps in the protection of women asylum seekers, as well as on the difficulties of including a variety of gender-related claims for both women and men within the historically determined asylum law. My own research takes a different approach to this topic. I see the topic of women’s specific claims for asylum as relevant not only because of the difficulties of gender-sensitive inclusions in the male-centered refugee definition, but also because of the discursive and material divide of the global south and north inscribed in the claims for asylum and to different degrees, in the various legal texts related to asylum. My thesis, therefore, focuses on some of these texts and does a discourse analysis of them in order to find out how these different types of inequalities – gender and global inequalities – are described and addressed there. I draw my theoretical approach on postcolonial feminist critiques that deal with the institutional and discursive appropriation of topics related to Third World women, legitimized

⁵ See for example Inderpal Grewal, “On the New Global Feminism and the Family of Nations: Dilemmas of Transnational Feminist Practices” in E. Shohat, *Talking Visions* (New York: New Museum of Contemporary Art, 2000), 501-506.

by some Western feminist scholarship, for nationalistic or similar purposes. Overall, gender asylum seen within the broader international and political context seems to be an under-researched field.

The methodological framework I intend to use in chapter one and two will structure my arguments in two ways: 1) through a critique of the mainstream liberal feminist approach on women's rights in the cases of "cultural" gendered violence against women (chapter 1); and 2) through a critique of the founding principals and historical conditions in which international law and organizations dealt with refugee protection (chapter 2). Both approaches are needed in order to engage in an analysis of the discursive and material origins of contemporary gendered asylum, i.e. they aim to recover the "situatedness" of international and national human rights claims in the broader context of global inequalities and particular discursive practices. Consequently, I hope this will open a critical space for the text analysis (chapter 3).

The methodology of the thesis includes: 1) discourse analysis of the legal recommendations and policies by UNHCR and US administrative bodies dealing with asylum and women, 2) discourse analysis of U.S. court decisions in the cases of gendered persecution, and 3) comparative analysis of international guidelines, national considerations and actual court decisions. I have chosen discourse analysis because I find that "a productive way of doing social research analysis is through the focus on language".⁶ According to Norman Fairclough, discourse analysis does not mean only the focus on specific texts. Critical discourse analysis approaches a text as "one element of the relatively durable structuring and networking of social practices."⁷ In other words, it sees texts as elements of social events, as the cause of social change and as a result of it. In my thesis, I analyze different legal texts seen as space of political and social change, linguistically modeled in a particular way, but

⁶ Norman Fairclough, *Analyzing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003), 4.

⁷ Ibid., 5.

also as a product of different discourses.⁸ By “comparative analysis”, I mean the analysis of similarities and differences of concepts and definitions in these texts seen as a product of their mutual influence and specific contexts.

The structure of this thesis as follows: The first chapter will criticize the unreflexive liberal theory claims about women and culture through using the critique provided by postcolonial theory and feminism that addresses problematic Western feminist practices. In the second chapter, drawing on the conclusions of the first, I will examine the historical and political connotations of international refugee law in the context of unequal global power relations. I use different authors’ findings regarding the instrumentalization of international refugee protection system, the Eurocentism of the refugee definition, and the consequences of such historical conditions for underrepresented groups in the refugee definitions especially Third World refugees and women refugees. In the third chapter, I go further and connect these historical conditions with the way how women’s claims for asylum have been addressed at the international UNHCR, U.S. national and the U.S. court level, with special a focus on the role of refugee and women’s rights advocates in the U.S. In the Conclusion I will answer my central questions, reflect on my findings and suggest issues for further research.

⁸ Ibid. Fairclough notes that discourse analysis also includes “interdiscursive analysis“, that is, „seeing texts in terms of the different discourses, genres and styles they draw upon and articulate together.“

Chapter 1: Trans-cultural communication in international feminist practices

1.1. Theoretical background: postcolonial critique of women's internationalism and trans-cultural communication

Western academic feminism in the past has not hesitated to approach the issues of gender-based violence in different “cultures” and parts of the world without considering the potentially different “situatedness” of these cultures within a system of global hierarchy/hegemony, even if this resulted in severe accusations by Third World women and men of supporting imperialism. I use the word “culture” with reserve as much as possible and only in places where it refers to original texts of reference, because its use without the given context is a problematic step itself.

Since the extensive critiques in the 1980s and the 1990s by G. C. Spivak, C. T. Mohanty and others that engage in a careful dismantling of any ‘neutrality’ and ‘universalism’ based on hidden inequalities, many authors have, taking this into account, followed this approach of systematically pointing out at the “skeleton” in the closet called: the feminist struggle to save Third World women.⁹ When Mohanty refers to “‘colonialism’ as a discursive practice”, she focuses on “a certain mode of appropriation and codification of ‘scholarship’ and ‘knowledge’ about women in the third world by particular analytic categories employed in writing on the subject which take as their primary point of reference feminist interests as they have been articulated in the US and western Europe.”¹⁰ I intend to analyze this appropriation and codification of knowledge of Third World women in the name of universal human right as it is articulated in the international and national system of protection of asylum seeking women. Although the texts that I analyze are not directly produced by feminist scholarship, all of them are referring to the influence of Western and international women's

⁹ G. C. Spivak, “Can the Subaltern Speak,” in Nelson and Grossberg (ed.), *Marxism and the Interpretation of Culture* (Basingstoke: Macmillan, 1988) and C. T. Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses,” *Feminist Review* 30 (Autumn 1988).

¹⁰ Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses,”: 65.

movements in advocating for a more intense protection of refugee women. I will conduct my analysis in many different steps by reflecting on the problematic issues that Mohanty strongly pointed out as: “the discursive colonization” of the material and historical heterogeneities of the lives of women in the Third World, producing and reproducing singular monolithic categories and images, and reinforcing western humanist discourse as the space for western women’s agency at the cost of Third World women.¹¹

I find crucially important for my analysis the contributions of postcolonial writings that established the main concepts for analysis, such as orientalism, culturalism, cultural essentialism, developmentalism, and historicism. For example, I will analyze how and in what way different authors use the term “culture” in referring to the persecution of women in their native countries, how they refer to cultural differences, and how these differences are engendered. Hommi Bhabha notes that acknowledging cultural difference in the ways liberal multiculturalism or cultural relativism does, is not sufficient for situating the concepts in their discursive historical meaning.¹² Terms such as “culture” or “customs” have been instrumentalized in colonial projects. For example, in colonial ethnographic mapping, “culture” has been represented as an exotic\barbaric site. Therefore, “cultural difference” as a concept should be addressed in a way that reveals the genealogy of its use.

This colonial use of the native culture as exotic or savage had a temporal dimension, i.e. the culture was seen as historically outdated or stuck in a (pre)historical “waiting room”. Historicism and developmentalism were used in describing the geographical and political space of colonized populations by using time measurements in which “Europe” functioned as the norm.¹³

¹¹ Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses,”: 66.

¹² Homi Bhabha “Staging the Politics of Difference: Homi Bhabha’s Critical Literacy” In: *Race, Rhetoric and the Postcolonial*. ed. by Gary A. Olson and Lynn Worsham. (New York: State University of New York Press, 1999), p. 15.

¹³ This has been further elaborated by Dipesh Chakrabarty, *Provincializing Europe* (Princeton: Princeton UP, 2000).

The concepts elaborated in postcolonial theory have been engendered by the feminist postcolonial critique in many different ways. Meyda Yegenoglu's examinations of "colonial fantasies" find gender central for colonial discursive practice.¹⁴ Colonialism as a patriarchal endeavor generally represented colonized women as the markers of cultural, traditional, developmental and other differences. Many feminist authors writing on nationalism and women have pointed out that women have been used as a site that represents the national "colors", the autochthonic and preserved original of the culture.¹⁵ A growing body of literature uses the feminist postcolonial critique in its analysis of the international women's movements and its role in imperial and colonizing projects.¹⁶

Still, many international women's organizations address gender-based violence transculturally in terms of universal human rights, using a "universalistic" and "neutral" ("non-political") approach as self-evident in their reports on female genital cutting, veiling, and so on. What, then, is the problem in how these organizations, as well as the recent gender sensitive interpretations in the international asylum law influenced by these women's organizations, address women-harmful practices? To answer these questions I go back to Susan M. Okin's in many ways influential article "Is Multiculturalism Bad for Women?" as an example of number of a problematic arguments leading towards culturalist and developmentalist conclusions, and as an example of a problematic construction of the idea of transnational feminism in the way the author imagines it.¹⁷ I use Okin's article also because the debate on multiculturalism that she contributes to by "representing" the feminist standpoint, is the space in which the texts I analyze, especially the U.S. guidelines for the protection of women asylum seekers, have been produced.

¹⁴ Meyda Yegenoglu, *Colonial Fantasies. Towards a Feminist Reading of Orientalism* (Cambridge: Cambridge UP, 1998).

¹⁵ For example, Nira Yuval-Davis, *Gender and Nations*, London, Sage, 1997

¹⁶ For example, Ann McClintock, *Imperial Leather. Race, Gender, and Sexuality in the Colonial Context* (NY: Routledge, 1995), or Julia C. Smith and F. Gouda, *Domesticating the Empire. Race, Gender and Family Life in French and Dutch Colonialism* (Charlottesville: UP of Virginia, 1995).

¹⁷ Susan M. Okin, "Is Multiculturalism Bad for Women?" in J. Cohen, and others, eds., *Is Multiculturalism Bad for Women* (Princeton: Princeton UP, 1999).

1.2 Is liberalism good for women?

Briefly, in her article “Is Multiculturalism Bad for Women?”, Okin asks whether multiculturalism and women’s rights as we understand them today are more in conflict with each other than they are allies. Although multiculturalism can be seen as coming from the same roots as feminism and the women’s movement, mainly struggling for equality and recognition and being based on identity politics or group claims, Okin argues that multiculturalism, unlike feminism, is a quasi-egalitarian idea because it uncritically defends “cultural practices” and disregards the inequalities it reinforces toward some members of a “cultural group”, such as women. Therefore, she argues, such a multicultural political approach should not be “tolerated” in any society with a historically liberal tradition. The immigrant patriarchal and misogynist “cultures” should clearly change and assimilate into the liberal majority of the western socialites, or be criminalized and consequently become extinct. The “cultures” that she depicts as essentially based on the cruel and violent oppression of women are conservative immigrant traditions/practices mostly coming from the Third World and rooted in religious myths. Opposite to these culturally traditional ways of living and treating women, stands the Western liberal culture that is rooted in secular law and egalitarian protection of all.

Okin implies that exactly those practices that are put forward as representative of one’s “culture” or “tradition” in public negotiations about multiculturalism are actually practices that oppress women. Although I would agree that most group identifications, like in the cases of identification groups such as class, ethnicity, nationality and so on, do seem to present gender relations as the essence of their members’ difference or group’s identity, prestige and power (in the case of dominant social groups), Okin does not equally mention in

the same argument that the same can be said for sexism or patriarchy in Western liberal middle class “culture” as Carol Pateman has shown.¹⁸

Therefore, we should ask what is the culture that Okin is talking about, and how does the state law, among many other factors that influence immigrant ways of life, become, or not become, a part of the whole picture? This question can be also asked for Okin’s notion of Western cultures and laws. Okin does not, in many parts in her essays, differentiate between the Western liberal state apparatus that is nominally forbidding gender and sex discrimination, from the cultural practices, customs, habits and everyday life of American society. She proposes the assimilation of illiberal cultures into a majority culture that, she claims, is in general practicing gender equality and liberal values of individual freedoms and liberties (“so that its members would become integrated into the **less sexist** surrounding culture”).¹⁹ Therefore, it is clear that she means the everyday liberal cultures of Americans and not the state laws:

*While virtually all of the world’s cultures have distinctively patriarchal pasts, some – mostly, though by no means exclusively, Western liberal **cultures** have departed far further from them than others.*²⁰

Consequently, when Okin talks about the role of the state laws, she identifies gender sensitive laws in Western countries as equal to the everyday culture of living. She also implies that other cultural groups do not have at all or tend to disregard both their native laws that forbid violence against women or their new country’s laws. Therefore, while immigrant culture is determined by tradition and religion, American culture is determined by the state law and its principles.

¹⁸ Carol Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988), argues that the basis of the social order in modern liberal states is rooted in sexual oppression of women. Whether or not this basis can be called the liberal ‘culture’ is debatable, but the patriarchal social order surely does exist, both in the liberal system and in the ‘cultural’ practices of the West.

¹⁹ Okin, “Is Multiculturalism Bad for women”, 22-23.

²⁰ *Ibid.*, 16.

*[W]omen in more liberal cultures are [...] legally guaranteed many of the same freedoms and opportunities as men.*²¹

Okin implies that living under the law of equality for men and women influences only “Western-culture” members. She makes it appear as if these immigrant families came from lawless jungles and upon their arrival, or their long-term residence in the new country, act as either illiterate for understanding laws or culturally predisposed not to obey them. Contrary to this, members of the majority “liberal culture” appear to be willing to obey the law even if they were not forced to. (For example, the 100,000 rapes registered per year in the United States in Okin’s analysis do not appear to be rooted either in backwardness or traditionalism).²² Further, Okin generalizes the whole population of foreigners as being essentially represented by those men who kill their wives in the name of a so-called culture. Concluding, her notion of culture is different for white liberal cultural groups and for immigrants. While “American culture” is shaped by the legal and constitutional principles of equality and freedom, immigrants’ cultures are unchangeable native customs of men alien to women or, precisely, the site of their oppression.

The second argument that I find highly problematic in her article is her understanding of world’s cultures as morally and civilization-wise unequal. This consequently follows from her essentialist and double-standard notion of culture. Okin argues that the Western-based value system of American “everyday life” should be a transcultural and universal norm that needs to be reached for other societies and cultures. Her theoretical approach to human rights is, in my opinion, flawed, because she sees human rights of women as a Western project that should with time spread around less fortunate parts of the world. She argues from the same line of argumentation when she “positions” herself by saying – “I think we - especially those

²¹ Ibid., 17-18.

²²For example see FBI statistics on forcible rapes in the US:

http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime/forcible_rape.html

of us who consider ourselves politically **progressive** and opposed to all forms of oppression [...]” (my emphasis).²³

Therefore, her first argument constructs the image of “culture” represented with specific backwards practices, i.e. her notion of a patriarchal core of culture is implied only in the cases of immigrant cultures, while Western “cultures” have cultures of law and principles. With the second step she makes, she argues that cultures, both western and immigrant, are positioned on the imaginary scale of development whose criteria are human rights and gender relations. I believe that such a theoretical approach does not necessarily come from a blatantly imperial position, but from her strong belief in the modern liberal theories of universal and individual equality and freedoms, in other words, the liberal theory’s understandings of human rights. I find this approach to protection of women from Third World “cultures” politically and theoretically problematic. The applied critique of such an approach will be central for my analysis of the women’s asylum seeking claims.

1.3. Is the body of the Third World woman (her) property?

Okin’s theoretical approach clearly belongs to liberal theory that puts central stage individual rights seen as privileged in protection and inherent since everybody has them from birth. On the other hand, according to her, collective rights should be questioned, specifically whether they should be given ‘to someone by someone’. She critiques the universalistic and gender-blind norm of *homo universalis* for not including women, but does not accept the same critique that attempts to deconstruct the norm made according to a white, Western man, or woman, i.e. the multiculturalist critique of liberal theories. Will Kymlicka addressed this in his response to her article.²⁴ On the contrary, Okin deliberately places the Western liberal

²³ Okin, “Is Multiculturalism Bad for Women?”, 10.

²⁴ “In her work, Okin has shown how liberal theorists implicitly or explicitly operate with the assumption that the citizen is a man, and never ask what sort of institutions or principles women would choose. (...) In my work, I show that liberal theorists have operated with the assumption that citizens share the same language and national

approach to human rights and cultural belonging at the center of her article. Okin argues that Western “cultures” departed from patriarchy and are based on individualism, personal autonomy and human rights protected by the state and the laws. They should be the *norm* of cultural development for all other cultures, even to the extent that some cultures should become extinct if they are incompatible to this norm.²⁵

I find this to be a problematic part of liberal theory of human rights. The problem can be narrowly formulated as: Whose cultural tradition/value system determines the interpretation of human rights (and their violation) in everyday politics? The cases that Okin discusses are perfect examples of this “universalistic” *aporia* of human rights. Female genital operations, the veil and polygamy seem to be some of the most debatable issues because some women’s movements consider them to be violations of women’s human rights, whereas other women support them as their traditions. Because these cultural practices become declared as “violations of human rights”, they become a matter of the juridical and penalizing systems.²⁶

The second more theoretical problem in Okin’s approach lies in her use of human rights as neutral, universal and disconnected from political and global inequalities and changes, and allegedly a-historical and culturally neutral. I say allegedly because in fact the cultural and historical Western tradition underpins the human rights theory. Human rights were not always thought of as natural and inherent, and they are very much so a modern liberal-state invention. Debra Nedelsky argues that human rights, or the Western liberal

culture, and never ask what sort of institutions would be chosen by ethnocultural minorities”. Will Kymlika, “Liberal Complacencies” in J. Cohen and others, eds., *Is Multiculturalism Bad for Women?* (Princeton: Princeton UP, 1999), 33.

²⁵ This stand does not allow much room for the differences within the global cultural heritage, and as a site of reference reserves the white, male-only normative space, extended to white women. This, I think, presents the biggest problem in the contemporary liberal women’s movement whose policies are generally, almost exclusively, rooted in the universalistic and individualistic human rights approach.

²⁶ Consequently, human rights argument can serve as a legitimization of the sovereignty of Western countries and their humanism, opposing it to, the not-quite sovereign, developing countries. This legitimacy of liberal bourgeois “culture”, as universal political culture, through human rights as compared to the developing countries/cultures violation of human rights, is essential for its existence. Without it, - and we can call it colonial philanthropy or missionary patriarchy - the Western liberal system could not be as efficient.

system of rights in general, are rooted in the concept of the right to property.²⁷ Making clear the boundaries of one's ownership over one's property presents the essence for the Western legal understanding of rights. She explains how historical conditions of time produced the need for protection of one's property from the revolutionary majority in the time of democratic changes of the American Revolution. Consequently, the Anglo American concept of a right (civil, political or human) inherited the previous emphasis on property and its reliance on unequal power relations and the distribution of goods.²⁸ With this, social peace and order could be achieved by overwriting the fact of unequal property distribution with the right to one's person, one's body, and one's property. Instead of property distribution reform, Anglo-American constitutional theories offered equal state protection for everybody's property, even if that was unequally distributed.

Liberal political theory and philosophy took this individual and autonomous nature of the self (person, body and property) as their principal standpoint. The problem of such approach, for Nedelsky, lies in the illusion of boundaries that surround the body seen as separated object (an isolationist approach). According to Nedelsky, this notion of bounded self/body legitimates the system of controlling (and legitimizing) of what is allowed and what is forbidden to penetrate this body seen as property.²⁹ This abstraction of the concept of bounded body makes it problematic to define what practices performed on the body are "approved", and by whom. Is it our own individual decision what will cross our bodily boundaries and what will not? For Okin, FGM seems to be an extremely violent "mutilation", while some other interventions on an "intact body" are perceived as less violent. The example of FGM, which Okin uses uncritically as violation of the female body, shows how such a system of control is culturally or socially constructed. Further on, this isolationist approach

²⁷ Jenifer Nedelsky, "Law, Boundaries and the Bounded Self" in R. Post, ed., *Law and the Order of Culture* (Berkeley/LA/Oxford: University of California Press, 1991).

²⁸ The property system usually, in the beginning of the modern states, was inherited from the feudal or colonial distribution system, and therefore unequal.

²⁹ Nedelsky, "Law, Boundaries and the Bounded Self", 174.

on bodily boundaries annihilates the important aspect of the culturally created body, and the body as a result of cultural interchange. The body is not isolated property but culture-specific and perceived within a specific ideological system.³⁰ I find both arguments (the problematic notion of the intact body ignoring and masking the performed system of control, and the problematic notion of the essentialized body that silences the social constructiveness of the body) strongly convincing and challenging for the liberal body-as-property theory that Okin and others use. Arguing on the line of Merleau-Ponty, I see the discourse on women's bodies and their violation as a product of the legal system of human rights, the system that has been produced by a set of institutions developed historically through different power relations.³¹ Following his view on humanism, a reflective humanist approach is needed in order to see human values as "inseparable from the infrastructures that kept them in existence".³²

1.4. Historicizing the transcultural feminist discourse

If we take into consideration the pitfalls and challenges of transnational/transcultural feminist practices embedded within the liberal reformist and developmentalist discourse of rights, then the crucial question is: How should the contemporary reformist, or humanist, international feminist movement address the complexity of global power relations in which gender is one but not the only axis of analysis, and is itself the site of reflected global inequalities?

One possible approach for transnational feminisms to be reflectively humanistic in their approach to reconstruct the dominant value-system and develop reformist politics is, as suggested by Inderpal Grewal and Caren Kaplan, to always take into account that power is

³⁰ Ibid., 172

³¹ As paraphrased in Debra Bergoffen, "From Genocide to Justice: Woman's Bodies as a Legal Writing Pad," *Feminist Studies* 32, no. 1 (Spring 2006): 14.

³² Ibid.

scattered depending on different national, historical, social and other context.³³ “If feminist political practices do not acknowledge transnational cultural flows, feminist movement will fail to understand the material conditions that structure women’s lives in diverse locations”, and it will further reproduce universalizing claims of dominant Western cultures.³⁴ The material oppression of women is not, as Okin implies, only the “inhuman” patriarchal culture and religion, but also includes the international hegemonic oppression of women as a part of the Third World, or as part of the global inequalities. It also includes the patriarchal local nationalisms, the local structures of domination, state-juridical oppression, and their influence on each other. Precisely because of the multiple and changeable systems of power and domination, the term “culture” loses any stable referent and thus becomes obsolete to use as referring to the root of people’s social practices, let alone people’s oppression. For Grewal and Kaplan, “transnational feminist practices require this kind of comparative work rather than the relativist linking of ‘differences’ undertaken by proponents of “global feminism”; that is, to compare multiple, overlapping, and discrete oppressions rather than to construct a theory of hegemonic oppression under a unified category of gender.”³⁵ Consequently, feminist international practice should be against any essentializing of non-western cultures and peoples, against the imaginary of the *Other* - the patriarchal savage - and against any use of women as markers of this Eurocentric representation of difference.

Many Western feminist practices, especially regarding topics like the ban of clitoridectomy or sati in the period of colonization, have been either disadvantageous or directly oppressive for some women, and many still write their reformist politics with a similar lack of the awareness of their possible consequences. However, a lot of western or non-western feminist scholarship nowadays proves to be strongly aware of these power

³³ Inderpal Grewal and Caren Kaplan, eds., “Introduction”, in *Scattered Hegemonies, Postmodernity and Transnational Feminist Practices* (University of Minnesota Press: Minnesota, 1994).

³⁴ *Ibid.*, 17.

³⁵ *Ibid.*, 17-18.

inequalities and proceeds in a different direction. As C. T. Mohanty stated, “western feminist discourse and political practice is neither singular nor homogeneous in its goals, interests or analysis.”³⁶ Therefore, I draw my inspiration from theoretical and methodological approaches, such as Susan Pedersen’s in her still in many ways seminal article “National Bodies, Unspeakable Acts: The Sexual Politics of Colonial Policy-making”, where historical international (colonial), national (anti-colonial struggle and nationalism) and multiple local perspectives are shown as intersecting in producing the modern discourse on clitoridectomy.³⁷ In this case, the British imperial feminism played a crucial role in reproducing the colonial fantasy of victimized African women and victimizing African culture. Another example of a useful and critical approach towards the topic of Third World culture and women’s rights is Uma Narayan’s critique of second wave feminist (Mary Daly’s) discourse on universal cultural violence against women, in which Narayan provides us with a genealogical and literary dismantling of problematic (historically and geographically) ignorant generalizations about “Indian” *sati*.³⁸ Narayan criticizes Daly’s judgment of *sati* for ignoring social, class, cast, ethnic and geographical contextual features of *sati*, and for consequently blaming “the culture” for oppressing “the Indian woman” (where women are again a monolithic category represented as victims or objects of pity). Moreover, in Daly’s use of the term culture, it is imagined as a male unchangeable space of women’s sufferings and enslavement, developmentally backwards.³⁹ Addressing the “cultural practices”, Narayan argues, we carry the historical burden and baggage of terms, and in cases like *sati*, clitoridectomy or veiling, we see clear historical examples of colonizing projects that aimed to differentiate the

³⁶ Mohanty, “Under the Western Eye”, 65.

³⁷ Susan Pedersen, “National Bodies, Unspeakable Acts: The Sexual Politics of Colonial Policy-making,” *Journal of Modern History* Vol. 63, No. 4 (Dec., 1991): 647-680.

³⁸ Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminism* (NY & London, : Routledge 1997), Ch.2: “Restoring History and Politics to Third World Traditions”, 54-60.

³⁹ *Ibid.*, 54-60.

colonized from the colonizers by using women as symbolic markers of this difference, underpinned by inequality and violence.

Taking into account these very important critiques and recommendations, in the next chapter I will analyze the historical and political context of institutions that address gender asylum. Thinking about the historical burden or, more precisely, the genealogy of ideas, practices and institutions and recovering hidden historical power relations within them will be a constitutive part of my analysis.

Chapter 2: Gender asylum in a historical perspective: International law and the Western politics of asylum

This chapter presents an outline of the historical and political context in which internationalization of the asylum and refugee protection took place. It will outline the basic facts about the League of Nation's and later the UNHCR's legal instruments for the protection of refugees. The aim of the chapter is to recover the political conditions in which contemporary definitions and interpretations have been shaped and, consequently, the difficulties of introducing both gendered and Third World cultural experiences of asylum claimants into the law and national court practices.

2.1. Methods in feminist critique of international law and organizations

In my thesis, I use different methods developed by feminist theory in analyzing and critiquing the power relations in the international arena and in the international women's movement that advocated for the recognition of gender-based violence in international law. Hilary Charlesworth, a scholar whose work concentrates specially on the methodology of feminist research in international law, proposes two possible approaches: "detecting silence" (of women's and other oppressed groups' voices), and "world traveling" (as a self-reflective response to differences among women and a critique of the use of monolithic categories, such as "Western women" and the "Third World women").⁴⁰ In my analysis, these methods should question international law's claims to generalizations and universalism in a way that they detect the structural hierarchies and inequalities both between men and women and between different groups of women. In my research, I will discuss the protection of women from gender-based violence in international and US asylum law, in which asylum law can be seen

⁴⁰ Hilary Charlesworth, "Feminist Methods in International law" in Nancy E. Dowd and Michelle S. Jacobs, eds., *Feminist Legal Theory, an anti-Essentialist Reader* (New York: NY UP, 2003), 78-86.

as male oriented, i.e. silencing the gender related claims; but also reflecting the unequal power relations between women themselves, i.e. between women refugees and their American advocates and attorneys. The aim with using this approach is also to avoid and critique the lack of understanding of the complexity of women's oppression/persecution as it is often simplified in the (asylum) law practice by the advocates and judges.

Ann Orford outlines the pitfalls and implications of unreflexive claims by feminist scholars and activists in the international arena.⁴¹ She argues that a different scholarly approach for feminists and other reformist international politics is needed – one that is strongly aware of the consequences of any claim in the context of international law and power relations. She also provides an alternative reading of international law and governmental organizations in which feminist scholarship and politics should not enter without taking into account the colonial-rooted and Western-oriented structure and foundations of these institutions. Anthony Angie similarly proposes that international law and organizations cannot be detached from the colonial past.⁴² He claims that the new “science of development” led by Western interest blossomed in organizations such as the League of Nations and the UN (“science” that, in the late 20th century includes human rights and women's rights development through different development programs and goals) encouraged by the historical potential of internationalism, i.e. “the spirit” of the 20th century. This new international approach, he argues, has been seriously disadvantageous for Third World countries, starting from the League's mandate system that internationalized colonialism. One of the particular aims of international organizations, such as the UN, was/is to bring the underdeveloped countries into the system of global capital and exchange, but not to radically change the power relations or endanger the interests of rich countries.

⁴¹ Ann Orford, *Reading Humanitarian Intervention, Human Rights and the Use of Force in International Law* (Cambridge: Cambridge UP, 2003).

⁴² Anthony Angie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations,” *Journal of International Law and Politics* 34, no. 3 (2002): 513-633.

Therefore, feminist scholarship and politics in the sphere of international law have to be open-ended, communicative and communicated among different parties in this system of multiple global inequalities. If we see the international law and organizations as such, it would be easier to avoid the implications of unreflexive claims, such as the appropriation of a feminist reformist agenda by the neo-colonial and nationalistic projects frequent in the contemporary era of “humanitarian” interventions that legitimize themselves with reference to women’s rights, among other things, while still reproducing unequal international power relations.⁴³

2.2. The League of Nations: The internationalization of the European asylum

In order to outline the context in which I place my analysis of the gender asylum and claims by Third World refugee women, I find it crucial to investigate the discursive and historical context of the legal concepts in asylum law and politics, before the gender-sensitive recommendations entered the law.

Asylum as a concept is an intrinsically international and political issue. It was developed institutionally in the period of the demise of Western European colonialism and of the beginning of Western anti-communist politics. The first internationalization of the refugee system appeared with the Leagues of Nations’ (LN) regulations of refugee status in the period between 1920 and 1935.⁴⁴ In this early period of international organizations, only states were seen as significant agents in the international arena, and consequently, the concept of refugee

⁴³ This refers to the feminist critique on contemporary American nationalist endeavors to appropriate feminist claims for humanitarian and neocolonial interventions in the world. See for example, Abu-Lughod, Lila, “Do Muslim Women Need Saving? Reflections on Cultural Relativism and its Others,” *American Anthropologist* Vol. 104, No. 3 (September 2002): 783-790.

⁴⁴ The 1951 UN Convention Relating to the Status of Refugees mentions all the definitions and conventions inherited from the League of Nations: Arrangements of 12 May 1926 and 30 June 1928, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939, and the Constitution of the International Refugee Organization. See Convention, 1951, Ch. 1: “General Provisions”.

itself was seen as an international anomaly, i.e. stateless persons in a world of nation states.⁴⁵ But the refugee explosion in the interwar period made refugees become visible actors in international relations and law since this flow and the resettlement of people could not be coordinated by any single state alone. Around 1920, the Russian Revolution refugee flows made Western countries realize how highly political and sensitive the refugee issue was becoming in international relations. As a consequence, the High Commissioner for Refugees was established by the League of Nations in 1921 for dealing with Russian refugees, later replaced by the Nansen International Office for Refugees in 1930, as an autonomous and non-political organization recognized by the LN.⁴⁶

Aware of its position in international relations, being placed in the middle between the revolutionary East and Capitalist West, the LN realized the political implications of international asylum given to the fleeing population. The Nansen Office, being established as an autonomous office, can therefore be seen as an attempt to claim distance from the Leagues Western European power dominance in the governing levels. Besides the international tensions, the Nansen Office was also struggling with financial dependence, holding on to the private donations in order to service the needs of refugees. Financial insecurity and the decline of the League's reputation in the 1930s contributed to the limited power of the League's international protection of refugees.⁴⁷

In the 1930s, the Nansen Office experienced yet another crisis, due to the refugee avalanche from Germany, Italy and Spain, containing mostly Jewish and other politically persecuted refugees. The Office initiated a Refugee Convention in October 1933 that was adopted by 14 states, and today presents the first international refugee law document, but not

⁴⁵ Existing international law did not recognize individuals as holders of rights in the international arena. See J. Hathaway, "The Law of Refugees" in B. S. Chimni, ed., *International Refugee Law, A Reader* (London: Sage 2000), 10.

⁴⁶ See G. Jaeger, "On the History of International Protection of Refugees," *IRC* (September 2001): 728.

⁴⁷ *Ibid.*, 727-732.

without difficulties. The difficulties related to the implementation of the protection even for Europe's own citizens.⁴⁸

The League of Nations system for international protection of refugees has influenced the later UNHCR structure and ideological positioning in more than one way. It has offered an outline for a legal refugee definition that is Eurocentric, which would later prove to be critical for refugees coming from the Third World; and it outlined a role of the state's sovereignty in the protection of refugees that allows only ambiguous, minimum and unclear responsibility of the state.

2.3. The UNHCR and the Western Cold War asylum politics

Today asylum appears as a part of the broader human rights discourse. The extent to which we can see the UNHCR endeavors to assist refugees and displaced people in truly internationally coordinated and supported projects as successful depends on the larger political context of the time, on the consequences and implications of the legal framework established, as well as on its work for today's refugees and on the relationship and impact it had/has on the member states. When the UN initiated the UNHCR in 1950/51, its independence and non-political nature were emphasized in the context of the beginning of tensions between the two blocks in the Cold War. Refugees became a highly risky and political issue.⁴⁹ In this context of movements of people and political flights, a "nonpolitical" intervention by the neutral body was needed both for the states and for the UN.

What seems to be different from recent trends in refugee protection is the fact that refugees in the founding period of the UNHCR were coming mostly from the communist

⁴⁸ R. J. Back describes how Britain was reluctant to ratify the convention seen as intervening in national sovereignty. The refugee question was a part of the debate about British reluctance to accept big number of Jewish refugees from the National Socialist regime in Germany. Robert J. Back, "Britain and the 1933 Refugee Convention, National or State Sovereignty," *International Journal for Refugee law* 11(4) (1999).

⁴⁹ Guy S. Goodwin-Gill, "Refugees: Challenges to Protection," *International Migration Review* 35/1(2001) and Charles B. Keely, "International Refugee Regime(s): The End of the Cold War Matters," *International Migration Review* 35/1 (2001).

countries, admitted for permanent resettlement, and were generously admitted in large numbers by Western European and Northern American governments. For example, during Castro's rise to power in Cuba, the US publicly supported asylum seeking migration.⁵⁰ In this case, the aim of U.S. Cold War politics was not to introduce stability but to destabilize the communist regimes and influence their collapse by supporting the internal groups and the emigrants that were opposing them.⁵¹ This argument goes even further to claim that asylum politics has long been a tool for the U.S. foreign policy towards communist countries.⁵²

The UNHCR had to take into consideration these political events and its implications on the international protection of refugees - the instrumentalization of asylum for international power struggles, and therefore it declared the neutrality and nonpolitical nature of its work in its Statute.⁵³ Proclamations of the humanitarian, non-political and autonomous nature of its work reflect the UNHCR's intention to be truly international, non-biased and reformist in protecting the *universal right* of the individual to asylum.⁵⁴ For the international protection of refugees this surely presented a step forward towards more decentralized power relations, but it was not without pitfalls either because the Cold War power relations were inscribed in the work and policies of the UNHCR itself and resulted in its limitations in many ways. First, the financial structure of the UNHCR depended on mostly rich countries, and these donors did push their political interests.⁵⁵ Secondly, although the Statute declared the UNHCR to be

⁵⁰ Keely, "International Refugee Regime(s): The End of the Cold War Matters," 306-308. "U.S administration of both parties generally accommodated Cuban refugees even after all hope was abandoned that mass exit would disable the government, in no small part due to the influence of Cuban Americans who had been previous beneficiaries of generous admissions policy aimed at destabilizing the Castro regime in Cuba."

⁵¹ Ibid.

⁵² Matthew J. Gibney, *The Ethics and Politics of Asylum* (Cambridge: Cambridge UP, 2004), 132.

⁵³ Statute of the UNHCR in its second article states: "The work of High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social, and shall relate, as a rule, to groups and categories of refugees." Statute of the Office of the United Nations High Commissioner for Refugees, chapter I, paragraph 2, (December 14, 1950).

⁵⁴ The UNHCR was given a mandate by the General Assembly in order for the office to be neutral, legitimate and democratically governed (the UNHCR's Statute, Chapter I paragraph 4 and 5).

⁵⁵ For, example, in the beginning of the UNHCR's work, that is, in the early period of the Cold War, refugees that were handled by the US in an alternative way. The UNHCR had severe financial problems and the Ford Foundation's donations have played crucial roll in 'saving' the institution. These donations have to be seen in the context of highly political events from the period, such as Hungarian refugees from 1956 within the

neutral and universal, the agency dealt primarily with European refugees.⁵⁶ And thirdly, in this formative period of the UNHCR, the USA and Western European countries saw refugee regulation as part of the ongoing Cold War politics and a matter of home security. By pushing the interest of their own countries and dealing with refugees independently from the UNHCR, Western countries consequently minimized the authority of the power appointed to the Commissioner.

The consequences of the Cold War on the refugee system are mostly visible in the more restrictive asylum policies in the period from the 1970/80s, and even more since the 1990s. After the fall of the 'iron curtain', asylum was no longer offered so generously to ex-communist nationals, since there was no longer an interest to encourage the flight of these people as a means of Western states' foreign policy. Keely argues that the contemporary crisis of the asylum system derives exactly from the formative period of the UNHCR, that is, the manipulation and instrumentalization of the asylum system by the US and other Western countries pushing their interests to destabilize the communist block.⁵⁷ He argues that since the LN, but definitely since the 1951 UN Convention on the status of refugees, in the international arena there have been two policies in the international arena: one for the refugees of the Soviet block, and another for the rest of the world (meaning Third world countries). As a result of this, the UNHCR's eye was primarily turned to Third World refugees while incapable of solving the contemporary issue of detention camps in Europe and the US). The *non-entre* principle for Third World refugees consequently became a prioritized

Soviet/American power competition. See in Denis Gallagher, "The Evolution of International Refugee Regime," *International Migration Review* Vol. 23, No. 3 (Autumn 1989): 582.

⁵⁶ Difficulties in reaching full international membership and representation can be seen in the fact that, for example, the UNHCR's controlling body (Executive Committee) was composed of only 24 member state appointees and reached membership of 70 different countries as late as in 2006. Secondly, the list of High Commissioners shows that most (all except one) of the commissioners were coming from the Western countries. And thirdly, the UNHCR office was not opened outside Europe until 1962 in Burundi. See the Statute of UNHCR and Executive Committee on <http://www.unhcr.org/publ/PUBL/3d4ab5fb9.pdf> (last accessed on May 30th, 2007).

⁵⁷ Keely, "International Refugee Regime(s): The End of the Cold War Matters," 306

principle that has overwritten the legal tradition of *non-refoulement*, as the core of legal refugee protection.⁵⁸

Western countries instrumentalized the international refugee law, and rearticulated the principles so that they could legitimate their actions, usually using the discourse of national security.⁵⁹ Courts all around the Western world started deciding on *repatriation* and extradition. The EU's centralized system of asylum includes detention camps. Some writers, more closer to the Foucauldian approach on world politics, call this system of detention and segregation "a new apartheid" and juxtapose terms like *asylum*, *apartheid* with ethnic *cleansing* and *prison*.⁶⁰ For Anthony H. Richmond, the previous generous asylum protection granted to the communist block refugees, but guaranteed to all universally in the 1967 Protocol, now seem clearer than ever a "cold luxury", and one mainly reserved for Europeans. Therefore, the contemporary Western policies of asylum can be described as a form of *global apartheid*.⁶¹

2.4. White, upper-class and male centered definition of the refugee

These historical events and conditions had their impact on the legal formulations of the status of refugee. The Convention Relating to the Status of Refugees in 1951 defined that the term "refugee" shall apply to a person who, due:

to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the

⁵⁸ *Non-refoulement* principle has been stated in the Refugee Convention 1933, in later in the 1951 Convention. "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The Convention Relating to the Status of Refugees, Adopted on 28 July 1951, Chapter 5. This principle presents the core of international refugee law as the strongest bounding principle that state should not cross even if they decide not to accept the refugee.

⁵⁹ In the 1981, Ronald Reagan started the *non-entre* policy by stating that refugees and immigrants are 'a serious national problem detrimental to the interests of the U.S.' Goodwin-Gill, p. 125

⁶⁰ See for example Anthony Richmond, "Global Apartheid: Refugees, Racism, and the World Order" in B. S. Chimni, ed., *International Refugee Law, A Reader*, 137-141.

⁶¹ *Ibid.*, 139. Richmond mainly refers to the asylum system in Europe, Northern America and Australia after the wars in former Yugoslavia. Since then the majority of asylum seekers are coming from the global South.

*protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*⁶²

This definition outlined the experience of European (male) refugees in the period of the Second World War; the Convention even stated so in its chapter 1 (“As a result of events occurring before 1 January 1951 ...”).⁶³ Firstly, the definition recognizes only political dissidents and national, racial and religious minorities as eligible for asylum. Secondly, the concept of “membership in a social group”, where varieties of otherwise ignored reasons for claiming asylum could be placed, was not elaborated in details but takes into account only the European experiences of refugees. The third criticism refers to the male oriented kinds of persecution that are outlined in the definition. By placing the persecution in the sphere of the public and political, many claims by women are invalidated.

In the Protocol Relating to the Status of Refugees in 1967, the international refugee law removed these temporal and geographical limitations to the Euro-centric refugee law, but the definition regulating what could be considered as persecution, and therefore, a legitimate claim for refugee status, did not change:

*Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention, and [c]onsidering that it is desirable that equal status should be enjoyed by **all refugees** covered by the definition in the Convention irrespective of the dateline 1 January 1951, (...) the term "refugee" shall (...) mean **any person** within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2)*

⁶² The Convention Relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, see internet version on http://www.unhcr.ch/html/menu3/b/o_c_ref.htm (last accessed on May 30th, 2007).

⁶³ Ibid.

were omitted. [...] *The present Protocol shall be applied by the States Parties hereto without any geographic limitation [...]*.⁶⁴

Despite the fact that geographical limitations were removed, the definition of the refugee and the scope of recognized persecutions were not expanded in such a way that they would include the refugee experiences around the globe. Therefore, the Euro-centered definitions in refugee law resulted in UNHRC's and US's limited recognition of the needs of Third World asylum seekers.⁶⁵ Most of the Third World refugees were fleeing due to reasons such as war, ethnic conflicts and persecution, natural disasters, and so on, and were excluded from the right to asylum. James Hathaway notes that it is difficult to argue that this (Eurocentric definition) was done on purpose, in order to exclude the underdeveloped countries' refugees, but it was more likely an effect of the UNHCR's "universalistic" ambitions and, accordingly, its universalistic definition for refugees that took place in the Protocol 1967.⁶⁶

Not quite detached from the Eurocentric (white/upper-class western politically oriented individual) definition of refugee, is the male-centrism of the definition. The definition of the refugee, "a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion"⁶⁷ was in many ways a result of the Cold War conditions. Gender, sex, ethnicity and many other possible grounds for persecution were not included.⁶⁸ These five types of persecution were considered to be the most common for the authors of the 1951 Convention and 1967 Protocol who had in mind male European upper-class refugees.

⁶⁴ The UN Protocol Relating to the Status of Refugees, 4 October 1967. see Internet version on http://www.unhchr.ch/html/menu3/b/o_p_ref.htm (last accessed on May 30th, 2007).

⁶⁵ James Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" in B. S. Chimni, ed., *International Refugee Law, A Reader*.

⁶⁶ *Ibid.*, 61.

⁶⁷ The UN Convention Relating to the Status of Refugees from 1951.

⁶⁸ For detailed analysis of the difficulties with introducing sexual orientation as a grounds for asylum in the U.S., see Greg Mullins, "Seeking Asylum: Literary Reflections on Sexuality, Ethnicity, and Human Rights," *MELUS Multi-Ethnic Literatures and the Idea of Social Justice* Vol. 28, No. 1 (Spring, 2003).

In 1985, in the *Acosta* case, the U.S. court recognized that sex/gender can be accepted as grounds for persecution within the criteria of “membership in a particular social group”. The US appeals court elaborated what the definition of the persecution on account of membership in a particular social group could mean:

*[...] persecution on account of membership in a particular social group encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic [...] such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership.*⁶⁹

It is important to emphasize that the sex/gender inclusive traits of the definition appeared in the law that defines membership in a particular social group by underlining the “past experience such as former military leadership or ownership”. Although this definition by the U.S court has filled the gaps the UNHCR’s definition of “a social group”, such description refers to a refugee either fleeing communist persecution of members of the bourgeoisie or anti-colonial uprisings against Western and local elite landowners.

Many authors, as well as many international feminist activists, have persistently pointed out the gender-bias in the legal definition, and ignored its classist and racialized traits. The male adult individual taken as a standard in the refugee law excluded a whole range of individual approaches to the protection of refugees that experienced different kinds of persecutions characterized by age, gender, cultural, religious, political, physical, mental and other factors. Gender and age inclusive reforms were pushed forwards most visibly in the last few decades. The women’s movements and women’s rights conventions influenced this advancement of refugee law by pointing to the different, gender-specific kinds of torture,

⁶⁹ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

persecution and violence, which makes women's asylum claims sometimes different than those of their family members.⁷⁰

The UNHCR's Executive Committee issued a statement in 1985 that encourages states to take into consideration women's different experiences: "(W)omen asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group'."⁷¹ After that, the UNHCR repeatedly called on states to recognize the gender specific persecution that women refugees may have experienced and recommended the special treatment of women, special training for officers and development of national guidelines for these matters.⁷²

In 1995, the first national guidelines for specific needs of women asylum seekers were issued in the U.S., followed by Australia, Canada and the Netherlands.⁷³ The case law in these states has contributed to the recognition of a wide range of persecutory acts that are gender-related, like sexual violence, domestic violence, punishments and discrimination for the transgression of social mores, sexual orientation, FGM, and trafficking. International recommendations and guidelines opened up a space for the protection of women that suffer from multiple and complex kinds of persecution, which could not be incorporated in the male centered definition from the Convention in 1951.

⁷⁰ Convention of All Forms of Discrimination Against Women in 1979, Declaration on Elimination of Violence Against Women in 1993, Beijing Platform for Action adopted by the Fourth World Conference on Women in 1995 and finally, the ICTFY's (International Criminal Court for Former Yugoslavia) recognition of war rape as torture and persecution in 2000.

⁷¹ ExCom Conclusion No. 39 xxxvi, 1985.para.k.

⁷² In 1990, ExCom recommended that states should provide women asylum officers. In the 1991, the UNHCR issued "Guidelines on the Protection of Refugee Women" in which it was recommended that special needs of women in refugee camps should be recognized. In the 1993, ExCom encourages development of national guidelines. In the 1995, 1996, 1997 and 1999, ExCom again calls for recognition of women's refugee status within the criteria of "a social group" (within the 1951 Convention definition of refugee), and for the different gender-related persecutions that they experience.

⁷³ The U.S. Immigration and Naturalization Service, "Considerations for Asylum Officers Adjudicating Asylum Claims from Women", 26th of May, 1995; Department of Immigration and Humanitarian Affairs of Australia, "Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers", July, 1996; Immigration and Refugee Board of Canada, "Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update", 13 Nov, 1996; and Netherlands Immigration and Naturalization Service, "Working Instruction No. 148: Women in Asylum Procedures", subsequently superseded by guidelines in the Aliens Circular 2000.

The discourse of the UNHCR surely makes an attempt at trans-cultural understanding and acknowledgment of differences. But the recent international and national trends in the protection of women refugees seem to be emphasizing gender only. If gender is seen from a universal perspective, there is the possibility that such an approach might blind us to the complicated and individual specificities of women around the world, and open up a space for silencing the complexity of women's everyday lives. Persecutory acts that women may suffer from are connected also to their political opinions, their religious interpretations, material oppression, and so on, and gender is a part of these. Catherine MacKinnon, among others, has influenced this inclusion of gender in the refugee law by claiming that gender has been the primary reason for the persecution of some women, framing her argument within her blame-the-pornography-for-everything campaign and within her theory of universal oppression of women represented in the legal affirmation of the power and domination of males over females.⁷⁴

⁷⁴ A Response to Catharine MacKinnon's Article "Turning Rape Into Pornography: Postmodern Genocide" (published in *Ms Magazine* 4(1) (1993): 24-30) by Vesna Kesic from *Centar za žene Rosa, centar za žene žrtve rata* can be found on web site http://www.women-war-memory.org/hr/A_response_to_c_mackinnon/ (last accessed on May 30th, 2007).

Chapter 3: Gender-based asylum claims: From the international (the UNHCR) and national (U.S.) guidelines for the protection of women asylum seekers to actual “gender asylum”

In this chapter, I will analyze the recent development in the U.S. asylum law towards acknowledging “cultural” violence against women in non-Western countries as a basis for granting asylum. My analysis will include three levels: the level of the international protection of women asylum seekers, the level of the U.S. legal guidelines for dealing with women asylum seekers, and the level of court practices. Each level, as I see it, incorporates and interprets previous ones depending on the chronological sequence, but they also differ from each other. The international UNHCR’s vocabulary attempts to include the diversities of different international experiences of women asylum seekers, while the U.S. guidelines are influenced more by the American legal context, i.e. the court’s decisions. The court decisions are also influenced by the U.S. historical and political context as well as by the politics and strategies of local human rights and women’s rights advocates. I will analyze how the language of the international legal system of protection of women asylum seekers changed while being introduced into the local, national court practice, asking how the vocabulary of women and cultural violence underwent change at its most pragmatic level, that of its applications in the courts.

The court decisions over the past decade, which are ultimately the main focus of my analysis, have been crucially important for the ways the claims of women asylum seekers have been formulated. Are women persecuted by their culture, state, or local social groups? To what kind of a “culture” do these legal texts I analyze refer - geographically and discursively? Are all women members of the potentially persecuted group or only the women opposing the dominant treatment imposed upon them? Are these gendered persecutions contextualized with regard to class, place of living, age, ethnicity and individual political, religious and other beliefs? These questions I intend to answer by looking into the U.S

guidelines for women asylum seekers in 1995, the UNHCR's guidelines in 2002, and the cases that are considered precedents in these issues. The order of analysis I chose due to the chronological sequence, consequently the cases I chose have been decided on after the 2002 UNHCR's guidelines. Among them, the *Mohammed* case, the most recent case from 2005, will receive special attention.

3.1. Gender and orientalism in the asylum seeking process

Many scholars have pointed out the relation between asylum law and culturalist prejudices that instrumentalize and alter the asylum claims, especially in case law. Basing her theoretical approach on Edward Said and his writings on orientalism, Susan Musarrat Akram offers an analysis of orientalism in the U.S. refugee protection system, mainly in the approach of refugee advocates towards claims of women refugees from Muslim cultures.⁷⁵ Her main argument states that the essence of the Western stereotypes of Muslim refugees lies in the misconception of Islam as monolithic, oppressive towards women and cruel and inhumane in its practices. The asylum claims, articulated by refugee advocates, especially those of Muslim women claimants, have continuously been referring to Islamic laws or cultures as the oppressor, instead of state laws that persecute or fail to protect citizens from persecution.⁷⁶ The author shows how both advocates and judges have been wrongly referring to religion and culture in their statements on what or who performs persecution. In particular, for some refugee advocates, and academics that influenced the new development of a gender sensitive refugee law, the claims of women asylum seekers in the dominant Western viewpoint seem to be very interesting because they see women as generally oppressed by the Third World cultures.

⁷⁵ Susan Musarrat Akram, "Orientalism Revised in Asylum and Refugee Claims" *International Journal of Refugee Law* Vol. 12, Issue 1 (January 2000).

⁷⁶ *Ibid.*, 20. The author explains the case of *Bostanipour*, where the court referred to the applicant's persecution as performed by the Islamic law that forbids the change of religious belief, and not the Iranian state law which actually failed to protect the religious minority.

Akram describes a number of cases of women asylum seekers in the U.S. and Canadian courts where the attorneys have formulated their applications, and thus determined the court rulings, by claiming that these women had been persecuted by the Muslim religion and customs. These claims, she argues, formulated by the refugee advocates, silence the real oppression that women undergo by naming the oppressor simply as “Muslim customs” or religion. The case of *Nada*, a Saudi woman claiming to be persecuted for refusing to wear a veil, is a good example of the author’s argument. Nada’s advocates claimed that she was a member of “a particular social group”, using the UNHCR’s gender sensitive recommendations, which included all Saudi women opposing “Muslim customs”.⁷⁷ Therefore, in her application, Nada was represented by her advocates as somebody denouncing her religion, although that was not the case. The claimant made a statement in the court explaining that she was fleeing from the political oppression of women which, for her, had no religious or cultural roots.⁷⁸ Her application could have been formulated by her attorneys as persecution due to her different views on religious norms, and consequently, the choice of her attorneys to formulate her claim in such a way resulted in the representation of Saudi refugee women as denouncing their religion, culture and social practices.

Encouraging the claims for asylum solely on gendered persecution as self-evidently caused by the Islamic law or “Muslim culture”, refugee advocates persist on presenting women as denouncing and opposing the “Muslim mentality” and fleeing Islam. Orientalism can be found here in the advocates’ discourse, i.e. in the statements that point to a monolithic and static concept of Islamic culture/religion, or what Edward Said called “the internal consistency” of the imagined Orient, perceived as the “deep and recurring image of the Other”.⁷⁹ “The internal consistency” of the Orientalist discourse, the firm and unchangeable

⁷⁷ Ibid., 18.

⁷⁸ Ibid., 26.

⁷⁹ Edward Said, *Orientalism*, (New York, Vintage Books, 1979). Said states that Orientalism is a "Western style for dominating, restructuring, and having authority over the Orient" (p.3), that it is based on an ontological and

imagined object seems to have no correspondence with a “real” Orient, but is established as a sign of the “Westerner’s positional superiority”. This reiterating image of the Orient in courts rulings blurs concrete problems in women’s lives by ignoring to address the function of the state laws and state protection, the international conflicts that produced a poor material status of women in some countries, the reappearing but not consistent conservatism in some cultures, and so on. As far as this representation of Islamic states goes, the state is either addressed as Islamic, and then used interchangeably with Islamic social mores, or addressed sporadically, meaning not held centrally responsible, for failing to protect its citizens. Moreover, this representation of the Third World state slips easily into the stereotype about the state as dysfunctional and lacking, or even in need of international intervention.

In order to further examine the reasons and origins of such tendencies in the recent court decisions, I intend to analyze not only religion as a site of orientalist constructions, but also cultural, legal and engendered presuppositions implied in them. But first it is necessary to take a step back to the level of the U.S. and the UNHCR guidelines dealing with women fleeing gender-based violence because the images and representations discussed above have been a product of both national (U.S) and international discourse on women’s position in the Third World countries.

epistemological distinction between the “Orient” and the “Occident” (p. 2). “The internal consistency of the Orientalist discourse, despite any lack of correspondence with a “real” Orient and its establishment of the Westerner’s positional superiority, is key to conferring an objective and innocent status to it.” Said, “Orientalism”, as paraphrased by Meghena V. Nayak, “The Orientalism of Mapping Bodies and Borders: Postcolonial (In)Security and Feminist Contentions on the India Pakistan Border,” Southwestern University, Brown Working Papers in Arts and Science, Vol. 3, (2006) on web page: <http://www.southwestern.edu/academic/bwp/pdf/2003bwp-nayak.pdf> (last accessed on May 30th, 2007).

3.2. Analysis of the U.S. guidelines: “Considerations for Asylum Officers Adjudicating Asylum Claims from Women”, 1995

In May 1995, the U.S. Office of International Affairs issued “Considerations for Asylum Officers Adjudicating Asylum Claims from Women”, a guidelines for the protection of women asylum seekers to inform asylum officers, advocates/attorneys and claimants on how to deal with asylum claims based on gender-specific persecution.⁸⁰ The guidelines were grounded on the earlier mentioned UNHCR suggestions to all states and recommendations for acknowledging women’s specific needs within the refugee law definitions, such as gender specific persecution, membership in a social group and oppressive gendered practices.⁸¹ My question is: How is a social group based on gender defined, i.e. are “all” women of one state persecuted on the grounds of their sex and gender? Who is the persecutor, and who is the victim? If persecution is a result of women’s transgression of social mores, what kind of a role do social mores play in persecuting a person according to the guidelines? How are terms such as state, culture, customs and religion used, and with what burden of meanings on them? Finally, I will compare my findings with the UNHCR’s vocabulary preceding the US guidelines and the UNHCR’s own guidelines seven years later (2002).

Cross-cultural understanding: The main goal of the U.S. 1995 guidelines is to:

[...] *provide the INS [Immigration and Naturalization Service] Asylum Officers Corps (AOC) with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender*”.⁸²

Since asylum officers are dealing with refugees from foreign countries, the guidance and background provided actually serve as an information source for the officers’ assessing an

⁸⁰ The U.S. Immigration and Naturalization Service, “Considerations for Asylum Officers Adjudicating Asylum Claims from Women” (May 1995). See internet version on <http://www.jobelaw.com/articles/gender/1.htm> (last accessed on May, 10th, 2007).

⁸¹ See previous chapter. The UNHCR issued recommendations in 1985 for dealing with women asylum seekers in which “women as a social group” have been defined as a group of women who transgress the social mores and risk harsh treatment, which can be taken as a ground for asylum. The UNHCR also issued Guidelines for the international protection of refugees in 1991. Both documents are mentioned as legal background of the American guidelines.

⁸² The U.S. guidelines: “Considerations for Asylum Officers Adjudicating Asylum Claims from Women”, 1.

unfamiliar social and cultural context of women claimants. The guidelines remind asylum officers to

*[...] bear in mind the context of these human rights and cross-cultural considerations when dealing with women claimants.*⁸³

The wording “cross-cultural considerations” for gender-based violence against women is structurally brought into these texts in a specific way. In the guidelines, the cross-cultural considerations are mentioned in regards to the cases where asylum officers have to deal with different laws and customs of *some* countries. The list of women-oppressive practices points to the countries where laws and customs discriminate against women:

*The laws and customs of some countries contain gender discriminatory provisions. Breaching social mores (e.g. marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given to the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries.*⁸⁴

Without providing any historical or social context for these discriminatory provisions, but still referring to specific acts, the list of acts that are considered to be “breaking social mores” is clearly geographically pointing to some Muslim and other Third World countries. Further on, practices considered discriminatory against women no longer refer to the “laws” as one of the two causes of discrimination or responsible party mentioned previously, but exclusively to the “social mores”. As the description of discriminatory acts goes further, the phrase “social mores” becomes exchanged with “other cultural or religious norms”, which even more narrowly identifies the source of women’s oppression placing it in culture/religion

⁸³ Ibid., 1.

⁸⁴ Ibid., 4.

sphere. Therefore, the use of terms such as “(country’s) laws“, “(country’s) customs”, ”religious” and “cultural norms” is ambiguous in the text, and in many places it is unclear whether or not the authors hint to culture as oppressive, and whether the state is merely inefficient or irrelevant.

What kind of oppressive “cultural and religious norms” are the U.S. guidelines referring to? Could these claims be referring to *some* other country’s culture as well, like religious and patriarchal social customs of Poland or the U.S., for example? Wearing lipstick is singled out as a marker of individual freedom that distinguishes Western societies from “some” other countries. Therefore, the reference to a ban on lipstick or mandatory veil, as most commonly used examples, already presuppose the criteria used to chose these practices as oppressive. Wearing lipstick seems to have a more privileged place among human rights than, for example, being allowed to wear veil in Turkey or France. In general, what almost systematically gets through as a message is that the term “culture”, defined through a number of practices arbitrary chosen, clearly refers to Third World cultures, since the term is hardly understandable in the same way if in its place we would imagine, for example, the British culture, as homogenous and ahistorical as presented in the text.

Who is the persecutor? Any reference to the local and international economic and political oppression of women in poor countries is missing from the text. The authors state that the culture and religion of some countries are discriminatory against women. They do not refer to any specific culture, state, or time frame. This use of concepts, ahistorical and disconnected from political, economic or other “outside” influence, points to an orientalist/romantic notion of “native” culture, a culture that is supposedly unchangeable and original. Culture is understood as the actor of women’s oppression, seen as functioning monolithically and homogeneously, oppressing women -through men-, regardless of these women’s specific living conditions or social and economic characteristics.

Further in the paragraph, the text states that as a result of religious and cultural norms, women are systematically oppressed. (“As a result, the civil, political, social and economic rights of women are often diminished in these countries.”⁸⁵) The guidelines suggest that women are (homogenously) oppressed by the culture and religious/social mores, regardless of their class, cast, ethnicity, place of living, and even their historical and political context. The Guidelines further explain: “Women in many cultures are viewed as completely subordinated to their husbands [...]”.⁸⁶

The notion that women’s subordination to their husbands is clearly a matter of culture, seems to be a very problematic political statement. If we take religion or customs, as the guidelines suggest, that are based on traditional scripts or beliefs, they are a surely a matter of interpretation within a specific social and historical moment. They can not be described simply as the oppressor. If we take the broader term “culture”, like the guidelines also do, there is a problem of drawing the limits of the term “culture”. Is culture detached from a “dysfunctional” state or international power relations that shape women’s material and cultural surroundings? In other words, by using the term “culture” in such an essentializing ahistorical and depoliticized way, the text fails to address the material conditions of women’s lives and, even more importantly, masks the real structure and causes of women’s poor economic standard in many countries. For example, the oppression of women in rural parts of Africa, where their lives are economically disastrous, is rooted in the colonial labor politics. Many authors argue that the African colonial labor economy was based on encouraging or forcing men to leave their land in order to work, while women were kept in the villages, and consequently seen as preservers of the autochthonic African culture.⁸⁷ In a different scenario, women today would work as well as men, so the “culture” (in the meaning of U.S. guidelines)

⁸⁵ Ibid.

⁸⁶ Ibid., 7.

⁸⁷ See for example Fredrick Cooper, *Beyond Slavery; Explorations of Race, Labor and Citizenship in Postemancipation Societies* (Chapel Hill: University of Northern Carolina Press, 2000).

or patriarchal social norms harmful to women would work out differently because of the income and choices available to women. This kind of complex approach towards the roots of women's oppression seems to be missing from the text, although it is worth mentioning that asylum officers, and the authors of the guidelines, have to their disposal the information center, RIC (INS Resource Information Center), that should provide data about the poor material conditions of many women in the Third World countries within the historical and political context, addressing the state legal structures as well as cultural practices.⁸⁸

On what grounds are women persecuted? Legally, women refugees may claim asylum based on "persecution or well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion".⁸⁹ In case of specific gender persecution, U.S. guidelines acknowledge the previous UNHCR conclusions that define the persecutors as agents or acts that often "seek to harm her [woman] on account of her political or religious beliefs concerning gender".⁹⁰ Therefore, women's persecution or well founded fear of persecution defined as a result of their different political or religious beliefs, and not solely of their sex/gender. The UNHCR recommendations on international protection of women refugees from 1985 state the same: "[W]omen asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a 'particular social group'".⁹¹ In other words, international law, or more precisely the UNHCR recommendations, does not explicitly engage in defining the cultural or religious norms as persecutors. The U.S. Supreme Court in the 1991 also defined that "persecution" takes place as the victim proves to have different political opinion,

⁸⁸ "Considerations", p.8. The resources that asylum officers should base their rulings upon are provided by the Resource Information Center (RIC), an independent agency established to provide reports on political, social, economic and security issues for public authorities as well as private customers. RIC provides the list of countries that, for example, practice FGC or veiling as regulated by law. *Asylum officers must be able to relay on objective and current information on the legal and cultural situation of women in their countries of origin [...]*.

⁸⁹ As defined in the UN 1951 Convention Relating to the Status of Refugees.

⁹⁰ "Considerations", 8.

⁹¹ Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 39(k) (39th Session 1985).

and not because of persecutor's characteristics: "[...] if a fundamentalist Muslim regime persecutes democrats, it is not engaging in persecution on account of religion."⁹² Nevertheless, the U.S. guidelines depart from this interpretation by addressing religious norms as the source of women's oppression and by doing that, open up space for different interpretations that might occur in the case law.

What is the relationship between women and their persecution? The U.S. guidelines interpret the concept of "membership in a particular social group" so it can include gender sensitive refugee claims. The guidelines quote the BIA's (the Board of Immigration Appeals) definition of persecution based on membership in a particular social group as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic [...] such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership."⁹³ These characteristics that define the group are either unchangeable or fundamental to the person's individual identity or consciousness.⁹⁴ Consequently, gender can be constitutive for a social group due to the legal interpretation of gender arising from sex as unchangeable, but persecution has to be proved as targeting the person's beliefs (i.e. opposing the dominant gender roles) that are unchangeable or fundamental to that person's identity and consciousness. The U.S. guidelines, incorporating these definitions, clearly note that asylum is granted to a woman on political grounds and not on account of biological sex. In the asylum claims of women, gender is usually combined with other characteristics such as ethnicity or political and religious beliefs.⁹⁵

⁹² *INS v. Elias-Zacarias* case (112 S.Ct. 812, 1991), quoted in the "Considerations", 10.

⁹³ *Acosta*, 19 I&N Dec.at 233., as quoted in the "Considerations", 12.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 13. In the *Fatin* case, the court found possible that women in Iran could form a social group based on their gender, but did not find convincing that the claimant would be persecuted solely based on her gender. Other courts were usually combining gendered persecution reasons with other reasons.

Therefore, women could be persecuted or threatened with persecution due to their refusal to comply with the dominant social or legal norms, and not solely because they are women. I emphasize this legal framework in order to outline the space of possible incorrect interpretations, such as an “overwhelming patriarchal culture” as a persecutor even without women’s declared opposition to it, but also to point out how U.S. case law has recently assessed women’s claims.

To conclude, on the one hand, the U.S. guidelines draw on the international definitions and acknowledge international and the Supreme Court recommendations (“The evaluation of gender-based claims must be viewed within the framework provided by existing international human right instruments and the interpretations of these instruments by international organizations.”)⁹⁶ In the opening sentence, the guidelines state that “recent international initiatives have increased awareness and suggested approaches to gender-related asylum claims”.⁹⁷ On the other hand, the U.S. guidelines open a space for different interpretations, i.e. the guidelines’ discourse on the cultural and religious roots of oppression and persecution of women seems to depart from the UNHCR’s language, a step further in its “politics of naming”.⁹⁸

3.3. Analysis of the UNHCR’s “Guidelines on International Protection, Gender-Related Persecution within the Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, 2002

International recommendations for the protection of women, like those emanating from the UNHCR’s and UN’s women forums, conventions and conferences, seem to be relatively cautious when referring to issues of trans-cultural understanding. The UNHCR’s

⁹⁶ Ibid., 2.

⁹⁷ Ibid., 1.

⁹⁸ By “the politics of naming” I refer to the Christine J. Walley’s use of term in her article “Searching for “Voices”: Feminism, Anthropology and the Global Debate over Female Genital Operations,” *Cultural Anthropology* Vol. 12 No. 3. (Aug., 1997): 405-438, where she describes the importance and politics of how we name certain practices, and consequently, whose “voices” are we representing.

1985 Conclusion refers to the bad treatment of refugee women, mainly because asylum officers and the system of protection do not recognize their specific needs.⁹⁹ Therefore, asylum officers need to be educated additionally in order to attain cultural understanding in dealing with culture-related violations of women's rights. The U.S. guidelines, on the contrary, assume a more simplified notion of trans-cultural understanding represented in the list of cruel patriarchal religious or cultural practices. In my reading of the UNHCR's "Guidelines on International Protection, Gender-Related Persecution within the Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", published several years after U.S. guidelines, in 2002, I find that the language produced by the UNHCR is drawing on the approach of earlier UNHCR recommendations and going even further in careful and detailed addressing of varieties and complexities that can be found in women asylum claims, and therefore, this language differs in great deal from that of the U.S. guidelines. I will elaborate this here with a number of concrete examples.

Cross-cultural understanding: The UNHCR 2002 Guidelines seem to have a different approach of "cross-cultural understanding", one that does not include prejudice about gender relations, nor includes generalizing statements on the oppression of women by solely culture or religion. On the contrary, the Guidelines instruct the officers to be fully informed on the complexity of the social context of particular cases:

*It is essential to have both a full picture of the asylum seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin. (emphasis added)*¹⁰⁰

⁹⁹ It is recommended that asylum officers are to be trained in sensitivity "to issues of gender and culture" in order to improve women's protection. Therefore, culture here implies a whole different meaning. 'Conclusion on the International Protection of Refugees', adopted by the Executive Committee of the UNHCR Program, No. 39(k) (39th Session 1985).

¹⁰⁰ The UNHCR, "Guidelines on International Protection, Gender-Related Persecution within the Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", 460.

The Guidelines, further on, suggest restraining from any kind of generalizations about gender: “Making generalizations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked.”¹⁰¹ This can also be understood as recommendation for avoiding any generalization about Third World women and men.

What kind of practices are considered persecutory? The UNHCR Guidelines, compared to the analyzed US guidelines, are much more detailed in explaining the complexity and diversity of gender-related claims. For example, the list of gender related persecution practices is much broader and includes almost all recent types of gender-related claims for both men and women, including sexual violence, family/domestic violence, coercive family planning, female genital mutilation, punishment for transgressing the social mores, and discrimination against homosexuality.¹⁰²

Who is the oppressor/persecutor?: Due to the growing number of asylum cases with gendered claims all over the Western world, the UNHCR Guidelines also broaden up the space in the international protection for women refugees by recognizing the oppression of women at all levels. Most importantly, it recognizes that persecution of women asylum seekers may also take place in the sphere of privacy or household, which is sometimes ignored by government who assesses the claims, but nevertheless, responsibility of the state plays a crucial role even if the state is not the persecutor. Unlike the implications of U.S. guidelines, the Guidelines do not go as far as assuming that the persecution in the sphere of privacy where women are vulnerable and governments fail to intervene is governed by culture/religion as an isolated actor of persecution. For example, the role of the state is much more visible as a responsible party in particular persecution, be it in the private or public sphere:

¹⁰¹ Ibid.

¹⁰² Ibid., 459.

Even though a particular State may have ‘prohibited a persecutory practice’ (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.¹⁰³

Further in the text, the guidelines point out that the agents of persecution could be the state, a lack of state protection, or non-state agents such as local groups or individuals, but, again, in no place is the blame appointed to religious or cultural practices as the sole source of women’s oppression.¹⁰⁴ Moreover, the Guidelines engage in elaborating the complex ties between the state (i.e. state laws and protection) and the cultural/religious codes that differ from case to case but can not be ignored in the assessments:

For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religion and State institutions, laws and doctrines.¹⁰⁵

In this paragraph, the Guidelines refer to different kinds of persecution that women claimants for asylum may experience. Opposing or transgressing the social mores is not limited to renouncement of the religion, but can also include women’s political or religious disagreement with the ruling system and governing structures regarding the dominant belief about gender roles. Secondly, women’s transgressing the social or religious norms is not always perceived as a disobedience to the religious dogmas, but more often as a disobedience to the political regime that integrated religion in its strategies of governing, or disobedience to

¹⁰³ Ibid., 461.

¹⁰⁴ Ibid., 463.

¹⁰⁵ Ibid., 465.

the ethnical, national, kinship group's identity politics and ideology and so on. Culture and religion cannot be singled out as a persecutor, because they are always used by some agents for some much more particular reasons. Overall, the Guidelines not only distinguish between different forms of women's political, social and material oppression, but the agents of persecution are seen as situated in a much more complex and historically shaped structure of their societies.

The complexity and responsibility of the state legal structures in the asylum seekers' society is also emphasized in this paragraph. For example, the state can incorporate parts of religious codes as its own state law or it can appoint religious or other institutions with legal and penal responsibilities (based on non-state produced texts that these institutions judge upon). This kind of "legal pluralism" in heterogeneous state structures can be found in many states, and not only in countries with Sharia law.¹⁰⁶ This level of distinction was missing in the 1995 U.S guidelines.

On what ground are women persecuted? The U.S guidelines were unclear in addressing whether women could be persecuted solely on the ground of their gender, and the development of case law seemed contradictory in different rulings. The UNHCR Guidelines clarify that not all women of a particular society are eligible for refugee status. Persecution, or well-founded fear of being persecuted, has to be proven on account of one of five criteria: race, religion, nationality, membership in a particular social group, or political opinion. Gender related claims may be acknowledged within the criteria: "a membership in a particular social group" – interpreted by the UNHCR as a group of women who transgressed the social mores and are consequently exposed to the (well founded fear of) persecution. A particular social group is a group of individuals with a "shared characteristic other than their risk of

¹⁰⁶ The term "legal pluralism" is used for legal system where except the state law, other cultural, multicultural or religious codes are introduced or exist as legitimate legal texts. Term "heterogeneous state" emphasizes the state that does not exclusively function as unity of its legal and administrative bodies. See for example Boaventura de Suosa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* Vol. 40, No. 1 (2006).

being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, consciousness, or the exercise of one's human rights."¹⁰⁷

In other words, sex/gender can be the characteristic of the social group, but that does not automatically imply that the group is discriminated against. Actually, women as a social group need to have a common characteristic other than their persecution. In order to gain asylum, the claimant needs to prove that she is, firstly, a member of a social group (of women who transgresses the social mores due to their belief), and secondly, that she has been persecuted or have a well-founded fear of the future persecution. In this light the Guidelines clarify that women asylum seekers can have a range of different reasons to claim "gender" asylum, but those claims are based women's conscious and political (in a broader sense of the word) disagreement with practices or ideology of the dominant regime. Therefore, the emphasis is on the women's choice not to comply with certain social forms, and not on an oppressive man-only "culture" or "religion" that women renounce since it is alien to them.

3.5. Gender asylum case law

The U.S courts ruled in favor of asylum claims based on gender as reason of persecution for the first time in 1996, in the case of *Kassindja*.¹⁰⁸ The U.S. asylum officers and appealing courts based their rulings on the UN 1951/1967 definition of refugee, the UNHCR guidelines and recommendations and, finally, on the previously mentioned 1995 U.S. guidelines. The recognition of gender as a category at the U.S courts was also influenced by the advocates lobbying within different spheres of refugee law. The first relevant breakthrough is considered to be the recognition of persecution conducted in the private

¹⁰⁷ Ibid., 465.

¹⁰⁸ Matter of Kassindja, 21 I. & N. Dec.357, 361 (BIA, 1996)

sphere, and therefore, changing the exclusive public definition of persecution enforced by the state or non-state individuals and groups in public sphere.

Women's persecution does not fit into the UN's 1951 Convention's strict categorization of five reasons for (well-founded fear of) persecution: religion, nationality, race, political opinion, and membership in a social group. Women's claims needed to be recognized as a specific kind of persecution based on these five categories. For example, the *Fatin* case was the first where a U.S. appeals court broaden up the interpretation of the 'social group', that is, gender was recognized as the bases for persecution. The court ruled that Fatin could be considered a member of the "social group of the upper class Iranian women who supported the Shah of Iran, a group of educated westernized free-thinking individuals."¹⁰⁹ It would be wrong to conclude from this ruling that all women in Iran are eligible for asylum, i.e. that only gender/sex makes a social group whose members are targeted for persecution. Fatin based her claim on a combination of criteria: political and gender persecution. She was a member of a subgroup - women who *oppose* dominant restrictive gender regulations. The court refused her claim because she did not prove that her political (gendered) beliefs were strong enough to be in risk of persecution. Therefore, the court refused her a political asylum, but "women as a social group" had been established as a precedent.

Overall, the definition of persecution was finally expanded by this case in a way that women could form a social group and that gender-based violence was included in the persecutory acts. The 1996 *Kassindja* case was the first case in which asylum was actually granted to a person fleeing from gender-based violence, namely opposing to FGM (female genital mutilation), that presented a well founded fear of persecution on the grounds of membership in a social group. The social group was clearly defined as based on gender/sex and not on race, political opinion or other criteria, but the intention of the asylum seeker to

¹⁰⁹ *Fatin v. INS*, 12 F. 3d 1233, the Third Circuit (1999).

oppose dominant social mores played a crucial role. Kassindja was found a member of the social group of “Togolese young women opposing the practice”.¹¹⁰

At the same time, variety of other claims of women has been refused. *Fatin*’s case, mentioned above, is an example of the court’s failure to recognize women’s specific claims within the asylum law. The various gendered claims of women asylum seekers in different cases were formulated through the criteria of religion persecution (different religious interpretations of gender roles), persecution based on political opinion (different political opinions on gender roles), membership in a family as the bases of persecution (opposing the family gender roles), and so on, and the majority of them were refused.¹¹¹ Let me add that political opinion during the Cold War was considered quite enough for attaining asylum in the U.S., while women’s persecution based on different political beliefs is not seen as credible. Therefore, obviously still male-centered in their interpretations of the asylum law, the courts were discouraging women’s claims.

On the other hand, the gender aspect of their persecution, although leveling down the complexity of different kinds of gendered persecutions to simplified term like “oppression of women in Iran”, was emphasized. For example, in the *Fatin* and *Kassindja* cases, the courts encouraged those claims where gender was the sole factor. In the case of *Fatin*, she was rejected because her political beliefs, that is, her disagreement with the state structures on gender roles and political stands, were found not strong enough, while at the same time the court “was very sympathetic to” women in Iran due to Iran’s harsh and inhumane treatment of females (“the Court is very much sympathetic to the respondent’s desire not to return to Iran, [because] she would be subject to the same discriminatory treatment as all other women in Iran [...]”).¹¹² In the *Kassindja* case, persecution was even stronger described as based only on gender/sexuality. Therefore, women are bound to formulate their claims as fleeing

¹¹⁰ Matter of *Kassindja*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

¹¹¹ For example *Gichen* case or *S-A* case, as cited in Amanda Knief, 7.

¹¹² *Fatin* v. INS, 12 F.3d 1233, the Third Circuit (1993).

from persecution based on gender in such a way that their persecution is seen as oppression of (all) women in the society, and consequently ignored when they formulate their claims based on the political, religious individual disagreements about gender roles. Recently, this trend has persisted and women's asylum claims - formulated as fleeing gender-based persecution in an oppressive surrounding - have been accepted.

Overall, women are structurally disregarded in the male-centered asylum law. On the other hand, women asylum seekers (especially those whose claims were approved and then announced as a great step forward) should also be seen within the restrictive and nationalistic asylum law/system in general. And thirdly, women are also part of a larger group of those underprivileged by the asylum law, because the definition of a social group in the US asylum law has been modeled on, and according to the (privileged) class traits ("former military leadership or landownership") and gender traits (male-centered definitions of persecution) and, therefore, is disadvantageous to many persons in its exclusion of sexuality, ethnicity and gender-specific claims.¹¹³

Finally, the Mohammed case, resolved in 2005, seems a legally logical consequence of the tendencies that I find in the U.S. case law, namely in the way that the court here clearly accepted the asylum claim based on persecution targeting all women in a specific country.

3.6. Analysis of the Mohammed case, 2005

The *Mohammed* case appears to be a result of international and national legal discourse, such as the UNHCR guidelines, U.S. guidelines, and a number of cases that established legal tradition to base the rulings on. It is relevant to look into the way the crucial concepts were elaborated in this court decision, such as "women as a particular social group", "persecution as gender specific", "culture as an actor of persecution of (all) women" and the

¹¹³ For further analysis see Mullins, "Seeking Asylum: Literary Reflections on Sexuality, Ethnicity, and Human Rights".

discourse around “judging cultural practices”. The discourse that is produced in courts, and around the asylum seeking process, cannot be detached from the influence of the advocates representing asylum seekers, that usually come from the human rights or women’s rights NGOs as in the most “celebrated” case of *Kassindja*.¹¹⁴ Therefore, I will examine the discursive framework of these texts: the court descriptions and rulings and the advocates’ formulations of main concepts.

The *Mohammed* case is extremely interesting since it is the first case in which asylum was granted to a woman on the grounds of culturally based persecutory practices, namely FGM, although the “genital operation” was already been performed. Secondly, in this case, the court ruled that Mohammed may be considered as a member of a particular social group, “a group of all women in Somalia”. Thirdly, the court did not address Mohammed as an individual opposing the persecution, nor did it address her different political or other beliefs.

Past persecution as the basis for asylum: Past persecution is an eligible claim for asylum if the claimant proves that “an incident... rise(s) to the level of persecution; that an incident was on account of one of the statutory-protected grounds; and was committed by the government or the forces that government is either unable or unwilling to control.”¹¹⁵ The judge in the *Mohammed* case expressed a strong conviction that “the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law.”¹¹⁶ The court decision further notes that the mutilation of women and girls is “a horrifically brutal procedure”, often performed without anesthesia, that results in long-term physical and psychological consequences.¹¹⁷ Since persecution can be physiological and emotional as well as physical, it constitutes a basis for asylum protection. Additionally, the court ruled in such a way basing its decision on a number of reports and

¹¹⁴ E.g. Karen Musalo, the advocate in the *Kassindja* case, is also a member of the Center for Women and Refugees Studies' (see www.cgrs.com).

¹¹⁵ *Mohammed v. Gonzales*, the Ninth Circuit (March 2005), 3077.

¹¹⁶ *Ibid.*, 3078.

¹¹⁷ *Ibid.*, 3078.

documents (provided by RIC and WHO), stating that this practice causes long-term harm, concluding that further or future mutilations are likely to happen.¹¹⁸

The court's stands on FGM and patriarchal culture of Somalia: The court decided that FGM causes a) long term harm like sterilization¹¹⁹ that causes “an inherent” well founded fear of future persecution because such persons will be persecuted for the rest of their lives;¹²⁰ and b) is “not an isolated act of violence, but rather a form of gender-based persecution, practiced to overcome sexual characteristics of young women, [...] and to control women’s sexuality.”¹²¹

*[FGM] permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life.*¹²²

Even if it is disregarded that FGM presents a possible future persecution like sterilization, the court added:

*[...] government would have some difficulties in establishing that Mohamed would not be subjected to further violence that is related to her past persecution, given the conditions in Somalia.*¹²³

The court continues by saying that the claimant might be further tortured, e.g. she could be raped, additionally mutilated, etc.¹²⁴ The informative reports provided by the RIC for the court made clear that subordination and persecution of women in Somalia are not limited to FGM:

*Women are subordinated systematically in the country’s overwhelming patriarchal culture, and rape is commonly practiced in inter-clan conflicts.*¹²⁵

¹¹⁸ Ibid., 3084.

¹¹⁹ Ibid., 3085. The court explains that, similar to FGM, sterilization “deprived a couple of their natural fruits of conjugal life...”.

¹²⁰ Ibid., 3086.

¹²¹ Ibid., 3083.

¹²² Ibid., 3086.

¹²³ Ibid., 3087.

¹²⁴ Ibid.

¹²⁵ The State Department’s Country Reports cited in the court’s ruling.

That the court recognized the long-term harm of persecutory acts is not a problematic issue, but what comes out clearly from this text - that persecution is embodied in the culture - has a broader meaning. Somalia's "overwhelming patriarchal culture", we are led to conclude, was enough for the court to state that Mohammed suffered horrific oppression and persecution. Conditions in Somalia, a country torn apart by long-lasting local and internationally influenced conflicts, are far from providing individuals or groups with a persecution-free environment but the particularities of these conditions were not addressed in the text. On the contrary, only the country's "patriarchal culture" was strongly emphasized. Even more important, Mohammed testified on a series of persecutory acts towards her family and herself, but she was denied asylum on those grounds as she was not found credible.¹²⁶

The Nine Circuit's judge opened the court's ruling with an extensive description of FGM that was taken from previous court rulings such as the *Kassindja* case. When the court explained the grounds for accepting Mohammed's application, namely that FGM was presented as evidence later in the trial, the judge made an additional explanation of what FGM is considered to be:

*We note that many courts and the BIA [Bureau of Immigration Affairs] refer to the practice at issue here as FGM. We see no need for using the initials rather than the full three word phrase. We are short neither of paper nor of ink. The use of initials, if it has any effect, serves only to dull the senses and minimize the barbaric nature of the practice. The further bureaucratization of the language would serve no useful purpose here.*¹²⁷

What I find interesting at this level of analysis is the change that can be traced from the way UNHCR and U.S. state guidelines address the cultures of asylum seekers. Using the authoritarian pronoun "we" in addressing the (multicultural) American public (and by

¹²⁶ Ibid., 3067.

¹²⁷ Ibid., 3068.

multicultural I refer to the meaning of the court ruling for immigrant communities that practice their native societies' customs), the ruling also functions as a reinforcement of difference between the immigrant communities and the "liberal majority". This text functions as a message similar to that in Okin's article "Is Multiculturalism Bad for Women", namely that immigrant patriarchal cultures need to be assimilated into the less sexist liberal majority or else be penalized and extinct.

The definition of the membership "in a particular social group": Further, I wish to come back to the legal interpretations based on concepts such as social group and persecution, because I think that these interpretations could be seen as parting more and more from how previous cases or UNHCR's legal recommendations interpreted them. According to the previous case, the *Kassindja* case, in which FGM was considered legitimate grounds for asylum, the court based their decision on Mohammed's membership in "a particular social group".

*In this case, there are at least two ways in which the agency could define the social group to which Mohammed belongs. First, it could determine that she was persecuted because of her membership in the social group of young girls in the Benadiri clan.*¹²⁸

Based on the interpretation on *Kassindja* case, the court could have considered her as a member of a particular social group consisting of young girls of her clan that had not yet had FGM, and who *oppose* the practice. But this was not the case with Mohammed. The court explained that it is not mandatory that a person opposes the practice because:

The persecution in this case – the forcible, painful cutting of a female's body parts – is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality. That is, the shared characteristic that

¹²⁸ Ibid., 3081.

*motivates the persecution is not opposition, but that the victims are female in a culture that mutilates the genitalia of its females.*¹²⁹

Additionally, the court proclaimed that the legitimate asylum could be established based on a membership in a group of all Somali females, since 98% of them have been genitally “mutilated”. The court explained further this novelty in the gender-based asylum case law in the following way.¹³⁰

*Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances **females in general**) may constitute a social group is simply a logical application of our law. (emphasis added)*¹³¹

Since sex is an “inherited” characteristic, it makes a person eligible for being a member of a social group. This conclusion does seem logical and is legally supported. What follows, or is implied, is that the social group understood as such, is seen as persecuted homogeneously, and even more interesting, its members are not required to proclaim political, religious or any other opposition to their persecutor. Although the court here refers to the U.S guidelines, the guidelines themselves do not mention that all women of some country, based on their gender as belief and sex as inherited, could constitute a social group that has a well-founded fear of persecution because they are women. To clarify, women can constitute a social group, but their persecution has never been perceived as persecution based on their gender solely. It was crucial for the claim that the oppositional beliefs towards the alleged persecutors regarding gender relations are proven.

In determining who the persecutor was, the court in the Mohammed case stated that the persecution was proved to be enforced by the “culture” itself because the government does

¹²⁹ Ibid.

¹³⁰ In the *Fatin* case, the court ruled that not all women could form a social group that fears persecution. Previously, only the strong opposing beliefs that individuals have could be a bases for constituting a social group of women opposing the practices against their oppressive surroundings.

¹³¹ Ibid.

not allow nor engages in practicing FGM, and there is no identifiable militia or group of people that are the persecutors. Actually, within the context of the court's language, the same women who are the victims of this cultural persecution, i.e. members of the particular social group constituted of all women in Somalia, appear to the agents of "persecution" (in the cases of FGM in some countries the practice is done by women). To perceive the culture as a main persecutor is even more bizarre since Somalia has had a completely dysfunctional governmental structure, for almost a whole decade now, which fails to protect its citizens. The state role is again not addressed properly for regulating the social interactions, or failing to do so.

The roles of advocates and attorneys: An analysis of the advocates' role in this case might give a new angle in determining the factors that have influenced this change in legal interpretations and courts decisions. The court reopened Mohammed's request after ruling that her previous attorney had failed to present evidence that she suffered this great harm in the past.¹³² When she applied for an asylum, Mohamed claimed that she had a well founded fear of persecution on the account of her membership in a Benadiri clan. In the civil war, Mohammed said, her family fled Somalia when her brother and father disappeared, when her sister was raped and when the militia attempted to arrest the rest of her family and clan.¹³³ After fleeing to the U.S. via Ethiopia, she filed a request for asylum that was denied on the grounds of a lack of credibility. After the denial, she hired a new attorney that pleaded for reconsidering the deportation because the claimant feared genital mutilation upon her return. This was the first time FGM was mentioned, and it was obviously done on advice of the attorney. The new claim stated that 98% of Somali women are 'mutilated', that Mohammed had not yet been genitally mutilated and that Mohammed's previous attorney failed to raise this evidence due to negligence. Although Mohammed's physician report stated differently,

¹³² Ibid., 3067.

¹³³ Ibid., 3067.

i.e. that Mohammed was genitally operated on, and although the state attorney argued that the new motion did not prove negligence due to the fact that FGM has not been proved in court practice as a sort of future threat (but only torture in the past), the court ruled in favor of reopening the application, because, as mentioned, FGM obviously presented a past persecution with long lasting consequences. Mohamed stated in her application:

*I then hired a new attorney [...] where I learned that my subjection to female genital mutilation constituted past persecution and torture.*¹³⁴

In the second motion, she stated that she had been mutilated in her childhood, and submitted the evidence for the previous attorney's negligence, together with the medical report and WHO's reports on women's life conditions in Somalia. Her request was denied again by the asylum officers because of failing to prove the negligence. Finally, the Ninth Circuit judges, at the high appealing court for asylum claims, accepted her request and eventually her claim.

The advocates in this case have used both the international and the national legal framework in order to find a way for their claimants to gain asylum status, but in doing so, they have not contributed to the overall expansion of the legal recognition for the complicated context of women's persecution. On the contrary, they have used the "popular" trends in the American national discourse, articulated in the foreign and domestic nationalistic politics, and consequently reformulated the asylum claim of their clients. By doing so, consciously or not, the advocates have reinforced the Western "salvation" policies where FGM, veil and other symbols of "women's oppression" are used as the philanthropic reasons for the humanitarian interventionism.

The media reported on these celebrated cases like *Kassindja* and *Mohammed* mainly from the perspectives of the refugees' advocates and attorneys, and additionally contributed to this politics. National Public Radio issued the report on *Mohammed* case formulated as "all

¹³⁴ Ibid., 3069.

women in Somalia could be found eligible for asylum in the U.S.”.¹³⁵ After the *Kassindja* case was celebrated as the milestone of Third World women’s salvation, together with the advocate Karen Mussalo, the Center for Women and Refugees Studies, and others who published news articles and books, the *Mohammed* case can be seen as further advancement in this trend.

Local women’s human rights activists, especially those working with immigrant women and against FGM, and legal experts usually contributed to this use of asylum for reproducing the difference between the cultures. For example, Catharine Hogan from the “Washington Metropolitan Alliance Against Ritual FGM” stated that they should:

*warn [immigrants] families that we consider this child abuse [...] It is a form of reverse racism not to protect these girls from barbarous practice that rob them for a lifetime of their God-given right to an intact body. (emphasis added)*¹³⁶

The discourse in which the authoritarian “we” should warn the immigrant about what we consider to be “barbarous” and “God given right” seems to be unfortunately similar to the language of the judges in the *Mohammed* case. Although judges in the cases of asylum claims were many times in direct conflict with the feminist activist for refugee rights, as in the case of the notoriously restrictive judge Alito who pushed forward an extremely conservative and restrictive policy in his court room and provoked the criticism of women’s and human rights advocates, in this case judges and some feminist advocates seem to have a similar agenda.¹³⁷ Additionally, as mentioned, the ruling of judge Samuel Alito in the *Fatin* case presents the first legal acceptance of the interpretation of gender as constitutive of a “particular social group”.

¹³⁵ National Public Radio, <http://www.npr.org/templates/story/story.php?storyId=4531744> (last accessed on May 21st, 2007)

¹³⁶ As quoted in Ellen Gruenbaum, *The Female Circumcision Controversy* (Philadelphia: University of Pennsylvania Press, 2001), 218.

¹³⁷ See report in San Francisco Chronicle on Judge Samuel Alito's ruling in the case of Fatin on <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/11/20/MNGMJFRADU1.DTL> (last accessed on May 30th, 2007).

Canadian advocate and activist for women refugees Sherene Razac has stated that asylum claims work if women are “able to present themselves as victims of dysfunctional, unusually patriarchal cultures and states.”¹³⁸ This “humanist” and “philanthropist” approach, linguistically voiced in the authoritarian and distancing “we” pronoun, opens up several difficulties for the protection of women in asylum law, and for Western feminism embodied in American nationalism. Firstly, it does not critically address the restrictive, classist, male-centered and culturalist U.S. asylum law in which women, accepted on basis of their “unusually patriarchal” cultures, are waved as a flag of American freedom ideology. Grewal finds this asylum policy best represented by the imposed metaphor of transition from “unfreedom to freedom”, in which the American nation is imagined as the “pick” of human rights development.¹³⁹ Secondly, it does not critically address the complex and disadvantageous position that women asylum seekers are actually living, and with *Mohammed* as the best example. Mohammed testified in the court on a whole range of disastrous events and torture that she and her family went through, but until her advocates “reviled” her case as the circumcised Hottentot Venus exhibited to the audience, she was not found “credible”. Her case, a success story of “salvation”, masks both the conservative U.S. asylum law and shows there is no interest to address material or discursive/representative oppression of women in the Third World. I see the discourse produced in these court rulings, in their use of terms such as women’s oppression, culture, religion, state to be underpinned by the discourse of colonial mapping.¹⁴⁰ As soon as the space is described and marked as culturally patriarchal, oppressive, and in a way dystopian, the role of women is used to fit this mapping as their

¹³⁸ Sherene Razack, “Domestic Violence and Gender Persecution”, as quoted in Inderpal Grewal, “On the New Global Feminism and the Family of Nations: Dilemmas of Transnational Feminist Practices” in E. Shohat, *Talking Visions* (New York: New Museum of Contemporary Art, 2000), 501-506.

¹³⁹ Grewal, “On the New Global Feminism and the Family of Nations: Dilemmas of Transnational Feminist Practices”, 517.

¹⁴⁰ Mapping as a tool of colonial rule was discussed by many scholars such as Benedict Anderson, but further use of this term was developed in the postcolonial theory, and also by the feminist and nationalism scholars, such as Susan Bordo and others. See for example Meghena V. Nayak, “The Orientalism of Mapping Bodies and Borders: Postcolonial (In)Security and Feminist Contentions on the India Pakistan Border”.

bodies are signs for the cartographer. Their bodies are described as mutilated and victimized, and stretched through these legal texts as markers of this mapping. In this scenario, some women find their initiative and realization of their agency through the silenced and “victimized” *other* women in the developmentalist image of the world and history.

Conclusion

In this thesis, I have dealt with recent development in the refugee law towards gender-inclusive and women-sensitive interpretations by analyzing the UNHCR Guidelines, the U.S. national guidelines for asylum officers and the text of actual court cases at the U.S. court of appeals. I asked how did the texts I analyze address the protection of women refugees fleeing from gendered violence, and how the vocabulary of these texts differs due to the different contexts they are embedded in.

I found that the international protection of women in asylum law – the UNHCR 2002 Guidelines – has been addressing the multiple reasons of women’s oppression as refugees in a much more careful and complex way than the U.S. legal texts that I analyzed; the latter are embedded in a different discourse in which women are presented as symbolic markers of human rights violations in the Third World countries. Therefore, my specific findings are that international law, governmental organizations and liberal women’s human rights NGO’s shaped the (international and national) legal protection of (women) asylum seekers in such a way that, once applied in the pragmatic level of the court room such as in the U.S. case law, it:

- 1) reproduces global inequalities with its representations of “Third World” women and their culture; specifically it reproduces the colonial discourse about Western cultural superiority and gender equality in the West, and the concomitant need to save Third World women from their backward cultures with their inherent violence;

- 2) uses women asylum seekers fleeing violence by instrumentalizing them for broader political purposes

- 3) covers up still restrictive and racist Western asylum politics towards immigrants.

These finding I will further elaborate below.

1. In my analysis of the textual politics that have pushed the gender asylum claims to the forefront – with an unreflexive strategy of referring to a “global” and “overall” women’s oppression – I found that the actual claims women make are much more complex and structural than the courts have addressed. Their multiple material and discursive oppressions have been silenced, and instead “culture” has been given the role of their single or primary oppressor. The introduction of gender and its subsequent application in the American appeal courts have been celebrated by human rights and women’s rights activists and scholars, but as I showed, it is not enough to introduce gender into the system of refugee protection, if gender is used there as a monolithic and universal category. My analysis of the U.S. guidelines and asylum court decisions thus shows that women’s oppression has been addressed in such a way that it reproduces the colonial discourse of the free and enlightened West versus the backward and oppressive Third World and/or its (violent) “cultures”.

2. Further on, I showed how women asylum seekers fleeing Third World countries in some recent cases could be seen as being *instrumentalized*, similarly to the anti-communist dissidents and refugees of an earlier era, for political or neo-colonial purposes, while (most important for the asylum seekers) the restrictive system of asylum politics has not been radically changed. For this finding, I find an additional supportive argument in the recent criticism coming from the academic right and opposing the gender asylum. Claiming that asylum is “a political refuge for those seeking positive change in their countries of origin and not the resettlement policy for populations fleeing backward cultural and civil norms”,¹⁴¹ Dan Stain opposes the gender asylum because it does not send the message of the Western authoritarian “we” to the specific countries. In my thesis I argued that gender asylum has been unfortunately used exactly for these purposes. Especially in the highly politicized context (with widespread anti-Muslim rhetoric) of post-September 11, we have to be aware of the

¹⁴¹ See Dan Stein, “Gender Asylum Reflects Mistaken Priorities”, *The Human Rights Brief*, The Center for Human Rights and Humanitarian Law, Washington Collage of Law, <http://www.wcl.american.edu/hrbrief/v3i3/stein33.htm>. (last accessed on May 30th, 2007)

instrumentalizing approach towards the concept of gender asylum by nationalistic ideologies, such as the use of Third World women for political purposes.¹⁴²

3. My third finding regards the masking of the restrictive nature of Western asylum policies. Women asylum seekers from all around the world, as well as men, have been denied asylum, and put into a dangerous position in cases of deportation because their claims were not found “credible”, while at the same time (the few) accepted asylum claims that were sending a message about “the barbaric” Muslim and African cultures, oppressive to women, were celebrated as showing the willingness of “advanced societies” to save Others – the old philanthropic discourse. The restrictive asylum policies of the Western countries are a crucially important factor in the international protection of women refugees, and should be addressed by feminist refugee advocates as loudly as the “overwhelming” patriarchal oppression of women in the Third World. Taking into account the earlier mentioned Croatian case as an excellent example of an extremely restrictive asylum policy, I see even more clearly that the Western framed restrictive asylum policies have less to do with the moral and humanistic protection of individuals who, in many cases, have lost the dignity and polity in their home countries – whereas the latter is, according to Hanna Arendt, an essence of our humanity¹⁴³ - and have more to do with politics of international inequalities and colonial discursive practices produced by the dominant Western cultures in which gender asylum has gained new implications.

To conclude, I have criticized the contemporary U.S discourse on gender asylum from a broader perspective, in order to outline what I see as the challenges and pitfalls for scholarly and activist politics working on the improvement of women asylum seekers’ protection. In

¹⁴² See for example Inderpal Grewal, “On the New Global Feminism and the Family of Nations: Dilemmas of Transnational Feminist Practices” in E. Shohat, *Talking Visions* (New York: New Museum of Contemporary Art, 2000), 501-506.

¹⁴³ “Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as men, his human dignity. Only the loss of a polity itself expels him from humanity.” Hanna Arendt, *The Origins of Totalitarianism*, 1951, as quoted in M. Gibney, “The Ethics and Politics of Asylum”, 1.

order to achieve more reflective politics in the name of asylum seekers, politics that address the global and “scattered” hegemonic structures as the root of oppression and consequently these women’s persecution, and are also able to name the concrete persecutory agents and acts without culturalist generalizations, it is necessary to critically oppose any politics or discursive and material practices that reproduce the binary of developed and undeveloped cultures or advanced and backward societies, and impose the notion of hierarchical “difference”. For example, as I proposed in chapter 2 (p. 25-26, 28-29) and 3 (p. 48-50) one possible approach for the advocates of women asylum seekers is to address the restrictive Western asylum politics within the context of unequally distributed global divide that restrictive asylum politics supports and reproduces. Another possible suggestion for a more just asylum politics is that asylum policies should themselves recognize and encourage the judges and officers to recognize a variety of women’s claims as asylum seekers, without neglecting women’s agency in their claims. In other words, women flee gendered violence because they oppose the hegemonic systems of dominance in their surroundings for political, religious or for any other reason. This dissident and active aspect of the gender asylum should not be taken away, especially not by feminist advocates.

With respect to further research, I hope that the kind of critical discourse analysis that I have done here, which starts by researching the historical background of certain texts and questioning the legacies of these histories, and subsequently tries to connect these historical findings to the terms and concepts used in contemporary legal texts, will also be applied to other contexts, such as the European asylum guidelines, and/or specific asylum cases in Europe.

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