

# GENDER PERSECUTION: A RESPONSE TO THE UNHCR GUIDELINES

*Sharon Pickering\**

With the production of the UNHCR Guidelines on International Protection: Gender-Related Persecution, Australia now has an additional set of guidelines to set beside our very own, internationally well received, Guidelines on Gender Issues for Decision-makers. Despite both sets of Guidelines, the latter being far more developed than the former, I predict we will continue to rely on a bifurcated system of recognising gender persecution: sophisticated court-based decisions and under-scrutinised primary decisions.

Decision-makers at the primary or first stage merits review level have rarely the time, the capacity or the will to engage with the many contradictions such Guidelines present for their daily business of determining refugee status. A commitment to protecting women from gender persecution that accurately fits the Convention definition requires effective procedural realisation at the initial interview stage if it is to protect any woman. My initial concern is, how can the UNHCR Guidelines be implemented at this initial decision-making stage? However this concern is coupled with another: what role do these Guidelines play in preventing governments from legislating away, or preventing policy and practice from realising gender persecution within the current Convention definition? It is clear we must seize the intent and spirit of recognising gender persecution raised by the development of these Guidelines, but in turn we must acknowledge and address their flawed assumptions, omissions and their potential marginalisation if we are to reach a position where we can establish effective protection from gender-based persecution under the Refugee Convention.

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\* BA (Melb) MA (Soton), PhD (Melb) is a Senior Lecturer in Justice Studies, Monash University.

I contend that the punitive turn in refugee protection within developed nations has been marked by watershed moments in relation to issues raised by, or in direct response to, cases of gender-based persecution. If you like, gender-based persecution has often acted as the moment to usher in more restrictive refugee protection policies for all those seeking asylum in the developed world. Therefore, my concern is how can we consider these Guidelines as a buffer to the many issues raised by gender-based persecution for refugee determination procedures in general, but also whether these Guidelines sufficiently take account of the ways that the recognition of gender persecution is often used by developed nations to signal that the system is out of control, that refugee protection is in need of containment and the international refugee regime, in the words of the Australian government, needs to be reformed.

Before I go any further I want to offer two general observations.

First, while I am not going to offer a discourse analysis of the Gender Guidelines, I would like to note that the use of language in the document should alert us to what seems to be its ongoing discomfort with gender. The document repeatedly talks about a 'gender sensitive interpretation' of the Convention. Sensitivity suggests a need for compassion, for kindness. I would argue that cases of gender persecution require complex and detailed knowledge of the ways human rights must apply to the multifaceted and diverse lives of women in a non-discriminatory way. While sensitivity is to be commended, perhaps even encouraged, women are not being turned away at borders, or having their cases rejected by primary decision-makers because decision-makers are simply insensitive. They are turned away because, in particular, initial decision-makers have been inaccurate and discriminatory in their decisions and have located themselves, their government and the woman applicant at a far distance from human rights.

Second, the Guidelines make clear that not all the women of the world will be able to claim protection under the Convention. In this moment of rejection, the spectre of hordes of women is still raised similar to the well-worn 'threat' of 'hordes of Asians' or 'entire middle eastern villages' being ready to claim asylum. I am unaware of any statements on race or nationality or religion that similarly require decision-makers, governments and the public to be placated by the

comment that indeed not all people of religion or having a nationality are automatically entitled to protection under the Convention. The Guidelines read:<sup>1</sup>

Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The unbounded potential of what comes hereafter in the Guidelines needs to be tempered by acknowledging this always threatening influx. Gender is not something to strap down or to contain. Seriously redressing gender-based persecution is about living up to the principles of non-discrimination and should not be intimidated by the spectre of unproven numbers.<sup>2</sup>

I now return to my specific task. In responding to the background paper<sup>3</sup> on gender persecution for the Global Consultations I found little to take issue with and much to reinforce. Suffice to say that if decision-makers at all levels in Australia took a similarly informed, complex and rights-based approach, women seeking asylum in Australia would be more able to predict the outcome of their applications. 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*, released in May 2002, may in some part capture the depth of issues outlined in the Background Paper, however, I have a number of reservations about the Guidelines - most specifically in relation to what I consider to be the three most serious omissions. The Guidelines omit clear and compelling statements locating refugee law within international human rights law, they do not significantly address cultural relativism in decision making, and they do not tackle the site where gender persecution sustains heavy attack: and that is the issue of credibility. I would argue that these three areas are consistently at the core of cases of gender persecution, and considering the discussion of the first two in the Background

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- 1 UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, para 4.
  - 2 See concluding comments of Penelope Mathew, "Conformity or Persecution: China's One Child Policy and Refugee Status" (2000) 23 UNSW Law Journal 103.
  - 3 R Haines, *Gender Related Persecution, Background Paper* commissioned by the UNHCR Global Consultations on International Protection, 2001.

Paper, they are notable by their absence in the Guidelines. These three omissions signal that the Guidelines do not seriously contribute to advancing critical understanding and practice in refugee determination and sit comfortably within frameworks which consider protection an act of gratuitous humanity and do not challenge the assumptions and practices of primary decision-makers within this punitive environment.

I will engage with each of these three omissions in turn and suggest why, within the Australian context, their absence will continue to endorse current practice rather than transform that practice. Taken together, these three omissions suggest that the lack of clear ideological intent of the Guidelines makes them susceptible to co-option into the discriminatory delimitation of refugee protection.

### ***I THREE SERIOUS OMISSIONS OF THE GUIDELINES***

#### ***A The Absence of a Human Rights Framework***

The Guidelines struggle to locate gender persecution and the Refugee Convention within the broader field of human rights law. The Guidelines use the term human rights in five places, with no articulation of a human rights framework for gender persecution claims specifically, or refugee law generally (with the exception of footnote 2). There are two basic points I want to make here. First, failing to locate gender persecution and refugee law within international human rights law goes against the burgeoning scholarly literature on gender persecution and refugee law.<sup>4</sup> Second, the Guidelines need to locate gender persecution within international human rights if they are to offer any resistance to the legislative wiping away of gains made in this area.

We know that claims for gender-based persecution, and decisions that have upheld those claims have consistently relied on integrating gender persecution and the Convention with other international treaties.<sup>5</sup> Moreover, feminist scholars working to raise understanding of gender persecution have argued for what Penny Mathew has called a synergy between the Refugee Convention and general human rights law.<sup>6</sup> The Refugee Convention as a stand-alone document is rarely enough

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4 See for example, H Crawley *Refugees and Gender: Law and Process* (Jordans, London, 2001).

5 N Kelley "The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress" (2002) 13 *International Journal of Refugee Law* No 4, 559-568.

6 Mathew, above n 2, 105

to realise women's claims for refugee status. Guidelines on gender persecution need to compel decision-makers to read the Convention within a body of human rights law and acknowledge refugee law as a form of individualised and practical application of human rights norms.<sup>7</sup> This can help dislodge readings of refugee law that are immovably imbedded in domestic immigration law and engage a dialogue between refugee law and human rights law that can sustain what Anker has called a rich body of "trans-nationalised international law".<sup>8</sup>

Through the rapidly evolving field of women's human rights, a consideration of gender persecution has helped drive refugee law and human rights law together, with benefits for more than cases of gender persecution. It is also from international human rights that we strongly argue for locating gender persecution within a sophisticated reading of the current Convention and argue against an additional ground of gender. The normative potential of the Guidelines has been avoided by the absence of clear and detailed statements on the relationship of refugee law to human rights law. Keeping gender persecution precariously poised, conditional and delicate means both gender and asylum law are left to move at best in parallel to, but certainly apart from, human rights. Moreover, this state of play offers receiving states in the developed world another moment of refugee guidance largely unstained by international human rights.

It has been acknowledged that the 'legal wrangling' that has surrounded the acknowledgement of gender-based persecution as being adequately covered within the existing definition has been 'dominated by Western developed countries seeking to demark the limits of refugee protection'.<sup>9</sup> The tension between immigration control and the application of refugee law in accordance with standards of international human rights has been played out in some cases in the shadow that is the postured millions of refugee women now seeking protection. This is despite the fact that any right to Convention protection has never meant that protection has been readily or predictably accorded to women. It also means that when decision-makers have accorded women protection, often governments

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7 D Anker "Refugee Law, Gender and the Human Rights Paradigm" (2002) 15 Harvard Human Rights Journal 133-154. At p 138 "Refugee law provides an enforceable remedy – available under specified circumstances – for an individual facing human rights abuses. Determinations of refugee status entail contextualised, practical applications of human rights norms."

8 Anker, above n 7, 135-136.

9 Kelley above n 5, 560.

have sought to legislate away the connection of gender persecution, refugee protection and international human rights.

The case of *Khawar*,<sup>10</sup> and the legislative response of the Australian Parliament, is an example of how embracing the synergy between gender persecution, refugee law and international human rights law, has been considered by developed nations as going beyond the 'proper interpretation' of the Convention. In working to narrow the application of refugee protection, the Immigration Minister used the case of *Khawar* as evidence that the Australian courts and tribunals had been interpreting the Refugee Convention too broadly and in a way that went beyond its intended application. The Migration Amendment Bill (No 6) 2001 was therefore introduced to "'restore the application of the Convention... in Australia to its proper interpretation' (Ruddock 2001: 1)".<sup>11</sup> The legislation introduced a much more narrow and rigid interpretation of the Convention that is at odds with the kind of sophisticated and complex reasoning given in the *Khawar* decision and which now has a disproportionate impact on women applicants.<sup>12</sup> Most of all, the legislative response to the *Khawar* case provided a moment to restrict the application of human rights norms and the Refugee Convention to cases of gender-based persecution as well as extending restrictive determination to all asylum applicants. Locating gender-based persecution within international human rights law, and hence recognising the changing nature of the traditional subjects of international law, as the *Khawar* decision did, came to represent the troublesome nature of the judiciary and the repugnance of human rights for the realisation of domestic refugee policy. The Guidelines do not go forward into an environment that looks to embracing gender persecution, they go forward into an environment that is rapidly moving away from a human rights framework. As such the Guidelines need to clearly stake their claim on human rights and compel States to consider gender-based persecution and refugee law within international human rights. The Guidelines, as they stand, would not be considered by the Australian Minister as at odds with his intention in the legislation that has now made decisions similar to that of *Khawar* impossible.

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10 *MIMA v Khawar*, HCA, 11 April, 2002.

11 C Hunter "Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims," (2002) 8 Australian Journal of Human Rights 1, 107.

12 Hunter, above n 11, 107.

### ***B Ignoring the Role of Cultural Relativism***

The absence of a clear and sophisticated human rights framework also leads me to my second major concern with the Guidelines. The Guidelines have missed the opportunity to resuscitate refugee determination from the paralysis that is cultural relativism. While some commentators have noted that the trouble with cultural relativism comes from an unresolved theoretical standoff<sup>13</sup>, I would suggest that the causes are far more ordinary and everyday. In reaching for simplistic cultural explanations of gender persecution devoid of any developed understanding of violence against women, does see some women gain asylum. However both sexist and cultural stereotypes rely on essentialist understandings of both gender and the Global South.

There is now a growing body of research that points to how refugee decision-makers depend on linking gender-based persecution to practices attributable to "non-Western 'foreign' cultures"<sup>14</sup>. In short, without the clear 'foreignness' of cultural practice, gender persecution has often been dismissed or overlooked by decision-makers. The search by decision-makers for what Sinha has called 'cultural culpability' in cases of gender persecution has marked key US cases.<sup>15</sup> Such 'cultural culpability' is rooted in stereotypes about the helpless third world woman, the wickedness of the third world man, and the backwardness of State protection. This produces refugee discourses notable by positioning the cultural, political and legal superiority of western life.<sup>16</sup> Some commentators have noted, for example, that writings on refugee law leave the impression that social mores only exist in third world countries generally and Muslim countries specifically.<sup>17</sup>

I do acknowledge that the issue of culture is raised in paragraphs 5 and 10:

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13 Anker, above n 7.

14 A Sinha "Domestic Violence and US Asylum Law: Eliminating the 'Cultural Hook' for Claims Involving Gender-Related Persecution" (2001) 76 New York University L Rev, 1562.

15 *In re Kasinga*, and *In re R-A*.

16 Crawley, above, n 4, 10.

17 T Spijkerboer *Women and Refugee Law: Beyond the Public/Private Domain* (The Hague: The Emancipation Council, 1994).

...harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.

And in paragraph 10:

...relevant laws may emanate from traditional or cultural norms and practice not necessarily in conformity with international human rights standards.

I would argue, however, that the Guidelines needed to make a stronger statement regarding the prevalence of misplaced cultural relativism in the decision-making process. My research on the operation of the Refugee Review Tribunal in Australia has shown heavy reliance on the use of cultural stereotypes in cases where women are granted and denied status alike.<sup>18</sup> Decision-makers have relied heavily on what I have previously argued is the ideal gendered victim of international refugee law<sup>19</sup> and the Guidelines do not help decision-makers in addressing what are the many sexist, racist and cultural assumptions surrounding gender-based persecution that sustain this 'ideal victimhood'. The Guidelines do not significantly lead nor encourage decision-makers away from both the blatant and the subtle explanations of 'gender oppression...as symptomatic of an essential, non-western barbarism'.<sup>20</sup> Using such frames of reference Crawley argues the dehumanising structures from which women may have fled are reproduced in ways that infer women are alien from their own culture as well as alien from the culture of the refugee receiving country.<sup>21</sup>

In more practical terms, throughout the 1980s and 1990s various procedural and evidentiary barriers for the just application of refugee law to cases of gender related persecution were raised by advocates and scholars alike.<sup>22</sup> These often revolved around the inadequate and damaging questioning of female applicants with little or no understanding of the various ways torture and trauma are

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18 S Pickering "Narrating Gender and Particular Social Group: The Case of the RRT in Australia" Proceedings of the Conference Women Fleeing Gender-based Persecution, May 2001, Montreal: Canadian Council for Refugees, see also forthcoming, S Pickering *Criminology and the Refugee* (Sydney, Institute of Criminology Monograph Series).

19 Pickering (2001), above n 18.

20 Crawley, above n 4, 10.

21 Crawley, above n 4, 10-11.

22 Kelley, above n 5, 567.

experienced let alone the development of skills to work with survivors of sexual violence. When women applicants continue to be treated similarly to the rape victims in the developed world of the 1950s – we are not just dealing with a need for female interviewers and sensitive interview techniques, we are dealing with the intersection of cultural and racial stereotypes regarding appropriate sexualised victimhood. Compounding the role of cultural relativism in the decision making process has been the introduction of a series of policies and practices that exacerbate the role of cultural relativism.

In Australia primary decision-makers have been, in many ways, recast as agents of fraud detection. If you ask onshore protection officers what would be the most valuable skill in the interview environment they most likely will say: to be able to detect if someone is lying or to be able to know exactly how a particular person from a particular culture or region or religion will respond if they are lying or how they will respond if they have experienced torture and trauma. Importantly, these two concerns are raised in an environment where onshore protection officers have been cast as the last line of 'defence' in deterring refugees. They also introduce into the interview environment a concern with what can only be described as racial profiling. In short, how will an Afghan woman respond to direct questions about her claimed persecution that I can recognise as being a) truthful or b) a lie? Profiling and fraud detection is all about essentialist understandings of the human condition which has specific consequences for those claiming gender persecution.

The refugee determination system has coerced particular performances of gender persecution whereby women's experiences have been forced into a few options readily consumable by the determination system. The Guidelines do not seriously address how cultural essentialism has been the easiest way for decision-makers to redress gender persecution and the consequences this has for the system regardless of whether an individual woman gains asylum.

### ***C Failure to Address Credibility Issues***

The Guidelines also have not directly addressed the issue of credibility. This in some way reflects the absence of credibility issues in the Background Paper. I just want to make a short note that when decision-makers have not grappled with the complexity that a rights based approach requires, they have often returned to the issue of a woman's credibility.

Credibility is of course at the heart of refugee decision making, particularly in cases of gender persecution where detailed and trustworthy independent accounts

of the role and position of women in the country of origin are lacking. The issue of credibility is often raised in relation to whether the woman failed to engage state protection or whether her account of the failure of state protection is adequate. There is a long and disturbing history of women around the world being rendered child-like, manipulative, or just generally unbelievable in their demeanour, their altered story, and when they 'chose' to take part in legal systems. The Guidelines needed, I believe, to offer decision-makers greater guidance as to what is a serious credibility issue and what is not. A clear articulation of credibility issues would therefore directly tackle the struggle over the standard of proof in asylum applications relating to gender persecution.

There is considerable evidence in psychological literature that in recounting traumatic stories many people who are trying to accurately recount experiences that have occurred over a period of weeks, months and even years, often amend, introduce new elements and delete others over a series of interviews. This is not an attempt to sustain a lie, but to ensure that the story they tell is as true as they possibly can remember. However, too often, such amendment is considered to be evidence of a lack of credibility. This situation is compounded by women recounting stories of rape and sexual violence that they may be reluctant, for many reasons, to reveal as part of their narrative in initial interviews.

Crawley has noted that many women face additional problems in demonstrating that their claims are credible. The most significant issue re credibility has been the timing of women's claims of gender persecution. Often women have been considered lacking credibility for only disclosing their experiences in the second interview or after their case has gone to appeal. The non-disclosure of sexual violence, while well understood by many decision-makers, has seen many women's claims disregarded primarily because of their timing.

The issue of timing also raises the concern that the restriction of independent review of decisions will significantly impact on gender persecution cases where the full details of persecution regularly only emerge after a series of interviews. Moreover, credibility issues raise the specific problems with the highly stressed environment of initial interviewing. In Australia interviews are often conducted inside some form of detention, by those who have been flown hundreds of kilometres to conduct the interviews and who are encouraged to process the maximum number of claims in a day and who are very much a part of, and not apart from, the systematic demonisation of refugees. The procedural recommendations in the Guidelines do not adequately take account of the

environment in which the credibility of applicants is being questioned and the particular consequences this has for cases of gender persecution.

## ***II INSIDE THE PUNITIVE TURN: THE PROBLEMATIC APPLICATION OF THE GUIDELINES***

We live in a moment where the developed world's response to refugees can be understood, at best as an act of gratuitous humanity, and at worst, particularly in the case of Australia, one of punitive deterrence.<sup>23</sup> My question of the Guidelines is how can they be effectively realised amidst the punitive turn in refugee protection? For applicants who have suffered gender persecution how do the Guidelines assist their case in the present moment? This is not to suggest for a moment that gender is too hard in the current climate, but to argue that punitive refugee policies make the realisation of protection, that should well be covered by the Convention, increasingly difficult to realise. The punitive turn has two parts – one that restricts access to determination and the other that restricts the applicability of the Convention. Both parts affect the ways the UNHCR Guidelines will be implemented, in the same way they effect the operation of the current Australian Gender Guidelines for Decision-makers.

The development of these Guidelines is yet another signal to those working in the area that the interpretation of the Convention definition is increasingly bifurcated in the developed world. On one track, we have a relatively sophisticated and complex articulation of gender-based persecution by High Courts and in academic scholarship, and on another track we have the incessant hum of the rejection, marginalisation and general mishandling of gender persecution by primary decision-makers and even first stage review decision-makers. These Guidelines play to the first track with seeming little consequence for the second track. We must bring these two tracks together to realise effective protection.

Macho-militarism continually seeks to focus our attention on the mythical certainty of the homogenous bordered state and its unrelenting use of force to realise the ideologically and pragmatically flawed project of deterring refugees. This does not stand apart from the armour of developed nations that repels sophisticated understandings of the Convention and human rights and rejects

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23 S Pickering and C Lambert "Deterrence: Australia's Refugee Policy" (2002) 14 Current Issues in Criminal Justice, 65-86.

changes in processes that would enact protection in cases of gender persecution. These Guidelines offer little challenge to that armour.