

# **GENDER VIOLENCE AND THE RIGHT TO ASYLUM: IMPLICATIONS OF GENDER STEREOTYPING IN REFUGEE STATUS DETERMINATION**

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## Abstract

The drafting of the United Nations 1951 Convention Relating to the Status of Refugees and the 1967 Protocol laid the groundwork for the protection of individuals fleeing persecution in their home countries. The unstable nature of the geopolitical landscape encourages consistent monitoring of trends in refugee movement and asylum decisions. The past twenty years have produced an extensive body of work reflecting the need for reinterpretation of the Refugee Convention in response to the increase in asylum claims regarding gender related persecution. Subsequently, many member states have produced specific guidelines to assist in determining claims of gender related persecution. In addition to the current body of work on this topic, I argue the necessity of acknowledging and deconstructing gender assumptions surrounding violence, emotion and experiences of fear within countries of asylum. This thesis demonstrates the implications of these gender assumptions on the refugee status determination process through the analysis of current refugee jurisprudence and case law.

## Acknowledgements

*Someday, the light will shine like a sun through my skin & they will say, 'What have you done with your life?' & though there are many moments I think I will remember, in the end, I will be proud to say, I was one of us.—Brian Andreas*

The courage and endurance to succeed in all my endeavors, whether it be finding the perfect pair of shoes or running a marathon, comes not only from within myself but from all those around me. The writing of this thesis was no different and at some points *all* my courage and endurance came from those special individuals surrounding me. I would especially like to thank my supervisor Allaine Cerwonka, who provided me guidance and support through the constant evolution of this project. Without her patience and constant smile, I would have suffered many more nervous breakdowns. I would like to extend gratitude to my friend and colleague Jules, who was always there to provide a hug, a shoulder, mashed potatoes or a laugh just when I needed it most. Special thanks to Jeanne Hamilton-Bick who lent an ear and support while pounding the track around Margit Sziget with me and to all my dear friends from Central European University.

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through their eyes educated me on the extent to which cruelty exists in the world but more importantly, the true nature of hope and strength of spirit. I wish them continued courage and will always remember the wonderful sound of their laughter.

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## Introduction

So often the world sits idly by, watching ethnic conflicts flare up, as if these were mere entertainment rather than human beings whose lives are being destroyed. Shouldn't the existence of even one single refugee be a cause for alarm throughout the world?

-- Urkhan Alakbarov

In the geo-political landscape of the 21<sup>st</sup> century, the number of individuals fleeing their country of origin continues to rise and the plight of the refugee has received considerable media attention portraying images of Iraqis fleeing to Syria, Afghanis to Pakistan, and millions of peoples displaced as a result of ethnic conflict in Darfur and Somalia. At the same time the world is experiencing an ever increasing number of asylum seekers, states are tightening their borders against illegal immigrants and economic opportunists. Current discourse on refugee law and process focuses extensively on how states are reconciling the obligation to offer protection to those persecuted by their countries of origin while simultaneously preventing the influx of thousands of others deemed undeserving of admission.

Though these images garner sympathy from those exposed to their plight, most of the general public is uninformed about what happens to those faces when they arrive in a country of asylum. As an example, when I began to visit refugee camps in Hungary, the response from many friends and colleagues, including those native to Hungary was surprise at the existence of refugee camps in the country despite their close proximity. The mindset seems to be that a refugee is the face staring out from the television screen or cover of National Geographic, not sitting next to you on the tram or behind you in line at the market.

Overwhelmingly, the image of the refugee is dominated by the faces of women and children; in fact, it has been widely documented that this demographic makes up 80 percent of the world's refugees. My original research interest was in the specific experiences of refugee women in the camps and during the asylum process.

However, as I began to read about statistics, country reports, and case law I found an overwhelming amount of discourse regarding gender related persecution and its controversial approach by states of asylum.<sup>1</sup> Intrigued, I decided to change my investigation from the experience of the refugee woman to the construction of the female fleeing gender related persecution in the eyes of the law.

Through the review of literature, official directives, and analysis of cases in refugee law, I encountered frequent reference to the need for re-interpretation of the Refugee Convention in order to more widely encompass gender related persecution and other specific experiences of women. The UNHCR and other member states have begun to establish specific guidelines on recognizing gender related persecution as well as the introduction of gender sensitive training for decision makers. While this work has extremely important implications on moving toward a gender equitable opportunity for men and women seeking asylum, I argue that a fundamental issue has been overlooked.

Within countries of asylum, there exist stereotypes and gender assumptions regarding acts of violence against women. Indeed, the United Nations Development Program has concluded that no country treats its women as it treats its men. Ibhawoh (2003) posits, “given that every country discriminates against women, how will the line be drawn between ‘mere’ discrimination and discrimination so ‘severe’ that it amounts to persecution” (p.73)? The implication is that gender inequality, particularly with regards to violence against women, is not isolated to those “third world” countries committing human rights violations to the extent to qualify as persecution.

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<sup>1</sup> According to the UNHCR *Guidelines on International Protection: Gender-related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, gender related persecution has no legal meaning per se. However, Crawley (2001) defined it to refer to “the experiences of women who are persecuted *because* they are women, ie because of their identity and status as women” (p.7).

In highly developed countries such as the United States and Canada, victims of gender violence face many barriers in having their experiences brought into the public eye, with an even lesser chance of receiving justice. The judicial system, as well as the general public, has historically used the dichotomy of the public and private spheres to limit involvement in gender violence. Feminist critique of refugee law has targeted this same dichotomy as problematic in the asylum process for victims of gender related persecution. Additionally, the same gendered notions of emotion and rationality affecting the outcome of gender violence claims in the West become issues in decisions on gender related persecution. I argue that the denial of gender related asylum claims is not simply a result of misinterpretation or lack of inclusion in the definition of a refugee. Rather, there are deep seeded gender assumptions at work that must be addressed outside of the refugee context, as well as within.

I began this introduction by presenting the dilemma facing states when presented with an obligation to provide protection to valid refugees and the pressure of tightening borders. It cannot be denied that the large movements of refugees present a problem in the global landscape and states are not wrong to worry about an influx of large numbers of asylum seekers. However, I present the argument that the ambiguity of gender related persecution within the Refugee Convention provides an opportune place for denial of asylum claims in greater number than ‘traditional’ asylum claims, actively discriminating against women.

In the first chapter, I will describe the evolution of this project through a discussion of my methodology. This will be followed by section addressing the recent scholarly work and movements in refugee law relating to women’s asylum claims by situating the current discourse around gender related persecution in the historical context of the Refugee



Convention. Next, I will provide an overview of current issues facing asylum seekers such as problems of credibility and production of evidence. Chapters three and four will contain the analysis of my findings as I will situate the existing knowledge into a context of deeply embedded assumptions and attitudes surrounding gender violence in Western (developed) countries of asylum by focusing on the public/private divide, emotional expectations, and gendered notions of rationality. Of notable interest is the willing adoption of gender guidelines in Western countries who have not yet achieved full recognition of gender violence within their own courtrooms. Finally, I will conclude with a discussion of the implications of my research in the area of gender related persecution and additional questions left unanswered due to limitations of my own project. My thesis is based on the belief that women will not be treated as equals on the refugee playing field until the gender biases in Western countries of asylum have been fully addressed.

## Chapter 1: Methodology

Taking a feminist approach to research and methodology has been defined by Stanley and Wise (1990) as being focused on women, performed by women and is political in nature with a goal of improving women's lives. Tickner (2005) expands upon these ideas and recognizes four methodological guidelines for a feminist research perspective: personal concern with the research question; conducting research that is useful to women and less biased than conventional research; reflexivity and subjectivity of the researcher; and commitment to knowledge as emancipation. These four guidelines helped shape all stages of my research project, from an examination of the purpose of research topic and its place in existing literature to analysis of the results. In terms of methodology, frame works have progressed from purely quantitative of qualitative methods to mixed model studies. For the purpose of my research, a pragmatic approach to data collection was the most effective as it is based on the belief of the researcher that the question is more important than the method used, thus enabling any method to be implemented at any time in the research process (Tashakkori & Teddlie, 1998).

Initially, the chosen methodology for this project was ethnographic research in combination with case study and interviews. My plan was to spend time in two refugee camps in Budapest, Hungary observing and interviewing women waiting for decisions on their asylum claims. In addition, I aimed to interview social workers and lawyers with regards to issues they had encountered in terms of proving gender related persecution. I obtained an internship with the Cordelia Foundation in Budapest, an agency committed to the treatment of victims of torture and regularly visited the camps with their psychiatrists and social workers, where I was able to learn about their work in addition to having opportunities to interact with the residents. Upon introduction to the refugee population, I immediately

encountered a large hurdle. Beyond a language barrier (for which few interpreters were available), many of the women were far too traumatized by their experiences to participate in interviews outside of their work with the psychiatrists treating them. Conducting my research would run the risk of re-traumatizing the refugee women and violate ethical considerations. I continued to visit the camps with the Cordelia Foundation and spent time getting to know the refugees, listening to their stories, and understanding their situations on a personal level. However, while the experiences in the refugee camps gave me insight into daily life of an asylum seeker, for the purpose of my project it was necessary to change my approach from ethnographic research to interviewing and case law analysis. Importantly, being in the camps gave me the ability to read case law and literature with a more humanistic approach and an understanding of ‘the refugee’ outside of her political and legal identity.

In order to access all the necessary research material, I applied for and received a research grant from the Gender Studies Department at Central European University for the purpose of traveling to the United Nations Headquarters in Geneva, Switzerland. At the United Nations, I received access to the library holdings of the UNHCR. In addition to the most current information regarding refugee status and asylum procedure, I received training guidelines and techniques for assessing refugee claims involving gender related persecution. Online databases gave me access to current case law on refugees and gender related persecution.

Once I acquired a large amount of literature, my first task was to review the United Nations’ current policies, directives and definitions regarding refugee status. This included UNHCR’s suggestions for the interpretation of the Refugee Convention and detailed guidelines regarding the specific analysis of gender related persecution. Feminist critiques of refugee law, debates over the inclusion of gender related persecution into the grounds set out in the Refugee Convention, and review of influential asylum decisions provided a starting

point for the implementation of additional research strategies while also helping identify gaps in the research. By identifying the existing body of work on this topic, I was able to further focus my research questions on current questions and issues surrounding gender relating persecution. In what areas has the existing research failed to investigate or what additional questions haven't been addressed? My conclusions and questions following the literature review shaped my methodology and research tools for the remainder of the project which became a focus on existing case law concerning gender related persecution. My project evolved from existing within the realms of refugee work to encompass feminist ideologies and gender assumptions reflected in the outcomes of female asylum claims.

Legal research has been defined as “the process of finding the law that governs and activity and materials explain or analyze that law” (Cohen & Olsen, 2000, p.1). My goal in obtaining a compilation of case law on refugee status decisions was to detect patterns and themes present throughout decisions on asylum claims for gender related persecution. Though I was primarily searching for the justifications given by the courts for denial of status, it was also important to note the characteristics of what made a case more likely to receive a positive decision. I encountered an additional problem at this point in my research, as cases with negative decisions were difficult to find because they were typically unpublished. Therefore, my sample of denied asylum claims was taken from particular country databases which provided a list of all decisions regarding refugee cases. The countries with the largest number of accessible cases were Australia, Canada, The Netherlands, United Kingdom, and the United States. Although this sample may have limited my results, these countries are also the most relevant to the purpose of my research: demonstrating the link between underlying gender assumptions in Western countries and gender related persecution claims in those countries.

In addition to analysis of current case law, I conducted personal interviews with refugee advocates and lawyers. The participants were psychiatrists and psychologists from the Cordelia Foundation working with refugee victims of torture, the director of the Menedek Migration Center in Budapest, Hungary, and lawyers and advocates from the Hungarian Helsinki Committee in Budapest, Hungary. Through these interviews I was able to corroborate my findings of consistent themes and patterns in refugee status decisions in cases of gender related persecution. In order to reciprocate the assistance from the Cordelia Foundation, I have agreed to assist with their preparations for the International Day against Torture to be held on June 26, 2008. Stories of torture and persecution brought up strong emotions of anger and sadness during my research. However, this does not imply that my feelings affected my research in a negative way. In regards to her work during the Bosnian War, Beverly Allen (1996) suggests, “sometimes it is necessary to feel terrible in order to remain sane. Then you must act” (p. 38). By monitoring my own emotions regarding uncomfortable circumstances I heard about and embracing them, I could use them as a means to continue my work. My hope for this project is that it will contribute, if only in a small way, to a greater acknowledgement of the flaws in the refugee asylum process and perhaps assist in improving the situation of women seeking safety from gender related persecution.

## Chapter 2: Situating Gender in the Current Discourse on Refugee Law and Process

### 2.1 A Brief History

The United Nations High Commissioner for Refugees (UNHCR) was established in 1950 by the General Assembly of the United Nations in response to the large number of displaced persons post World War II and the subsequent Cold War. The purpose of its creation was to draft and sign the United Nations 1951 Convention Relating to the Status of Refugees, hereafter referred to as Refugee Convention. Because the original Refugee Convention was limited to individuals who became displaced as a result of events occurring before January 1, 1951 (also referring to those events which occurred in Europe), a 1967 Protocol to the Convention applied the refugee definition without the limitation of time or geographic location. According to an introduction to Resolution 2198(XXI) adopted by the United Nations General Assembly, “By its statute, the Office of the High Commissioner is entrusted, *inter alia*, with the task of promoting international instruments for the protection of refugees, and supervising their application” (2007).

According to Article 1(A) of the Refugee Convention, a refugee is defined as a person whom:

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

Because the drafters of the original Refugee Convention failed to provide guidelines on the application of the definition, current critique of refugee law focuses extensively on the ways in which this definition is interpreted and applied in the context of asylum claims. Half a century after the establishment of UNHCR, the global political climate and the refugee

landscape are in constant flux with fewer states willing to open their borders to immigrants, regardless of reasons for entering the country. Because the ambiguity of the refugee definition allows states to openly interpret who qualifies as a refugee, asylum decisions are increasingly criticized as being arbitrary or politically motivated.

Among the areas in which the definition is deemed particularly exclusionary are asylum cases based upon gender related persecution. In the Refugee Convention, gender is not included as a valid ground for persecution. Ironically, at the 1951 Refugee Convention a Yugoslav delegate suggested that sex should be included in the stipulation that the Convention shall be applied “without discrimination as to race, religion or country of origin” (Spijkerboer, 2000, p.1). His suggestion was unanimously rejected. Therefore, women subjected to acts such as genital mutilation, infanticide, forced marriage, spousal abuse, sexual assault, and dowry-related murders which are inflicted upon women because they are women must “show the link between gender, the feared abuse, and one or more of the grounds listed in the definition of a refugee” (Laviolette, 2007, p.173). Beyond the recognition of gender violence as legitimate persecution, or perhaps to increase it, it is necessary to break down assumptions and stereotypes which work to keep it outside the public view.

The first International Consultation on Refugee Women was held in Geneva in November of 1988 with the purpose of providing a forum where female specific refugee problems could be addressed (Kelley, 2001). The Platform for Action adopted at the Beijing Fourth World Conference on Women in 1995, which called upon states to recognize as refugees women with persecutory claims was followed by the Executive Committee of the High Commissioner’s Programme acknowledgement that:

in accordance with the principle that women’s rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution enumerated in the 1951 Convention and

1967 Protocol, including persecution through sexual violence or gender-related persecution. (UNHCR, 1993)

Following these acknowledgements of gender related persecution, UNHCR and several Convention member states such as Australia, Canada and the United States established guidelines on analyzing and interpreting gender related asylum claims. In light of these events, it cannot be denied that progress has been made on the inclusion of gender related persecution into the refugee definition. However, feminist scholars, activists, and refugee law professionals continue to work diligently as they attempt to further dismantle the male-centric definition in order to encompass a greater number of valid claims of gender related persecution.

## ***2.2 Linking Gender Violence to Persecution***

Though no specific definition has been established, Hathaway (1991) has stated “a well founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of harm in which the government cannot or will not prevent” (p.103). He further suggests that persecution occurs when serious harm exists in connection with the failure of state protection in addition to harm inflicted directly by the state. Specific actions such as detention, severe beatings, electric shock and other forms of torture or ill treatment have widely been accepted as persecutory, while harm specific to women, such as sexual assault, has not so easily gained recognition (Kelley, 2001). Spijkerboer (1994) has further noted that sexual violence is the only form of torture which is ever questioned as attributable to the state, implying that it must have a function apart from the purpose of punishment or abuse. Though it is accepted that women can be seeking asylum for the exact nature of persecution as men, problems arise when the *act* of violence is gender



related, such as sexual assault. Furthermore, connecting the harm feared to the state adds a considerable challenge when determining gender based violence as persecution.

Early feminist critics of the Refugee Convention suggested that women's experiences of persecution are largely ignored because "the key criteria for being a refugee are drawn primarily from the realm of public sphere activity dominated by men" and the "definition of persecution which acknowledges the feminist theory of social bifurcation: that society is divided into public and private spheres of activity; that the public sphere is male dominated and women are relegated to the private sphere" (Greatbach, 1989, p.518). Nearly twenty years later, feminists are still voicing concerns regarding failure of host state policies to recognize the lack of government protection from violence as gender-based persecution primarily because gender violence often occurs in the private sphere, rather than at the direct hands of the state (Boyd, 1999). For example, the Board of Immigration Appeals in the United States held that a Guatemalan woman who had experienced violence at the hands of her husband was not a refugee under the Convention definition because it was deemed a private matter, despite the fact that Guatemalan authorities failed to provide her with adequate protection or intervention (Martin, 2004). The court neglected to acknowledge that, even though the state did not directly commit the act of violence, they effectively condoned it by refusing protection.

Spijkerboer (1994) and Crawley (2001) have suggested four different methods useful to effectively demonstrate a causal link between gender violence and the state: if the assault was committed by the authorities or by organizations informally related to them; if the assault has been committed by others and the authorities are *unwilling* to give protection because they support or tolerate the actions; if the assault has been committed by others and the authorities are *unable* to give effective protection; or if the assault has been committed by

others and it is theoretically conceivable that authorities could provided protection but the woman concerned cannot reasonably be expected to turn to the authorities. Though these guidelines appear clearly delineated, states continue to argue that sexual assault remains in the private sphere as an act by a specific individual out of sexual need, rather than a violent act perpetrated specifically against women. The rape myth of sexual assault as a crime of sex rather than of power in addition to the idea that the burden of proof in demonstrating the lack of state protection falls upon the claimant will be discussed in a later section of the thesis.

After being exposed to acts of gender violence, women often face barriers to seeking out help from the authorities. Though Hathaway (1991) has interpreted the state connection issue such that there is “no failure of state protection where the government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming,” critics have argued the assessment of when a person could reasonable be expected to turn to the authorities (p.130). For example, “one could not reasonably expect a woman to seek state protection if there are reasons to believe that she will become a victim of violence again, this time at the hands of the police” (Spijkerboer, 1994, p.24). Consider the situation of women living under Islamic law where rape is often viewed as adultery on the part of the woman who can then be punished or killed by the authorities. For a host country to deem her incredible for failing to seek state protection would be unreasonable in light of the circumstances in her country of origin. Haines (2003) suggests the proper approach to the question of state protection is to inquire whether the protection of the state will reduce the risk of serious harm. To this end, information about country of origin is necessary though not always accessed nor required.

In order to assist states in identifying what constitutes persecution, other human rights instruments, such as the 1948 Universal Declaration of Human Rights and the 1979 Convention on the Elimination of All Forms of Discrimination against Women may be

implemented. These instruments have aided the international community in recognizing significant gender specific acts such as female genital mutilation, bride burning, sexual assault, and domestic violence as valid forms of persecution. However, once an act has been recognized as persecutory, it becomes necessary to prove a connection of the persecution to one of the accepted grounds under the Refugee Convention definition, which requires the fear of persecution to exist *for reasons of* race, religion, nationality, member of a particular social group or political opinion.

As Crawley (2001) enumerates, the “main problem facing women as asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds [and] in interpreting the Refugee Convention, decision makers have largely failed to recognize the political nature of seemingly private acts of harm to women” (p. 35). The default image of the refugee as male, intellectual and politically deviant does little to encourage or allow for the inclusion of women under the Convention grounds. Many reasons have been cited for this discrepancy, most of which involve the occurrence of women’s persecution within the private sphere versus the highly visual public persecution of men by the state. For example, expression of a political opinion in a conventional way typically occurs in the public arena, such as affiliation with a political party. In many countries, women rarely have access to public expression of a political opinion but are able to resist using other methods. As Spijkerboer (1994) illustrates:

Private talk in itself can be subversive, and therefore a political act...In the context of refugee law, cooking will normally be a private act and therefore irrelevant. This may change however if the food is given to a political opponent of the authorities, or if the cooking is done communally by relatives of “disappeared” persons. There is political talk and private talk- as we know. But there is also private cooking and political cooking. (p.56)

However, convincing decision makers of the possibility of “political cooking” proves to be a daunting task. Throughout the majority of societies across the globe, cooking and the kitchen is largely regulated to the private sphere. Bringing cooking into the

public, much less political, environment requires a reformulation of the nature of domestic work. The Refugee Women's Resource Project in the UK has described similar cases such as that of a Ghanaian woman:

...who attended rallies and meetings, and subsequently supported an opposition party by sewing flags and clothes for the supporters. She was detained for her actions and raped by police officers in detention. Despite this experience the adjudicator at her appeal dismissed her political participation as 'very low level.' (Bohmer & Shuman, 2008, p.226)

The implication of the court decision in this particular case illustrates the neglect of adjudicators to recognize women's work in the traditional private sphere as political acts, preventing access to a positive decision of refugee status.

In cases of gender related persecution for reasons of race, religion or nationality, claimants come across the same problematic division of the assumptions of gender violence as private acts. For example, in cases of rape during ethnic conflict, decision makers have argued that the sexual assault is a result of the climate of warfare irregardless of whether a group of women of a specific ethnicity or nationality are targeted. In 1998, a Netherlands court refused to grant asylum to several Tamil women who feared becoming victims of sexual violence by the IPKF in Sri Lanka. The court ruled that a well-founded fear of persecution in the sense of the Refugee Convention did not exist because "a risk of rape in a country where, as a result of domestic unrest, two armies are active does not constitute persecution (Spijkerboer, 2000, p.125). Gender related persecution for reasons of religion have been somewhat more successful in refugee asylum cases. Most notably, women fleeing Islamic countries due to a fear of persecution for disagreeing with religious rules have been recognized as valid refugees in international refugee jurisprudence.<sup>2</sup> Despite these successes,

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<sup>2</sup> Steiner (2003) suggests that "granting asylum to a refugee is an explicit critique of another state's treatment of its citizens, so states are often quick to accept refugees from foes, but hesitant to accept them from friends" (p.180). In the years of the Cold War, those fleeing the Soviet Union were far more likely to be granted asylum than those fleeing those regimes supported by the US (Bohmer & Shuman, 2008). . Boswell (2005) suggests "the West was only too pleased to demonstrate the superiority of the capitalist system through welcoming these

courts more frequently accept claims based on membership of a social group rather than one of the other four grounds set forth in the convention.

In order to prove asylum claims, refugee lawyers and advocates often attempt to demonstrate that some forms of gender related persecution are a result of “membership in a particular social group.” Though the drafters of the Refugee Convention did not expand on what constitutes a social group, it has been generally defined as a group defined by some innate or unchangeable characteristic of its members apart from the persecutory act. Although a significant body of work has been developed to assist decision makers in the interpretation of a social group, the inclusion of certain groups of women seeking asylum on the basis of group membership remains widely interpreted.

In 2001, an expert roundtable on gender-related persecution organized by UNHCR found that “it follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by immutable characteristics, and who are frequently treated differently than men” (para.2). Spijkerboer (1994) argues that simply being a woman is not sufficient to qualify as a member of a social group, but that some other characteristic must exist. Hathaway (1991) points to the example of ‘single women living in a Moslem country without the protection of a male relative’ as a cognizant social group while others are even more specific; at the *United States Department of Justice Board of Immigration Appeals In Re: Fauziya Kasinga*, it was determined that Kasinga suffered persecution for reasons of membership in the particular social group, “women of the Tchamba-Kunsuntu Tribe of Northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice.”<sup>3</sup> It has been reasoned that states strive to narrow the boundaries of the group as much as possible in order to limit a

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victims of oppression” (p.29). Based on these observations, the current “War on Terror” involving primarily Islamic states could be reflected in the acceptance of refugees from those countries

<sup>3</sup> See 21 I. & N. Dec. 357, Interim Decision (BIA) 3278, 1996 WL 379826 (BIA) in *Westlaw*

flooding of asylum seekers, such as all women at risk of FGM into the host country (Bohmer & Shuman, 2008).

The extent to which the particular social group is so narrowly defined reveals the use of gender related persecution to limit the influx of refugees. Should jurisprudence be established such that a precedent for claims of persecution for all women facing a threat of FGM be put into place, it could be logically understood that states would face a problem of accepting all asylum cases fleeing countries of origin with a history of FGM. However, I argue that the ability to so limit the social group through the ambiguity of gender related persecution deliberately discriminates against those female claimants.

## **2.3 Credibility, Corroboration and Culture**

Every person claiming . . . to be a refugee has ‘fear’ (‘well-founded’ or otherwise) of being persecuted . . . irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers. (Grahl-Madsen, 1966, p.173)

In 1966, Grahl-Madsen suggested that fear exists in all asylum claims, thus leaving the decision makers to determine the validity or falsity of their fear. This determination often derives from whether the state of asylum finds the claimant credible. The overall credibility of an applicant’s claim is normally assessed by reasonableness of the alleged facts, consistency and coherence of the story, corroborative evidence in support of the statements, consistency with common knowledge, and the situation in the country of origin (Gorlick, 2003). Current critics of refugee law and policy are focusing extensively on ways in which decision makers are evaluating the credibility of a claimant’s testimony. According to a representative from the Hungarian-Helsinki Committee in Budapest, credibility is possibly the most important aspect of current refugee law and the largest obstacle to receiving a positive decision of refugee status (G. Gyulai, personal communication, 19 May, 2008).

Neither the 1951 Refugee Convention nor the Statute of the Office of the UNHCR mentions credibility, but negative assessments are a leading reason for rejections in most refugee status determination systems (Kagan, 2003). Accordingly, Hathaway (2005) determines that in the wording of the original convention, all that needs to be established is the existence of a well founded fear of persecution based on one of the Convention grounds. Kagan (2003) elaborates on this point by suggesting:

[a] Jew fleeing Germany in the early 1940s or a Tutsi fleeing Rwanda in 1994 could invent an entirely false refugee claim, but independent evidence of her ethnic identity combined with evidence of ongoing ethnic genocide could still establish well-founded fears of being persecuted for reasons of religion or race. (p. 369)

Furthermore, the fabrication of a story is not listed as an exclusionary ground in the Refugee Convention.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Handbook), created in 1979 at the request of states to assist in applying the Convention, discusses the importance of credibility but has also been criticized for not articulating clear standards (Gorlick, 2003). According to para. 41 of the Handbook:

Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences--in other words, everything that may serve to indicate that the predominant motive for his application is fear.<sup>4</sup>

Though states are encouraged to “take into account...everything,” there is no clear articulation of specific guidelines to determine what may constitute (in)credibility. Subsequently, interpretation of credibility is widely determined by individual states, often resulting in seemingly arbitrary decisions on refugee claims. As Bohmer and Shuman (2008)

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<sup>4</sup> Throughout the Handbook only the male article is used when referring to asylum seekers.

point out, “in the face of the lack of corroborating evidence, asylum officials devise methods to test the validity of the accounts presented by asylum applicants” which usually serve to create arbitrary obstacles rather than accurately measuring credibility (p. 254).

Scholars concerned with credibility issues often remark that the devil is in the details; and adjudicators constantly seek consistency by checking and rechecking the facts (Norman, 2007; Bohmer & Shuman, 2008). However, many factors come into play which may affect the consistency and coherence of an applicants statements as well as their ability to corroborate claims. For example, problems of consistency could be explained in the statements of claimants who have suffered torture or other traumatic events which led them to flee their country of origin. Research has proven that the memory of individuals who have suffered harm can play a crucial role in an applicant’s ability to provide coherent and consistent testimony (Gorlick, 2003; Cohen, 2002). Post-traumatic Stress Disorder (PTSD) plays a key role in the behavior of trauma victims, as it can cause loss of memory, blackouts, severe anxiety. Despite efforts to encourage decision makers to remain aware of these issues, states continue to use inconsistencies in applicant claims as a method of denying refugee status. Because displays of emotion and behavior which can be used to determine credibility are severely judged through a gendered lens, I argue that this lens, in combination with the importance placed on the initial interview in the asylum process, serves to further limit the credibility of female asylum seekers.

An additional significant obstacle in determining credibility is the failure of many decision makers to take into account cultural differences in the refugee status determination process. A large body of research has been compiled relating to the importance of culture in determining refugee asylum claims. Kalin (1986) identified some common cultural factors affecting claimants in the interview process such as the manner of expression, cultural specific perceptions of time, and cultural relativity of notions and concepts. For example,



some nationalities do not think in terms of dates, but rather in seasons or whether it was a dry time or rainy time. Another example is the case of a Turkish man seeking asylum in Switzerland who was rejected when he referred to his hometown as being surrounded by mountains when in actuality, the town was situated amid hills. Because the Swiss “make a sharp distinction between a ‘mountain’ which is a steep and rocky elevation rising higher than timber-line, and a ‘hill’,” they failed to take into consideration the Turkish term “mountain” also applies to hilly regions (Kalin, 1986, p.234). Though cultural sensitivity is important in all asylum cases, women often have very specific cultural differences which affect the perceived credibility of their claim.

An appellate court in the UK determined a Pathan woman to be incredible due to her failure to report a fear of sexual violence at the asylum interview where both the counselor and the interpreter were male Muslims. However, the court failed to take into consideration the cultural and societal gender norms of Islamic regions concerning interactions between men and women (Crawley, 2001). Furthermore, as human rights discourse has been merging with refugee studies, the debate of “universalism versus cultural relativism” has come into play in refugee issues with specific implications for women (Ibhawoh, 2003, p.61). This debate is concerned with the notion that the Universal Declaration of Human Rights reflects Western attitudes while ignoring other cultural perspectives. An appropriate example is the recent discourse surrounding female genital mutilation which has been denounced by feminists and human rights groups as a form of violence against women, and recently recognized as a legitimate persecutory act in refugee decisions. Critics have suggested that the international condemnation of FGM reflects an ethnocentric and culturally insensitive Western value system. However, the undesirable outcome is that states can use culture to exclude women from protection through judgments “that dismiss the asylum application [by

adopting] the language of cultural sensitivity or respect for state sovereignty as a device for limiting refugee admission numbers” (Bhaba, 1996 as cited in Crawley, 2001, p.11).

Limiting the refugee admission number has become an increasing trend; and, it has been suggested that the “developments in the 1980s and 1990s ‘especially the increase in refugee numbers and the raising of barriers against inflows of immigrants’ resulted in considerable changes ‘in the international handling of refugee issues’” (Gorlick, 2003, p.82). The events of September 11, 2001 further tightened the borders of many Western countries in which individuals sought asylum. In response to pressure from the state to limit the acceptance of asylees, it seems that decision makers are narrowing the criteria for refugee status. Therefore, despite the suggestion of para. 203 of the Handbook that “it is hardly possible for a refugee to ‘prove’ every part of his case and indeed, if this were a requirement the majority of refugees would not be recognized...it is therefore frequently necessary to give the applicant the benefit of the doubt,” decision makers regularly deny asylum based on the inability of the claimant to provide proof. In the United States, “the law allows adjudicators to require corroboration of otherwise of credible testimony, including demeanor, plausibility, and inconsistencies” (Bohmer & Shuman, 2008). Thus, requiring corroboration enables decision makers to use extremely subjective criteria in their determination.

Though credibility and corroboration issues are problematic for all individuals seeking asylum, Crawley (2001) suggests “credibility may be particularly problematic for claims where the experience of persecution is in some way related to a woman’s gender status” (p.209). Women who come from societies in which virginity or marital dignity is the cultural norm may not disclose sexual abuse in the presence of family members, but could report it much later in the asylum process. Unfortunately, decision makers are often quick to dismiss statements that arise after the initial interview. An additional factor affecting women in terms of credibility issues is the difficulty in producing evidence to corroborate their

claims. For example, while men fleeing political persecution may have proof in the form of newspaper reports or warrants, women often lack this evidence due to the fact that their activities are primarily performed in the private sphere.

Chapter three will address issues resulting from the privatized nature of gender violence in the Western world and its relation to gender related persecution. It will further focus on the problematic requirement of connection of gender violence to the state for it to be considered persecution. Chapter four focuses on the gendered assumptions of emotion and reason pervasive in Western societies and the connection of those stereotypes to determination of “well-founded fear” within the Refugee Convention.

## Chapter 3: If Persecution is a Public Act, Gender Violence must be De-privatized

*The private is public for whom the personal is political.*—Catherine McKinnon

### 3.1 Experiencing the Public and Private Spheres

An important feminist theoretical framework concerns the distinction between the public and private sphere in relationship to gender roles. While the public sphere typically involves the political arena and participation in the public labor market, the private sphere refers to reproductive labor and domestic work within the family. Therefore, the assumption is that men participate in the public sphere while women are regulated to the private. As previously discussed, one important factor in cases of gender related persecution is the occurrence of familial or community violence which can be viewed by state and international law as the private sphere and not a space for public intervention. Nyers (2006) refers to this system of law as “being rooted in the liberal political traditions of rights-based individualism and so reproduces core liberal distinctions, such as the public-private divide” (p.48).

In western political thought and jurisprudence, feminist scholarship “has sought to uncover and dissolve the strict association of women with the private, domestic sphere and men with the public world of work and politics, as well as to expose the relationship between public/private ideology and gender oppression” (Bevacqua & Baker, 2004, p.58). The distinction between the public and private spheres in conjunction with gender oppression and violence has severe implications with regard to the interpretation of what constitutes persecution within the Convention definition of refugees and whether that persecution relates to one of the Convention’s five grounds. Furthermore, because the 1951 Convention definition has historically been interpreted through the framework of male experience, it is

essential for decision makers to be aware of the different lens required for determining women's asylum cases (Crawley, 2001).

Recent literature has recognized the importance of delineating male and female experiences within the public and private spheres, with special attention to how the private can sometimes become public. The feminist adage “the personal is political” illustrates the need for deconstructing and reconnecting the two spheres. In addition to the reformulation of what constitutes public and private acts, I argue the need to dismantle the traditional stereotype that gender violence, such as sexual assault and domestic violence, exists primarily in the private sphere and is thus an issue in which governments should have minimal involvement. Western feminist thought on gender violence has been brought to the public agenda after decades of work, ideas that could (and should) be incorporated into the critique of refugee policy and law. In this chapter, I will discuss the current jurisprudence surrounding gender violence in the West. Next, I will illustrate the implications of assumptions surrounding the private nature of gender based violence on gender related persecution. Finally, I will argue that the legal difficulties and stereotypes surrounding gender violence in Western (developed) countries in addition to the Convention requirement of a connection between fear, persecution and the state further compound the difficulties of female refugees in the asylum process.

### ***3.2 Gender Violence, the Public Sphere and Legality***

Gender violence, such as domestic abuse and sexual assault has long been relegated to the private sphere enabling traditional assumptions to continue to impact decisions made in the legal arena. As scholars have noted, so deeply rooted is this tendency to “associate women with the private sphere that courts still often refuse to adjudicate fairly those cases involving gender violence” (Bevacqua & Baker, 2004, p.62). One of the methods feminists

are using to combat this ideology, particularly in cases of sexual assault, is to reformulate rape as a crime of power and control rather than sexual passion. This shift in thinking can work to take the focus off the behavior of the victim and turn it on the perpetrator as a violent criminal capable of harming the public community in addition to the private individual.

Sheehy (2005) suggests that “individual women are assaulted by individual men, but the ability of so many men to repeatedly assault, terrorize, and control so many women draws on institutional collusion and gender inequality” (p.89). This “institutional collusion” is representative of the overall lack of the justice system in providing adequate protection or attention to cases of gender violence. In cases of both sexual assault and domestic violence, legal actors from police to judges have shown their reluctance to intervene in or pursue cases they continue to view as occurring in the private sphere. While working as a victim advocate and crisis counselor for the Sexual Assault Center of Northeast Georgia in the United States, I observed both the attitudes of law enforcement and experiences of sexual assault victims on a personal level. In cases where no physical evidence such as semen or visual harm to the body existed, law enforcement discouraged women from pursuing cases because they claimed to know a guilty verdict would be virtually impossible. Unfortunately, statistics and previous court decisions supported their doubts, illustrating the deeply biased judicial system. The statistics also suggest ninety percent of reported sexual assaults are perpetrated by someone the victim knows, which further muddles the legal analysis by introducing the issue of consent. When asking my opinion on the believability of a victim, law enforcement officers were more likely to doubt the incident as sexual assault when it occurred between acquaintances, suggesting the woman encouraged or provoked it in some manner. The most prosecutable cases in terms of judicial review were characterized by stranger rape, extreme violence, and convincing emotional response by the victim.

Victims of sexual assault have reported feeling subject to more interrogation than the perpetrator, humiliation when questioned about past sexual activity, and disbelieved when they failed to exhibit any physical proof of the assault. In order to illustrate the discriminatory nature of this line of questioning when training victim advocates and crisis counselors, I frequently told an anecdote called “The Rape of Mr. Smith.” In this hypothetical crime, Mr. Smith is questioned after reporting a late night mugging. As the police ask him why he was out so late at night wearing an expensive suit, why he hadn’t fought back even though the assailant had a gun, and whether or not it was true that he had a history of giving money to charity, it becomes clear how ridiculous these questions appear. However, this line of questioning occurs regularly after reports of sexual assault, particularly when physical evidence is lacking. The common practice of victim blaming has not only contributed to the shield behind which perpetrators of crimes against women can hide, but also limits the number of women who report assaults. The large shadow of doubt which is cast by law enforcement and the general public is transferred onto women experiencing assault resulting in their own belief that they are somehow at fault for their victimization. Convincing the victim of her own guilt is the ultimate illustration of the deeply embedded nature of privatizing and ignoring sexual assault.

A significant, widely recognized factor influencing attitudes towards sexual assault is the presence of alcohol. In the United States, researchers have consistently found that approximately one half of all sexual assaults are committed by men who have been drinking (Abbey, Zawacki, Buck, Clinton & McAuslan, 2001). While drunkenness is often used in an attempt to excuse the behavior, another common misunderstanding is that if people commit sexual assault when they are drunk, the drinking must have caused the assault. Not only is this a myth, but it has been suggested that the desire to commit a sexual assault may actually cause alcohol consumption (Abbey et al, 2001).

The privatization of domestic violence is perhaps even more pronounced than that of sexual assault. Associating the term ‘domestic’ with violence immediately relegates it to the private sphere of women, necessarily outside the view of the public. Furthermore, because domestic violence can exist in the form of both physical and/or emotional abuse, physical markers may not be present. Similar to sexual assault cases, domestic violence which is invisible to the eye can be easily dismissed by law enforcement and the general public, the result of which is millions of women living with their abuse in silence. When domestic violence is reported, women are subject to similar interrogation and treatment as are sexual assault victims including the suggestion that the attack was provoked. Again dominating the validity of the case is the presence or absence of physical evidence.

Cases in which physical evidence or proof of force is lacking have little chance of prosecution. In *Commonwealth v. Mlinarich* the adjudicator declared that force means “physical force, not threats, manipulation, or coercion” (Bevacqua & Baker, 2004). This ideology threads through cases of domestic violence as well, in which it seems that there is a hierarchy of gender related violence where the more physical the crime, the more truthful it must be. Bevacqua and Baker (2004) claim that “despite the incredible success of feminists in making domestic violence visible, police, prosecutors and judges are still hesitant to intervene in domestic violence cases...and treat it as a family problem rather than a crime” (p.69).

Among problems brought to the Toronto police department regarding reports of rape included:

[o]ccurrences [are] cleared based on judgments of character and comments on victim's behaviour and not as established by investigation or lack of forensic evidence; ‘police officer's refusal to even file an occurrence report’; judgments and comments about her demeanour ‘did not appear to be upset at all’; and ‘inappropriate’ personnel were sent to be trained as sexual assault specialists and rather than the ‘cream of the crop’ being sent—officers were sent on the basis of who was available. (Sheehy, 2005, p. 95)



Extending beyond the failure of law enforcement to act effectively in the investigation or involvement in domestic violence and rape cases, the public/private ideology continues to shape the law in that the courts often refuse to hold these government actors liable for damages resulting from their very failure to act. The reasoning given for this refusal is that private actors, rather than the state, caused the harm in the first place (Bevacqua & Baker, 2004). In the 1998 landmark case *Jane Doe v. Metropolitan Toronto Police*,<sup>5</sup> a court found the police department negligent in their conduct of a rape investigation (Sheehy, 2005). This case brought to public attention the extent to which gender stereotyping and sex discrimination plays a role in the handling of gender violence. Unfortunately, this victory was the exception rather than the rule and government parties are rarely held responsible for neglecting to intervene in the assumed private affairs of sexual assault and domestic violence.

In countries where numerous domestic violence shelters and sexual assault centers exist and laws have been established acknowledging the extent of these crimes, police still fail to intervene or pursue cases and more women a year are murdered at the hands of a spouse than a stranger. Where the society of many Western countries publicly condemns these acts of violence, it appears to be privately condoned. Furthermore, women in the West have achieved a relatively high presence in the public arena which gives them an advantage in bringing gender violence to light. Given the extent to which Western women are hindered in the judicial process, I suggest that asylum seekers who typically come from societies in which women are all but banned from the public sphere face increased obstacles in trying to prove refugee status. In the next section, I will present the argument that the extent to which gender violence continues to be privatized in countries of asylum exacerbates the difficult process of proving gender related persecution for women seeking refugee status.

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<sup>5</sup> See *Jane Doe v. Metropolitan Toronto Police* (1998), 39 O.R. (3d) 487 (Ont. Ct. Gen. Div) [Jane Doe].

### ***3.3 Gender Related Persecution and the Public/Private Sphere***

As demonstrated in the previous section, the assumed private nature of gender violence problematizes the legal process. Though feminist work in the West has wrestled with bringing private acts to the public sphere through protests, demonstrations, and establishment of support networks, gender violence often remains hidden. As MacKinnon (1987) succinctly states, “The private is public for whom the personal is the political” (as cited in Bohmer & Shuman, 2008). In countries from which women are often fleeing gender related persecution, the assumption is that those governments refuse to recognize gender violence as a public problem and may even condone its existence. While the host country may publicly recognize and condemn gender violence, the previous section has shown the reality of what occurs on the judicial level when that violence comes to light. Therefore, female claimants face the difficult process of convincing an already skeptical audience of the public nature of their persecution while further proving it exists under the Convention grounds.

Though no universal definition of persecution exists, it has also been broadly recognized as sustained or systematic violation of core human rights demonstrative of a failure of state protection, which can assist states in determining persecution through the framework of human rights. The UNHCR guidelines on gender related persecution (GRP) within the context of Article 1A(2) restate the fact that “GRP has no legal meaning, but encompasses a range in which gender is relevant” (UNHCR, 2002). In other words, adjudicators and credibility officers are given a wide range in which to interpret the meaning of persecution as they hear asylum claims. For example, according to section S420 of the Australia Migration Act of 1958, the Refugee Review Tribunal in reviewing a negative decision “is not bound by technicalities, legal forms or rules of evidence; and must act according to substantial justice and the merits of the case.”

Female claimants seeking asylum for gender related persecution are hindered by their ability to prove an act to be persecutory under Convention grounds, particularly because persecution has widely been understood as “a deliberate act of the government against individuals” (Nyers, 2006, p.47). Gender violence, particular rape and domestic abuse, is committed by individual men rather than governments, despite the suggestion that government collusion in crimes perpetrated by women be recognized.

Therefore, women face the hurdle of proving a violent act by a private individual to be a matter of interest to the state and as seen in the previous section, proving sexual assault or domestic violence to be deliberate acts by public figures can often be particularly problematic. Harm or threat of harm is not enough for a valid claim of refugee status as it must be linked to a state actor. A 2005 Canadian court of appeals decision in *Marianelli Del Carmen Urena Valverde v. Minister of Citizenship and Immigration* demonstrates the importance of this relationship.<sup>6</sup> Marianelli, a citizen of Costa Rica, claimed to have been raped at gunpoint by her step-father (Mora) and began receiving death threats upon reporting (with her husband Jimmy) the incident to the police. According to Marianelli and Jimmy, the police did nothing and were told they “had no evidence and that Mora was a respectable man.” The original negative refugee protection decision (RPD) suggested that Marianelli needed to do more than she had to access state protection. In the appeal, the appellant argued that:

the board did not consider that Mora is well-connected to the police, that he raped Marianelli and threatened to kill [Marianelli and Jimmy], that the police had twice refused to assist them, that they placed no trust in the police as a result of the attacks, threats and miscarriage, and that the threats have continued since they have come to Canada. (para.11)

The appeal further suggested that the RPD had failed to take into consideration psychological reports which suggested “their emotional condition might impact on their ability to seek

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<sup>6</sup> See Federal Court Reports of Canada, Docket: IMM-3822-04, Citation: 2005 FC 534

further state protection” (para.12). Despite these considerations, the court denied the application for judicial review by concluding “the report speaks to the applicants’ subjective fear, but it does not assist in relation to the objective issue of state protection” (para.18).

The relevant issues in the case above are three-fold. First, the Costa Rican police department failed to recognize the rape as a crime due to the lack of evidence. As demonstrated in the previous section, gender violence is often dismissed for this particular reasoning. The Canadian court neglected to take this into consideration when deciding the case. If the police did not recognize the event as a crime, how could it be reasonable expected that Marianella would receive their protection upon return? Secondly, the court found the appellants to lack credibility because they attempted to involve the police only twice, after which they received death threats. Again, how could they be reasonably expected to contact the police again if they feared for their life? Finally, though the court accepted the presence of subjective fear, they refused the claim only on the basis of lack of objective evidence proving the existence of a lack of state protection and thus, did not amount to persecution.

Spijkerboer (1994) has validated the argument that the major impediment to sexual violence as persecution in connection with Convention grounds is the traditional stereotype of sexual violence as a private matter. Arguments that sexual violence is a form of torture are similarly refuted making sexual violence the only form of torture ever questioned as persecution:

The problem in case law is this. Sexual torture by officials is dealt with as if it were an act by an individual citizen; it is up to the applicant to prove that this was a state act. That however is impossible: how can an applicant prove that an act is a state act, except by stating that it was committed by a state agent? (Spijkerboer, 1994, p.31)

This line of reasoning discriminates among refugee claimants and serves to reinforce stereotypes that rape exists as a crime of passion rather than an act of power and control. Furthermore, despite consistent accounts to the contrary, the assumption that the woman

somehow provoked the attack prevails in much of society. In cases where women have proven sexual violence committed by authorities, the courts often fail to accept sexual violence as persecution on the grounds of political opinion or member of a particular social group due to reasoning that the rape was a private act by the perpetrator based upon a “pent up sexual drive.” The case of a Sri Lankan applicant in the Netherlands demonstrates these social constructions of the nature of sexual assault. The applicant sought asylum on the grounds of political persecution by the LTTE after her son had been killed and she was repeatedly raped. Throughout the report are references to the fact that the LTTE men were under the influence of alcohol at the time of the rapes:

The applicant declares that on 22 December 19\*\*, five drunken members of the LTTE paid a visit to her house in \* and both raped her and beat her son. First, it does not appear from the applicant’s statements regarding the alleged problems with the LTTE that these relate to the grounds mentioned in the Convention. In this respect, reference can be made to the applicant’s statement that the members of the LTTE on 22 December 19\*\* acted in a drunken mood and that the applicant was repeatedly pressured by the LTTE to provide food and money. In light of the aforementioned, it must rather be assumed that the applicant and her family, as a result of the generally unsafe situation in the North of Sri Lanka, have become the victim of acts of arbitrariness from the side of the LTTE. (Spijkerboer, 2000, p.49).

Most striking in this report is the amount of reference to the alcohol consumption in relation to the sexual assault and the suggestion of the seemingly ‘arbitrary’ nature of the attack. The link between alcohol and sexual assault which was discussed in the previous section can be applied to persecutory situations as well; alcohol is often used to deflect fault away from the perpetrator and further removing it from the state. Researchers have also reported that alcohol has been used to facilitate crimes against women, such as the case of the mass rape as a form of ethnic cleansing in the Former Republic of Yugoslavia. From research on bride kidnapping in Kyrgyzstan, Handrahan (2004) found that alcohol was used by the ‘kidnappers’ as a means to gain courage, suppress fear and “overcome social inhibitions regarding aggressive

violence” (p. 224). In other words, scholars suggest that alcohol does not cause the violent act, but is rather used to facilitate it.

The suggestion that the attacks against the Sri Lankan claimant described above were arbitrary adds an additional obstacle in linking sexual assault to persecution. Unlike the cases of assault victims who are not refugees, asylum seekers must not only attempt to prove the assault happened, but that it could happen again upon return to the country of origin. If decision makers determine that the assault did happen but it was an isolated incident, the claimant will be refused refugee status. Finally, as I have suggested earlier, the ambiguity of gender related persecution gives states an area to limit the acceptance of asylum claims. Because a precedent for prosecution of gender violence has not been set within many countries of asylum, I argue they have additional leeway in the judicial process without facing documentation to sway their decisions.

## Chapter 4: Gender Differentiated Experiences and Emotional Expectations

True fear is a gift while unfounded fear is a curse.—Gavin DeBecker “The Gift of Fear”

### ***4.1 Articulating a Well founded Fear***

The articulation of the well-founded fear standard in the UNHCR Handbook offers clear support for the bipartite approach: To the element of fear—a state of mind and a subjective condition—is added the qualification ‘well-founded.’ This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term ‘well-founded fear’ therefore contains a subjective and an objective element. (Hathaway & Hicks, 2005, p.506)

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees states having “a well-founded fear of being persecuted” is the key phrase in the Refugee Definition (Para. 37). The authors of the Refugee Convention acknowledged fear as both a state of mind and subjective condition; thus, determination of refugee status requires an assessment of the applicant’s statements, personality, and psychological condition in addition to evidential support of the claim (Para. 37,38,40). Nyers (2006) suggests the “Convention definition effectively splits the refugee in two: the human capacity to reason (‘well-founded’) is held in tension with the emotion (‘fear’) that motivates an individual’s flight” (p. 45). Whilst agreeing with the dilemma asserted by Nyers, I argue that it is essential to delve more deeply into the concepts of reason, emotion and violence with regards to their existence as gendered constructs.

Feminist scholarship emphasizes the importance of recognizing the differing experiences of women and men, while also noting that those most informed about the experience are the subjects themselves. Approaching the subject of fear from the context of experience and subjectivity reveals its variation, an approach which should be necessarily taken when analyzing asylum claims. As Linda Green (1994) eloquently suggested, “[fear],

like pain, is overwhelmingly present to the person experiencing it, but it may be barely perceptible to anyone else and almost defies objectification” (p.230). Women’s fear of violence is experienced in different ways and spaces from men’s, particularly with regard to sexual assault and thus, must be viewed from a different perspective by decision makers.

Beyond Green’s notion of fear as primarily subjective, there also exist deeply rooted stereotypes and expectations of emotional reaction to fear. In order to assess the validity or existence of fear, it is necessary to deconstruct the underlying stereotypes relating to women and emotion. In this chapter, I will first describe the gendered constructions of reason and emotion with a focus on stereotypes of women as inherently emotional and men as rational. Next, the significance of these stereotypes will be analyzed in regards to the interviewing process of refugee claimants and the effects of emotional expectations on credibility. Finally, I will combine these stereotypes with the differing experiences of violence and fear among men and women to demonstrate the barriers facing female applicants in the asylum process in proving fear as well-founded.

## ***4.2 Emotional Women and Reasonable Men***

Hutson- Comeaux & Kelley (2002) suggests women face a double bind with respect to emotional expression, such that both expressiveness and emotional control are negatively evaluated. Other studies have noted that gender stereotypes may apply to beliefs about the expression of emotion more than the experience (Plant et al., 2000). Overly emotional women are viewed as irrational and over-reacting while restrained emotion in the face of intense events may result in negative social evaluations because it violates stereotypical expectations for women. In terms of gender differences, women are believed to smile more and express more positive and communal feelings, but also more powerless emotions such as fear, vulnerability and sadness while men are expected to suppress their emotions except in cases



of very powerful emotions such as anger and aggression (Timmers, Fischer & Manstead, 2003; Plant, Hyde, Keltner & Devine, 2000). When individuals breach these gender norms, their behaviors are often evaluated as false presentations during social interactions (Timmers et al., 2003).

Based upon the assumptions of gendered emotions and personality differences ascribed to each gender, women are suggested to be more communal while men are more agentic (Durik et al., 2006). These attributes can have serious implications with regards to the concept of men as agents of political activism versus women isolated to the private sphere of community and family, outside potential threats from the state. The implication of the perception of men as agentic implies their embodiment of the reason, rationality and competence necessary for action. In contrast, male-dominated philosophical, scientific and legal traditions have characterized women as emotional, irrational, incompetent, and childlike (Secker, 1999). The additional assumptions that women are more capable of manipulation and exaggeration have further ramifications in the refugee status determination.

Durik et al. (2006) claim that “emotions are at the core of motivated behavior” (p. 130). Translating this statement to the stereotypes of expression of emotion, the implication is that women judged negatively in social interactions would be less likely to validate the motivation behind their behavior. In the case of asylum claims, evaluation of the validity of the expression of emotions heavily impacts the granting or denial of refugee status (Crawley, 2001; Hathaway & Hicks, 2005). Hathaway and Hicks (2005) take the position that there should not be a subjective element in the standard of well-founded fear within the Convention definition. However, they also admit “reviewing courts typically accord great deference to the impressions of first instance decision makers, in matters related to demeanor, credibility, and veracity, applicants found not to be subjectively fearful are not likely to receive meaningful appellate review” (p. 516). Even more telling is the determination in *R v Secretary for the*

*Home Department*<sup>7</sup> that “[w]here an issue of credibility arose, it would only be appropriate to certify the claim as clearly unfounded on the ground of credibility alone if the interviewing officer were satisfied that nobody could believe the applicant's story.”

While it is important to acknowledge that authorities on refugee law, UNHCR, and many individual countries have recognized the potential dangers of misinterpreting fear, I suggest that the underlying gender assumptions affecting the interviewers and credibility officers have not been appropriately addressed, on which I will further elaborate in my case analyses. Even though the UNHCR guidelines state that the level of emotion of the claimant should not affect credibility (36(k)), this may not be enough to educate the interviewers on the consequences of traditional gender stereotypes about emotion and expression, which are often embedded in the unconscious. Furthermore, countries hearing asylum claims engage their own methods regarding procedural and evidential issues, potentially skewing the actual presentation of the applicant. In this section, I will demonstrate the effects of gender stereotyping in addition to cultural expectations on the interviewer’s interpretation of valid emotion and fear.<sup>8</sup>

Spijkerboer (2000) argues that “the flight motives of an applicant are always the product of choices made by the people involved in getting them down on paper- the applicant, the translator, the interview official, the lawyer, the decision maker” (p. 46). The number of individuals involved in the hearing of the story brings to mind the childhood game of *Telephone* in which a sentence is whispered and carried down a line of ears until the final child has heard a sentence completely differing from the original. The verbal statements of the claimant heard by a decision maker could easily change in content over the course of relaying the story. The guidelines for recording the interview vary across countries, but few

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<sup>7</sup> See *R (on the application of L and another) v Secretary of State for the Home Department and another*, Court of Appeal (Civil Division), [2003] EWCA Civ 25, [2003] 1 All ER 1062

<sup>8</sup> Though I will reference cultural influences, I will not fully elaborate as I am focusing primarily upon general gender stereotypes regarding women and emotion in typically Western countries of asylum.

actually require an audio or video recording. In the Dutch asylum process the interview report is not a verbatim report of what is said during the interview, the questions asked are not included, and the conversation is not recorded. In other words, the bits that are documented are only those which the credibility officer deems appropriate. According to refugee lawyers at the Hungarian-Helsinki Committee, Hungary has slightly stricter guidelines for reporting the content of the interview but the note taker is often also the interviewer and the translator, making human error nearly unavoidable (Personal Interview, 19 May, 2008). Due to the amount of responsibility in the hands of the interviewer, it is imperative for them to be trained in understanding special circumstances which may affect the actions or statements of the applicant.

Further complicating the interview process are issues of language barriers and ignorance of cultural differences. In most asylum cases, the applicant cannot communicate in the language of the country of refuge creating the necessity of an interpreter. Though efforts are sometimes taken to provide a female interpreter for female claimants, this may not be possible as quickly as the state would like to conduct the interview, which often occurs immediately upon arrival into the country of asylum. Furthermore, it is highly likely that the interpreter is a member of the same community of origin which often creates a reluctance of the female applicant to testify about her experiences- an issue rarely addressed by decision makers (Crawley, 2001). At worst, the interview process itself can re-traumatize the claimant immediately affecting her emotional presentation. In an advocacy guide by the United Kingdom Asylum Aid, a female applicant illustrates this idea:

What was more difficult was that the interview was with a male immigration officer...[if] this has happened to you, whatever country you come from, you feel a sense of shame, that it was your fault, and that you can't trust people anymore. Talking about rape was another form of torture. So I didn't get to tell my story even though I was meant to. (Asylum Aid, 2008)

In cases of gender related persecution involving traumatic events such as sexual assault, domestic violence or other forms of torture, the stereotypes of appropriate emotional expression can have severe implications in the credibility of the applicant who may react in a variety of different ways. For example, Rape Trauma Syndrome has been recognized as a psychological reaction to the experience of sexual assault. The Rape and Incest National Network (RAINN) describes three different reactions which often occur as a result of sexual assault: expressed affect, controlled affect, and shocked disbelief. Some survivors express their emotions in a very vivid expression by crying uncontrollably, extreme anger, and even laughter. Others may appear very controlled with no emotion at all, while some exhibit shocked disbelief expressed through disorientation and confusion. Though all of these emotional responses are valid, it may be difficult for someone unknowledgeable about Rape Trauma Syndrome to accept laughter as a valid expression of emotion following a traumatic experience.

A variety of factors also affect the behaviors of victims of domestic violence and the court's perception of the claims. One recognized behavioral pattern is referred to as Battered Woman Syndrome (BWS). Like Rape Trauma Syndrome, BWS describes the various ways in which victims of domestic violence respond psychologically and emotionally to trauma. Dr. Lenore Walker, one of the leading authorities on BWS, contends that victims of ongoing domestic violence exhibit similar behaviors such as personal shame around the abuse, loss of self esteem, and feelings of guilt that she somehow deserves the abuse. In the eyes of an asylum interviewer, shame and guilt can frequently be used to interpret a claim as false.

To illustrate the role of emotional expectations and their effect on credibility, I will present cases both in which the applicant was believed or deemed incredible based upon emotional response. Spijkerboer (2000) presents the important role of emotion in the case of a Sri Lankan woman seeking asylum in The Netherlands for the fear of persecution by the

LTTE on return to her home country. Anne<sup>9</sup> witnessed the death of her son at the hands of the LTTE as well as the experience of multiple rapes by the same men. In the report, the passage regarding the son's execution is given considerable weight in the narrative including:

the picture of the daughter falling and Anne going to her; Anne's feelings of loneliness ('Nobody helped us'); and the filmic description of Anne standing at her dead son's body, registering precisely where he was wounded, her sadness and her anger. (Spijkerboer 2000, p. 51)

On the other hand, the description of the rape is given little attention by the interviewer perhaps because of little detail provided or the lack of importance as seen by the interviewer. While the image of the grieving mothers falls directly into the categorical box of an appropriate emotional reaction, stereotypes about rape and an overall unwillingness to discuss it may have affected the interviewer's decision to gloss it over.

Anne's case demonstrates the power of interpretation of emotion along gender norms. As a mother, Anne elicited the proper reaction to the violent death of her son rendering her report credible in the eyes of the interviewer. Assumptions about motherhood have also negatively affected women making asylum claims. Judges have been inclined to make decisions on whether a mother's behavior towards her children seemed appropriate, as demonstrated in an assessment of the incredibility of a woman who left her children behind when she fled because it seemed to be inappropriate maternal behavior (Bohmer & Shuman, 2008). Even more disturbing is the assumption that "women from less developed parts of the world may be expected to grieve less about the loss of a child because 'they have more of them'" (Spijkerboer, 2000, p.65).

Crawley (2001) cites a United Kingdom decision that "the respondent presented herself as being quietly spoken and continually fearful and overwhelmed by distress. That was not the Tribunal's opinion in relation to the evidence she gave. We have found her to be

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<sup>9</sup> Not her real name.

articulate and intelligent...The Tribunal has given the respondent's claim the most anxious scrutiny and finds that it is fabricated" (p. 213). The court seems unable to accept the claimant's ability to present herself as articulate and intelligent after a previous encounter deemed her fearful and overwhelmed. Furthermore, the stereotype of the 'woman as victim' is at work here through the assumption that a woman who is *truly* fearful would not be articulate. Another female asylum seeker in The Netherlands was presented in the interview as describing her rape by five soldiers in short and factual words. The interviewer's perception of her lack of emotion with regards to her rape deemed her story incredible (Spijkerboer, 2000). These cases demonstrate the decisive impact of emotional expression on the decision of an applicant's claim, again reflecting the necessity of deconstructing gendered assumptions of emotion.

### **4.3 Proving "Well-Founded Fear" through a Gendered Lens**

It is important to take into account everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified. (Handbook, para. 41)

As the Handbook suggests, once an emotional expression of fear has been validated, the claimant must proceed to prove that the fear is well-founded and reasonable. Secker (1999) suggests society "has the power to provide or withhold particular means and opportunities that may be necessary to meet the standard of competence it sets" (p. 298). Though justifying and proving the appropriate standard of validity of their case within the asylum process is challenging for both men and women, gender assumptions create additional difficulties for female applicants. The female attribute of over-emotionality often becomes synonymous with irrationality and incompetence. Compounding the competence and rationality standards is that the standard of fear has been traditionally based upon the male

experience, though men and women experience fear in different ways. Furthermore, evidential proof of fear can be more difficult in the case of female claimants due to the often private nature of the (potential) persecution as well as a lack of precedent set in gender related asylum claims; and UNHCR gender related guidelines on persecution within the context of Article 1A(2) state that the determination of well-founded fear is case dependent, making any existence of precedent somewhat obsolete.

In the 1987 appeal to the US Supreme Court in the matter of *Immigration and Naturalization Services v. Cardoza-Fonesco*,<sup>10</sup> it was suggested that the Court interpretation of the standard to require applicants to present ‘specific facts’ through objective evidence to prove either past persecution or ‘good reason’ to fear future persecution was held in contention with the reference to ‘fear’ standard which causes the eligibility decision makers to address some matters of the subjective mental state of the applicant (para. 421, 430). Despite this important observation regarding conflicting interpretations of the Refugee Convention regarding the necessity of objective evidence in addition to a subjective mental state, courts continue to base decisions upon lack of concrete proof that a fear is well-founded.

In the case of refugee jurisprudence, the existing accounts have been based primarily upon the experiences of male claimants (Crawley, 2001). Just as political persecution manifests itself differently in the public and private spheres, so does the anticipation of physical and emotional violence. The image of the typical refugee as an intelligent and politically active man fleeing from his government immediately disadvantages women whose fear may not come directly from the state. Because the female refugee seeking asylum for gender related persecution often experiences fear in the context of a different space in society, she must convince decision makers of its validity outside the norm.

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<sup>10</sup> See US Supreme Court Decision *INS v. Cardoza-Fonesco*, 480 US.421, 1987 No.85-782

Koskela (1999) suggested, “women’s fear is crucially different from men’s fear: it differs in its extent, its nature as well as its effects on women’s lives” (p.111). Of particular interest are the different spaces and types of threats of violence faced by women and men. Though fear of persecution can be based upon events which either have or have not occurred, women have a more difficult time proving the event’s possibility due to a lack of precedence set in judicial law. Nagengast (1994) suggests “going beyond the mere presence or absence of violence challenges us to locate it within a set of practices, discourses, and ideologies to examine the role it plays in social relations...” (p.110). These spaces, types and ideologies of violence require re-interpretation of the experiences of men and women. While male violence usually occurs formally in a public manner, violence against women leading to asylum claims often occurs behind closed doors, informally and perpetrated against individual women by other individuals. Domestic violence provides a stark example of the difficulty in proving women’s fear as well-founded, as it is “still considered different, less severe, and less deserving of international condemnation and sanction than officially sanctioned violence...[and] tends not to be viewed as violence at all” (Crawley, 2001, p.130).

Many cases exist in which women flee their country of origin due to violence at the hands of their spouse, male member of their family or an employer. The Refugee Convention requirement that the persecutory act be linked to the state was addressed in a previous chapter; therefore, I will only concentrate on the importance of evidentiary matters and proof of well-founded fear in this section. In a recent interview with a psychiatrist in Budapest, Hungary working with refugee survivors of torture, it was suggested that those refugees with the most horrifying stories were the ones most quickly granted status (L. Hardi, personal communication, 9 May, 2008). I will show support for this claim through the following case analyses.



In a letter to Attorney General of the United States John Ashcroft regarding *Matter of Rodi Alvarado Pena*, UNHCR intervened in favor of the applicant, who sought asylum from gender related persecution in the form of domestic violence at the hands of her husband (UNHCR, 2004). The credibility officers found no reason to question her claim of a well founded fear based upon the facts of the case, which primarily focused on physical abuse in the form of broken bones, forced miscarriage, and threats of maiming. Furthermore, Ms. Alvarado attempted to run away numerous times and reported the abuse to the police, who refused to intervene. In opposition to this case is that of the negative refugee status decision in *Souha Awad Ghali v. Immigration and Naturalization Service*.<sup>11</sup> Though “Ghali’s testimony and her asylum application indicate that she endured verbal insults and unwelcome advances by her government supervisor for a three month period, and received a death threat after reporting an incident of harassment to the police,” the Board of Immigration Appeals concluded that “such mistreatment did not arise to the level of persecution.” I conclude that the lack of physical violence in Ghali’s case led to a negative decision for refugee asylum. Furthermore, sexual harassment is historically viewed as gender specific to women distancing it from the normative experiences of men on which the Convention was originally developed. From these cases and the statements made by the psychiatrist interviewed, I propose that the more severe the violence, the easier time the claimant has in proving her case amounts to persecution. This leads to questions of credibility for women fearing persecution without physical or documented evidence to prove the fear as well-founded.

As suggested in Chapter 3, Western countries such as the United States, sexual assault cases rarely prosecute without the presence of some form of physical evidence. Given the difficulty of gathering this evidence in a country where the law is supposedly on the side of the accuser, it could not be reasonably expected that a woman seeking asylum for gender

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<sup>11</sup> See US Court of Appeals for the Ninth Circuit No. 98-70947, 2000 US App. Lexis 19156

related persecution whose country of origin could not or would not provide protection to produce evidence of any kind. In cases where persecution has not yet occurred, but is feared upon return to the home country, Crawley (2001) adds that it should be accepted that country reports which indicate that a risk of harm exists prove the existence of a well founded fear. However, due to the private nature of these risks, it could be reasonable to assume evidence would not exist, in which case credibility should be based upon the testimony of the applicant. A cycle becomes clear as claimants cannot provide evidence to support their claims which means their claims are not deemed reasonable leading to continuation of a lack of precedence in available jurisprudence. Previously, I referenced Sheehy's research on Canada's refusal to hold the state responsible for not intervening in cases of domestic violence or failure to act in sexual assault investigations. In the case discussed in Chapter 3 of *Marianelli Del Carmen Urena Valverde v. Minister of Citizenship and Immigration*, the Federal court similarly dismissed the case by rejecting the claim that the state of Costa Rica failed to intervene in a sexual assault claim.

In some cases of women applying for refugee status, credibility is questioned when they claim fear, but have left only after years of abuse or have been in the country of asylum for a period of time without bringing up the fear of violence to the credibility officers or courts. In the case of Anne referenced above, it was eventually determined that Anne could not meet the "requirement that one leave the country *on account of* (and therefore apparently shortly after) the traumatizing event" (Spijkerboer 2000, p.53). In other words, though Anne was clearly traumatized, she could not have been reasonably fearful because she did not flee immediately. In addition to the experience and validity of fear, the timing of the claim has a heavy impact on credibility of the applicant. According to the Information Center about Asylum and Refugees in the UK (ICAR), one factor in the assessment of credibility is the timing of statements that are made. Decision makers "do not appreciate it when an applicant

discloses new facts or reasons for fleeing late in the procedure” (ICAR, n.d.). However, there are many reasons female claimants may wait to disclose information that require both a gender and culturally aware perspective of all involved in the decision making process. These reasons were already discussed in Chapter One.

Throughout this chapter, I have shown the relevance of gendered assumptions regarding the experiences of fear, the emotional reactions to that experience, and the refugee definition’s requirement of the male attribute of rationality to prove the existence of that fear. The nature of the asylum process places heavy weight on the subjective opinion of the interviewer, who comes from a society in which these gender assumptions are still prevalent.

## Conclusion

The purpose of this thesis was to explore further the problems in refugee law and process surrounding claims of gender related persecution. The majority of existing research as focused on the re-interpretation of the Refugee Convention to encompass gender related persecution, with some scholars suggesting a need to include gender as one of the Convention grounds. Furthermore, both UNHCR and some member states have set forth specific guidelines to assist in the refugee status determination process for claims involving gender related persecution. Despite these guidelines, with which Canada has had one of the longest experiences, researchers have not detected any noticeable effect on the decisions regarding gender related persecution (Haines, 2003). Furthermore, a representative from Hungarian-Helsinki Committee informed me that Spain has successfully added gender to their state directives regarding grounds for persecution which has since resulted in only one claim being recognized (G.Gyulai, personal communication, 19 May, 2008).

In light of this lack of significant progress, I have put forth that in addition to these contributions, there is a need to recognize the impact of deeply embedded assumptions about the nature of privatizing gender violence, degrees to which men and women experience fear and violence, and stereotypes regarding expectations of expression of emotions in response to acts of violence.

As a result of my research, which identifies the stereotypical assumptions surrounding gender that often negatively affect judicial responses to gender violence and gender related persecution, I argue the necessity of recognizing the extent to which the patriarchal nature of society affects women in many societies. Beyond the need to expand the recognition of gender related persecution in refugee claims, we need to recognize the expansive existence of violence against women. As I have conceded in my thesis, it is unreasonable to accept all

refugee claims as this would severely disrupt the balance of societies and create a huge burden on host states which may not have the means to accommodate a mass influx of individuals. However, it is unacceptable that women remain in situations threatening their basic human rights. Therefore, it is necessary for organization such as UNHCR, human rights groups, and all countries accepting asylum seekers to work together on the root problem of some female asylum seekers which is the global pervasiveness of violence against women.

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