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Barriers to Protection:
Gender-Related Persecution and Asylum in South Africa

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A research report submitted to the Forced Migration Studies Programme, Faculty of Humanities of the University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Arts.

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Abstract

In 1998, South Africa became the first country to explicitly state within its refugee law that gender-related persecution is a binding basis for asylum, further distinguishing South Africa as a state with outstanding legal commitments to gender equality. Creating further visibility within the law, however, is only one step in the process. How the law is implemented determines its real worth and effectiveness.

This study assesses the manner in which asylum decisions are made, particularly in cases of gendered harm, questioning readily accepted and essentialised notions of women and gender. It looks at how the South African asylum system defines legitimate refugees, and the interplay of fluid interpretations of gender, culture, violence and the political within these constructions. Through interviews with officials and asylum seekers, the study identifies trends in the refugee system, and interrogates the reliance on narrow understandings of the political and personal, as well as the nature of conflict and culture.

Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirement for the degree of Master of Arts in Forced Migration Studies at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

Julie Middleton

27 January 2009

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Introduction

South Africa introduced the Refugees Act in 1998 (Refugees Act, No 130 of 1998), following the coming into force of one of the most progressive constitutions in the world (Constitution of the Republic of South Africa, No 108 of 1996). The Refugees Act was no less ground-breaking. South Africa became the first country to explicitly state within its refugee law that gender-related persecution is a basis for asylum. Most other countries, including Canada, Australia, USA, New Zealand, UK and a handful of other European states, which recognise gender-based persecution as a basis for asylum have chosen not to amend their legislation, but have instead created non-binding guidelines of how gender can be incorporated within the definition of social group. Now, in 2008, new amendments to the Refugees Act are pending that seek to give gender an even more prominent position within the law (Refugees Amendment Bill, 2008).[1] While the current Refugees Act incorporates gender under 'social group,' one of the six grounds on which refugee status can be granted[2], the amendments suggest that gender be extracted from its position under 'social group,' and actually added as a seventh ground. Officials claim this change will reduce ambiguity and raise the status of gender within the Act, generating greater recognition of gender-related persecution cases.[3]

While, legally, South Africa has distinguished itself as a state with a real commitment to gender equality and women's rights, how the law is implemented and how it practically affects women[4] applying for asylum determines its real worth and effectiveness. In many countries, such as Canada, USA and UK, limited understanding of gender-related persecution has made any real redress difficult (Ceneda & Palmer, 2006; Oxford, 2005; Macklin, 2004). Despite increased awareness, the actual progress in recognising gendered claims has been *"largely symbolic when measured against the practical impact it has had on the lives of refugee women"* (Valji, 2001:25). Financial, cultural and social barriers deter women from migrating, and those who do may not be

[1] The Refugees Amendment Bill has been passed by the Parliament and is currently awaiting approval by the President.

[2] Section 3(a) of the Refugees Act reads that a person qualifies for refugee status, if "owing to a well-founded fear of persecution by reason of his or her race, tribe, religion, nationality, political opinion or membership in a **particular social group**, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country…" Social group is defined under Section 1(xxi) of the Act as including "among others, a group of persons of particular **gender**, sexual orientation, disability, class or caste."

[3] The Chairperson of the Standing Committee recalled a consultation regarding the amendments – "… [Participants] said rather put it in there; take out all the ambiguity, stop all the arguments that might take place in the future because not everyone sees gender as a particular social group."

[4] Due to the disproportionate effect of gender-related persecution on women, as well as the particular challenges women face in the asylum process, this study will primarily focus on women. It does, however, acknowledge that men can also be victims of gender-related persecution, and a number of these cases are examined.

willing to divulge their stories of gender-related persecution, or they may not know those experiences could constitute a legitimate asylum claim. They may also face insensitive asylum interviewers and officials who lack knowledge and understanding of gender and may disregard their experiences as illegitimate and ineligible. These issues work to discourage asylum seekers from claiming asylum based on gender-related harm, or if they have the courage to share these painful stories, they are often rejected for failing to prove their harm is actually persecution.

An estimated thirty-two per cent of asylum applications in South Africa are from women (CoRMSA, 2007), but there are no accurate statistics on why they flee, and how many have experienced gender-related persecution. Humanitarian and human rights reports, however, have documented experiences of women from around Africa who have fled sexual violence during conflict, or even gendered harm and discrimination during peacetime - domestic violence, female genital mutilation, forced marriage, rape – when protection by local authorities was weak or non-existent (Human Rights Watch, 1996 & 2003, ICRC, 2006; International Alert, 2005; Oloka-Onyango, 1995). Recognising such reports, this study asks, how does the South African asylum system apply the law and, particularly, how does it understand, construct and assess cases involving gendered harm?

Rather than focusing on the South African asylum law itself, however, this study assesses the manner in which decisions are made, questioning readily accepted and essentialised notions of women and gender. It looks at how the asylum system defines legitimate refugees, and the interplay of fluid interpretations of gender, culture, violence and the political within these constructions. The first section of this study conceptualises approaches to asylum law and gender-related persecution, and examines the most relevant approach in the South African context. The study then discusses underlying assumptions and understandings of gender-related persecution among asylum officials and within the system itself. Following this discussion, three distinct trends are examined, all of which demonstrate a reliance on sexist and essentialist notions of the political and personal, as well as the nature of conflict and culture. First, the study finds an emphasis on overtly political or officially sanctioned human rights abuses as grounds for asylum, as well as a dismissal of gendered claims as personal and common and therefore less serious or even irrelevant. Second, even where the state is clearly the perpetrator, sexual violence is seen as a basis for asylum only during the time of an officially recognised conflict. Third, officials appear to grant asylum in gender-related persecution cases only where the type of harm can be seen as related to an unfamiliar culture, or cultural backwardness. In conclusion, the study will discuss what these trends mean to asylum seekers who flee gender-related persecution, and whether South Africa truly provides the protection it promises.

Relevance of this Study

South Africa is in the unique position of being the first developing country to include gender-related persecution as a basis for asylum in its refugee legislation. While there is an abundance of literature available on asylum claims based on gender-related persecution in Northern countries, and likewise easily accessible research on women refugees in camps in Africa, there is a definite lack of critical analysis on the situation in South Africa. South Africa is also the only country in Sub-Saharan Africa which has a formal policy of integration for refugees, unlike its neighbours which often rely on policies of containment in camps and settlements. Because of the nature of its policy, South Africa encounters many of the same problems faced in the Northern developed states; however, it remains within the socio-economic climate of a developing country in Southern Africa, presenting a complex and unique range of issues.

While many authors have questioned how South African asylum officials treat gender-related persecution claims (Julien, 2003; Palmary, 2003; Valji, et al, 2006), no such studies have been carried out as of yet. This study is the first in South Africa that assesses how asylum law related to gender-related persecution is being interpreted and applied. It contributes to conceptualising the meaning of gender-related persecution and provides research into the challenges of gender-related asylum claims, as well as offering a spring board into further studies. In addition, this research complements the current work on gender and asylum being carried out by the Forced Migration Studies Programme at the University of the Witwatersrand.

Even outside South Africa, a search for literature looking at the implementation of policies on gender-related persecution produces few results. In the UK, an implementation study was released in March 2006 by a refugee advocacy organisation (Ceneda & Palmer, 2006). Another report looked specifically at Pakistani women and whether they are able to access refugee protection in the UK (Siddiqui, et al, 2008). In the USA, Connie Oxford (2005) conducted a study into the implementation of the US guidelines, particularly examining assumptions of the meaning of gender-based persecution by immigration practitioners, judges and asylum officers. The UNHCR has also produced a comparative analysis of approaches to gender-related persecution in 42 European countries, particularly looking at the adoption of the UNHCR's Guidelines (Crawley & Lester, UNHCR, 2004).

As Oxford (2007) points out, however, academic debates around gender-related persecution and asylum have largely stayed within the disciplinary boundaries of legal studies. Most studies related to gender and asylum focus on case law from various contexts, as well as international refugee law and feminist legal theory. They examine and reason why gender should be

incorporated within asylum regimes and critique previous legal judgements. While these types of studies have certainly led to advancements in seeing law through a gendered lens, they have *"ignored the social relations and networks of people who make, implement, use (and misuse), and rely upon the law"* (Oxford, 2007: 121).

Although this study examines the legal framework for asylum in South Africa, it is primarily interested in how officials involved in the refugee system understand gender-related persecution and apply those interpretations. Rather than examining this through a legal studies lens, it discusses the practice of asylum determination in South Africa from a social science and feminist perspective, evaluating the ways in which understandings of the law are formed, and how they affect claims of gender-related persecution. The study attempts to balance both the need to position its analysis within the essentialising boundaries of asylum law, while also challenging the assumptions on which that law is based and legitimises.

Conceptualising Gender and Asylum

International recognition of the historic marginalisation of women's asylum claims first appeared with a 1984 European Parliament resolution, followed by a 1985 United National High Commission for Refugees conclusion, both encouraging states to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment, due to having transgressed the social mores in their societies may be considered as a 'particular social group' within the meaning of Article 1 A (2) of the 1951 United Nations Refugee Convention (OJ, 1984; UNHCR, 1985; Erdman & Sanche, 2004). In an astonishing transnational and iterative legal process, further international advocacy succeeded in pushing some states to introduce non-binding gender guidelines for asylum claims (particularly Canada, the United States, United Kingdom, Denmark, Norway, New Zealand, and the member states of the European Union) and two countries to adopt binding policy (South African and Sweden) (Valji, 2001; Erdman and Sanche, 2004). Within a decade, the assertion that gendered harm could constitute persecution within refugee law had become a normative reality, internalised into international and domestic legal structure. Despite such recognition, debates on how experiences of gender persecution should be incorporated into the text of the law and the manner in which it should be interpreted and applied continue to rage. In the seventeen years since the first country, Canada, adopted gender guidelines into its domestic refugee law, it has become obvious that altering legislation was only just the beginning of change.

In Gender and Refugee Status, Thomas Spijkerboer (2000), breaks down the feminist critiques of international refugee law into three separate trends – the early critics who attacked the law as clearly patriarchal and identified a clear public/private division in the way it was formulated and applied; the human rights approach which relied on cultural explanations; and the anti-essentialist approach which asserted that gender-related persecution cases represent asylum seekers as cultural others. While this study will employ these categories; it also recognises the oversimplification implicit in the attempt to categorise complex approaches and analyses, many of which cut across such distinctions.

Early Critics

The feminist legal theorists of the 1980s exposed the gender bias of the apparently neutral and objective system of international law, questioning who determines legitimate human rights and state responsibility for abuses (Bunch, 1990; Charlesworth, et al, 1991). These authors saw themselves engaging in a struggle against patriarchy and considered this struggle a universal one (Spijkerboer, 2000). Women globally were presented as facing specific types of suffering that the refugee law did not adequately address because of its focus on men's experiences. Mackinnon (1989) and others argued that the law is not neutral or objective, and the public/private dichotomy

in the formulation of law is gendered towards responding to the rights violations most frequently faced by men (Charlesworth, 1999; Mackinnon, 1989). They argued that the dominance of the male voice in the western liberal tradition allows for a division to be drawn between the public and private spheres. The public sphere of the work place, the law, economics, politics and intellectual and cultural life, where power and authority is exercised, is regarded as the natural domain of men; while the private world of the home, hearth and children is seen as the appropriate space of women (Charlesworth, 1991). More importance has traditionally been given to the public realm and as a result men and masculinity dominates in law and life. As men have typically dominated the public sphere of politics, government and the state, the violations of human rights which happen in those arenas are seen as the most detrimental to society and thus the area of primary concern for refugee and human rights law. Interpretations of international refugee law have typically concentrated on persecution by the state and those acting on behalf of the state – individuals imprisoned, intimidated or tortured by the state because of their race, religion, nationality, membership in a social group or political opinion. Because the majority of gender-related persecution occurs within the private or domestic sphere, at the hands of private citizens, violence against women has been afforded a category of lesser importance, preventing women from accessing asylum. Despite the staggering levels of violence against women globally, because this violence occurs in 'private,' the international community has frequently accepted it as normal or even dismissed it as an individual or cultural matter (Bunch, 1990). As Mackinnon (1989: 238) notes, *"because women's injuries are shared in some way by most or all women, no individual women is* [seen as] *differentially injured enough to be able to sue for women's injuries."* Created based on men's experiences, refugee law has focused on public sphere, leaving women's experiences and thus gender-related persecution excluded (Crawley, 2004, Bunch, 1990, Charlesworth, et al, 1991, Seith, 1997, Mackinnon, 1989).

Charlesworth, Bunch and Mackinnon, however, challenged the natural acceptance by the law of the public/private distinction as an ideological construct that rationalises the exclusion of women from the sources of power. They asserted that it ignores the fact that such violence, although committed by private citizens is often condoned or even sanctioned by the state (Bunch, 1990). Rather than labelling acts of violence against women as private or personal, they should be recognised as political. In addition, women's acts, typically been viewed as personal (private), for example, women demanding the right to reproductive choice or women refusing to veil in Iran, should also be recognised as political acts of defiance and dissent (Kelly, 1993). *"Contrary to the argument that such violence is only personal or cultural, it is profoundly political. It results from the structural relations of power, domination and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work, and in all public spheres"* (Bunch, 1990: 491). In looking at the possibilities for change within the law

itself, Charlesworth (1991) acknowledges widespread apprehension about the utility of attempts at legal reform to create social change, especially when most forms of power continue to be controlled by men. But, looking forward, she suggests:

"A feminist transformation of international law would involve more than simply refining or reforming existing law. It could lead to the creation of international regimes that focus on structural abuse and the revisions of our notions of state responsibility. It could also lead to a challenge to the centrality of the state in international law and to the traditional sources of international law" (Charlesworth, 1991: 644).

Early feminist critics, such as those discussed above, asserted that international law itself was the problem. They challenged the assumption that the state was not responsibility for private acts, and argued for a rethinking and recognition of women's acts and violence against women in the private sphere as distinctly political.

Human Rights Perspectives

The early critics attempted to unite women globally around a common cause - fighting violence against women - and argued that women are most at risk in their homes and communities. In response, authors such as Jacqueline Greatbatch (1989) criticised this approach, opposing the tendency of earlier writers to homogenise women's experiences, erasing contextual analysis, as well as their assumptions about the inflexibility of law.

"This analysis flounders on its ahistoric, acultural approach to women's oppression, in addition to its inattention to key aspects of the Convention definition and its overarching limitations. The bifurcated version of society itself ignores the realm of women's lives outside domesticity and creates a rhetorical wall between domestic and social culture. It roots women's oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the interconnectedness of the public and private spheres." (Greatbatch, 1989: 520)

As Deborah Anker (2002) recognises, the development of gender asylum law has required a human rights framework. Following intense questioning about the capacity of the law to benefit women, authors argued that the answer to addressing gender-related persecution in the asylum system could be found from within the law itself (Kelly, 1993; Greatbatch 1989; Anker, 2002). According to the authors from human rights perspective, while the 1951 Convention does not set out to exclude women's experiences, it does so in two ways – its definition of a refugee does not specifically name gender as a basis upon which asylum can be granted, and secondly, in

applying the refugee definition, adjudicators have traditionally neglected to incorporate the gender-related claims of women into the interpretation of the grounds enumerated in the Convention (Kelly, 1993). Recognising the interplay of the personal and political in varying degrees, they argued for the adoption of concrete rules and guidelines and the legal recognition of gender-related persecution, either as a separate ground for asylum (ie. gender), or under the existing ground of particular social group within the 1951 UN Convention on the Rights of Refugees, which defines a refugee as any person who *"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, is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country"* (UNHCR, 1951: Article 1a (2)).

Despite calls to add gender to the UN Convention as a sixth ground for asylum (alongside the existing grounds of race, religion, nationality, political opinion and membership in a particular social group) (Stevens, 1993), the dominant approach has been to push for the evolution and transformation in the interpretation of refugee law. Authors such as Anker (2002: 139) argue that *"bars to women's eligibility for refugee status lie not in the legal categories…but in the incomplete and gendered interpretation of the law"*, and the failure of the decision makers to acknowledge the gendering of politics and women's relationship to the state. Simply adding gender as one of the grounds of persecution would not rectify the social and political context in which the claims of women are adjudicated and interpreted (Macklin, 2004). As a result, the UNCHR and countries that have adopted gender guidelines have attempted to rectify the lack of consideration of women's asylum claims by incorporating gender under the ground of "particular social group" within the definition of the UN Convention. Although the UN Convention does not provide a specific definition of the phrase "particular social group" (Kelly, 1993), the UNHCR's 2002 gender guidelines define it as, *"a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights"* (UNHCR, 2002: Section 29).

Authors following the human rights approach have also attempted to distinguish between the possible types of women's asylum claims. They stated that women face gender-neutral persecution on the same grounds as men would, however, they also suffer gender-related persecution, which can be classified into two categories — gender-specific and gender-based persecution (Kelly, 1993). Gender-specific persecution, according to these authors, occurs when the type of persecution experienced is tied to a person's gender, for example, women may be subjected to rape and other sexual violence, or the threat of such violence, for numerous reasons, such as punishment for race, religion, political opinion, nationality, and membership in a

particular social group. Gender-based persecution occurs when the persecution is inflicted on the victim on the basis of that person's gender (Kelly, 1993). From these debates, the term "gender-related persecution" has emerged to cover both these meanings.

Based on this thinking, the UNHCR's 1985 and 2002 gender guidelines, in addition to many domestic guidelines (including the proposed South African guidelines), recognise four ways in which women may face gender-related persecution:

1) Women who fear persecution on the same or similar grounds as men. This includes women persecuted for their identity or their particular beliefs. In this circumstance, women could face the same persecution, but the nature of the harm feared may be different from that of a man (for example, rape or sexual assault).
2) Women who fear persecution solely because of their familial or spousal relationships. They may be harmed in order to intimidate a family member, or because it's assumed they hold similar beliefs to other family member (for example, imputed political opinion)
3) Women who fear persecution resulting from conditions of severe discrimination on gender grounds, and are at risk of harm from private citizens (including their partners, family members and communities) because the state is unwilling or unable to protect them.
4) Women who fear persecution because of transgressing religious, customary or social mores.

Aside from setting out the meaning of gender-related persecution and outlining what types of harm it could include, the UNHCR gender guidelines also suggest interview procedures which could assist in encouraging women to disclose their experiences. Among other recommendations, the UNHCR (2002) suggests the following:

1) Women should be interviewed separately, without the presence of male family members.
2) Women should be given information about the asylum determination process and access to it in a language they understand
3) Women should be provided with interviewers and interpreters of the same sex as themselves
4) The interviewer should explain the process and ensure the claimant feels and understands it is confidential
5) Information should be collected that has relevance in woman's claims – such as the position of women before the law, the political, social and economic rights of women, the protection they can expect from authorities, any harmful traditional practices affecting

women, the incidence of violence against women as well as the penalties for perpetrators.

6) Interviewers should be able to give claimants information about social services available to them.

An additional characteristic of the human rights approach is the tendency to analyse the experiences of refugee women through a cultural lens, in contrast to the internationalist perspective of earlier critics (Spijkerboer, 2000). In trying to explain why some states are unable or unwilling to protect women from gender harm, human rights discourse attributed it to the force of culture (Visweswaran, 2004). Using culture as an explanation, the mainstream media, human rights reports, refugee lawyers and academics have often cast refugee women as fleeing from misogynist and patriarchal countries. An article by Patricia Seith (1997) on domestic violence is illustrative of this approach. *"Government and police protection are inadequate because the laws do not specifically condemn domestic violence and, due to pervasive cultural norms, related laws such as assault and battery are generally interpreted to preclude domestic violence. Cultural norms that devalue women not only perpetuate domestic violence, but also result in a culture that makes it virtually impossible for a woman to leave her batterer"* (Seith, 1997: 1815).

The human rights approach has been instrumental in advancing methods of recognising and assessing gender-related persecution that has been widely accepted in international and domestic jurisprudence. Using a predominantly legal approach, they have emphasised the role of culture in the oppression of women, distinguished gender neutral from gender related forms of persecution, and successfully advocated for such persecution to be incorporated under the ground of particular social group in the UN Convention (Spijkerboer, 2000). Alongside refugee law, the last two decades have also witnessed a remarkable transformation of the legal and political landscape. The early calls by Bunch (1990) and Charlesworth (1991) for women's rights violations to be considered human rights violations have been realised in many international forums. In addition, because of parallel international advocacy, crimes of rape, forced marriage, enforced sterilisation and sexual slavery are now recognised as war crimes and crimes against humanity and such cases have been tried at a number of tribunals (Bhabha, 2007).

Anti-essentialist Critiques

In identifying with the anti-essentialist method himself, Spijkerboer (2000) describes a three-pronged critique of the human rights approach to gender-related persecution.

First, the anti-essentialist critique claims that the human rights approach relies on neo-colonial stereotypes of the Third World Other. In human rights reporting and feminist literature, culture has

been portrayed as a non-Western phenomenon (Kapur, 2002; Visweswaran, 2004; Mohanty, 1998; Spivak, 1994). Chandra Mohanty (1988) and Gayatri Spivak (1994) critique 'Western', particularly feminist, writers for a tendency to portray third world women as monolithic cultural others. Rather than unpacking their unique experiences, differences and individual agency, they argue such writing appeals to its readers' neo-colonial sensibilities to save third world women from their uncivilised cultures (Spivak, 1994). In advocating for action, much modern human rights reporting on gender-related violence falls into the same trap; it reduces the totality of certain non-western countries to a set of cultural practices deemed violent towards women (Visweswaran, 2004). In contrast, however, when Western women – usually cast as liberated, empowered and on par with men - experience gendered violence, culture is not as easily used as an explanation. *"Culture is frequently invoked to explain the kind of violence experienced by women in the third world, though it is not invoked in a similar way when discussing violence against women in various Western contexts"* (Kapur, 2002: 14). Culture is something Others have and are oppressed by. Despite its effectiveness in persuading courts and officials, this reliance on culture has serious repercussions for those women whose claims involve persecution that cannot be blamed on culture, or a cultural practice. As Kapur (2002) warns, such portrayals of culture distract away from the real issues, the failure of the state to provide real protection for human rights.

The anti-essentialist critique is also sceptical about the use of membership in a particular social group as a persecution ground (Crawley, 2004; Macklin, 195; Razack, 1995). They claim this approach results in classifying all women's cases as special claims, leaving men's claims as the only real claims, and thus also excluding the possibility that men could also claim gender-related persecution (Spijkerboer, 2000, Palmary, 2003). Although the inclusion of gender as a social group in the UN Convention is now widely accepted, Crawley (2004) criticises it for depoliticising women's experiences by viewing women as one cohesive group and assuming that all women experience persecution equally. Rather than addressing the core issue of discrimination on the grounds of gender as a violation of fundamental rights, it defines them as passive victims, undermining the validity of their actions. *"I believe that actual or imputed political opinion is a preferable way to frame cases involving the discrimination and the violation of social mores: both strategically, insofar as it is a more accepted ground for refugee status, and politically, in that it recognises the diversity of women's experiences and locates them in their political and social context"* (Crawley, 2004: 329). While Macklin (1995: 260) agrees with this argument on an intellectual and philosophical level, she cautions that *"pushing 'political opinion' to its logical limit should not be discounted, but tactically it may not be the most viable one."* The personal is undoubtedly political, but it could be an uphill battle to convince asylum adjudicators that a

woman's refusal to endure domestic violence is in fact a political stance against the systematic subordination of women.

Asylum adjudicators also tend to employ gender as a synonym for women, rather than considering how men could be affected by gender-related persecution. While, as the UNHCR's gender guidelines recognise, "*due to the particular types of persecution, [gender-related claims] are more commonly brought by women"* (UNHCR, 2002: Para 3), gender-related claims can and have been brought forward by men. Gender, as used in the legal framework, refers to the socially or culturally constructed and defined identities, status, behaviours, roles and responsibilities that are assigned to men and women, as well as the relationship between them (LaViolette, 2007). Gender-based persecution occurs through the repression of those who fail to conform to social roles. Therefore, men can also be subjected to persecution based on gender. Many gender guidelines and legal analyses, however, treat gender persecution as essentially tied to biological sex, rather than the hierarchies of social roles (LaViolette, 2007). For example, in the proposed South African gender guidelines, there is no mention of how and whether men could also be victims of gender persecution, although its actual definition of gender is inclusive (Valji & de la Hunt, 1999). The Canadian gender guidelines refer specifically to women, but adjudicators have recognised they can also be applied to men. Despite this, a link is seldom, if ever, established between the guidelines and claims specific to men (LaViolette, 2007).

While arguing for the use of greater flexibility within refugee law, the anti-essentialist authors also question the ability of legal reasoning in and of itself to bring about the solution (Spijkerboer, 2000). Razack (1995) suggests that we work with the manner in which refugee decisions are made, rather than the specific content of the law itself. Decisions on asylum applications are made through choices by lawyers, refugee reception officers, translators, and others, all of whom are subject to internalised stereotypes and broader discourses of women as refugees. The asylum process is not dependent on the law itself, but on a construction of meaning by all the actors involved (Palmary, 2003). It is the attitudes of those within the system who are responsible for interpreting and adjudicating the law which must change. Reflecting on the impact of the Canadian guidelines, Razack (1995) states that they have not changed the traditional lens through which refugees are viewed. The institutional culture of the decision makers determines what counts as relevant knowledge, and the structural aspects of the process ensure it is sustained. Both Razack (1995) and Visweswaran (2004) suggest that the real inclusion of gender-related persecution relies on replacing the emphasis, away from cultural explanations and neo-colonial compassion, and towards a political understanding of why women flee and the denial of rights by political systems, placing the responsibility to protect human rights squarely back on the shoulders of the states, both refugee producing and accepting.

The Approach of this Study

This study will employ some of the approaches of both the 'early critics' and the 'anti-essentialists' in analysing the interpretation of gender in the South African Refugees Act. It questions the resilience of the public (political) and private (personal) dichotomy in the application of refugee law, and the impact it has on the adjudication of asylum cases in South Africa. It also seeks to assess how gender functions in practice, and analyses how those involved in the asylum process understand the interplay between gender, violence and politics. Ultimately, it argues the transformation of the law towards considering gender-related persecution claims needs more than a change in the law itself (ie. the inclusion of gender as a ground). Rather, a dramatic change is required – one which interrogates and alters the stereotypical manner in which asylum seekers are viewed and the law is interpreted and applied.

This study cannot claim that the law itself is gendered - in South Africa's Refugees Act, 'gender' may soon be added as a distinct ground for asylum. However, it can discuss whether such rhetorical changes in the law have not addressed patriarchal and essentialist interpretations of conflict, culture and the political relevance of gendered harm. As argued by the 'anti-essentialist' thinkers, and even some of the human rights theorists before them, a change in the law does not necessarily lead to a change in how it's interpreted and decisions are made. The mere existence of gender in the Refugees Act does not mean eligible women can successfully claim asylum based on gender, or that immigration officials or judges recognise such claims fully, without prejudice. Macklin (2004) warns, in her comparison of Canadian, American and Australian guidelines, that although their gender guidelines *"may appear as resolutions to the problems surrounding the application of the Convention to the particular circumstances of women and girls, they are not,"* (Macklin, 2004: 302). The gender guidelines merely identify a concern and formulate a response. The effectiveness of the law is determined by how it is implemented and whether it alters the practice of officials towards recognising and accepting the stories of gender-based persecution as legitimate asylum claims.

Methodology and Design

The research for this dissertation was carried out as part of a larger project examining gender and asylum through the Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand. Along with various student papers and dissertations, such as this one, the project also prepared an advocacy report and organised a conference. A number of researchers, including the author, undertook the various components of this research in consultation with FMSP, particularly under the guidance of Dr. Ingrid Palmary.[5] Funding for this research was provided by Atlantic Philanthropies and the National Research Council.

Research Design

This research uses qualitative methods which are situated within the feminist and critical theory tradition. Feminist theory, as a postmodern theory, seeks to deconstruct Western narratives of truth, knowledge, power and self, in particular, questioning the meaning and construction of gender (Olesen, 1998). Critical theory demands the researcher expose contradictions often accepted as natural, and recognise that such ideologies are not simply theoretical, but materially inscribed in social practices and intrinsically political (Kincheloe & McLaren, 1998). "*For instance, people act as if certain social and cultural relations were true even when they know them not to be true."* (Kincheloe & McLaren, 1998: 265)

Feminist theory also critiques the representation of research participants, encourages researchers to exercise reflexivity in locating themselves within the process of knowledge production, and argues for recognition of all knowledge as situated and perspectival (Palmary, 2005). Much feminist research has been criticised for its representations of the Other, often marginalised groups of women, and how it represents their experiences (Palmary, 2005). For example, Mohanty (1993) and Spivak (1993), in their critiques of writing on third world women have argued that representations of Other women often serve to essentialise their experiences, portraying them as politically immature victims of their culture and traditions. In an attempt to avoid the objectification of the Other, feminist research employs subjectivist, experiential reflexivity, asking the researcher to reflect on her location within the research and role in the production of knowledge (Marcus, 1998). Fine (1998) debates ideas of representation and reflexivity at the hyphen between self-other, recognising that the self (the researcher), and the other (the researched) are entangled. In assessing the "ethics of knowing", she recommends that we examine pivoting identities at the hyphen, but resist the tendencies to romanticise subjugated women or retreat from analysis and interpretation (Fine, 1998: 152). Feminist research, through

[5] Other researchers involved in collecting information used in this dissertation include Lindsay Harris, a law student at the University of Berkeley in the USA, Lisa Mushidi, an honours student with the Forced Migration Studies Programme and Zoe Rohde, a consultant at the University of Cape Town's Law Clinic.

standpoint theories, has also sought to focus on the relationships between everyday life and social processes, and the need to position individual accounts within the structure of broader social relations (Olesen, 1998). As a result, feminist research is itself unashamedly political, aspiring to confront the injustices of a particular society, or sphere within society (Kincheloe & McLaren, 1998). Whereas positivist researchers have often clung to the illusion of neutrality, feminist and critical researchers, more generally, are unafraid of aligning themselves with a more emancipatory approach. As Mohanty (1993:197) notes, contesting the notion of objectivity, *"feminist scholarly practices exist within relations of power – relations which they counter, redefine, or even implicitly support. There can, of course, be no apolitical scholarship."*

This research began with the broad and rather positively framed question of "what prevents eligible women from successfully using the gender provision of the 1998 Refugees Act to claim asylum in South Africa?" I then revised this question, and designed the research around three interlinking questions, which required a deeper inquiry into the assumptions and practices implicit in the refugee system: How do asylum seekers experience gender? How are gender-related asylum laws applied? And, how is gender constructed in the South African asylum system? The framing of these questions sought to recognise the diverse narrative of women's individual experiences, while simultaneously examining how their narratives are reproduced and understood by the asylum system.

The methodology employed included key informant and participant interviews and documentary case study analysis. The research focused solely on asylum claims lodged at the refugee reception offices in Johannesburg, Pretoria, Durban, Port Elizabeth and Cape Town. The focus was particularly on those cases which were originally rejected by Refugee Status Determination Officers (RSDOs) at these offices, and in which the claimants proceeded to contact the offices of Lawyers for Human Rights, or the University of Cape Town Law Clinic from January 2006 to July 2007. This time period was selected as it contained the most easily accessible cases with the most recent case notes (at the time of the research in July and August 2007) and it was more likely to reflect the current decision making patterns of asylum determination officials.

The research progressed through three phases, each building off the knowledge acquired in the previous. By treating data collection and data analysis as simultaneous, I was able to incorporate into successive interviews my analysis of how constructions of gendered harm are created and interpreted. For example, the concerns of lawyers informed the questions that were asked of asylum seekers, and the experiences of asylum seekers determined the issues addressed in interviews with asylum officials.

Phase 1:

Key informant interviews

The initial research for this study involved a series of key informant interviews with selected individuals involved in legal assistance for refugees and asylum seekers. The key informants were interviewed in a semi-structured manner, to provide general background information on whether there have been claims based on gender; what are the nature of those cases; what has are the attitudes of officials towards those cases; and what are the obstacles preventing women from making successful claims based on gender.

Two lawyers involved in refugee cases were interviewed to provide general background and insight into the refugee processes in South Africa, as well as their approaches to gender-related persecution claims. A representative of the UNHCR involved in resettlement was interviewed in regards to the UNHCR understanding of gender-related persecution, and the occurrence of such resettlement claims. As the UNHCR has in the past conducted training for RSDOs, the researcher also asked the representative questions related to the content and frequency of training provided.

Phase 2:

This phase primarily involved qualitative case study analysis using purposeful critical case sampling. Asylum cases were analysed, and interviews were conducted with purposefully selected asylum claimants.

Desktop review of cases

The study examined all available cases at the Lawyers for Human Rights offices based in Johannesburg, Pretoria, Port Elizabeth[6] and Durban as well as the University of Cape Town Law Clinic from January 2006 to July 2007. In reviewing the cases, each client file falling within the designated period was reviewed and the gender and country of origin of the client recorded. The grounds of asylum, if available, were recorded for female clients. If the file, male or female, yielded any information suggesting that the claim was gender-related, or could have been a factor, the file was set aside and the claimant was considered for a later interview.

A total of 4372 client files were examined. Interestingly the number of female files for 2006 to July 2007 found in Pretoria was the highest in terms of the percentage of total cases for each office (26%), followed by Johannesburg (19%), Durban (11%), Cape Town (11%) and finally Port Elizabeth (9%). While this merely represents the number of women seeking legal assistance at the chosen research sites, it is noteworthy in that the percentage of female clients at the legal

[6] The Lawyers for Human Rights in Port Elizabeth is no longer participating in the Refugee Rights Project, but these files were accessed in their storage location in Pretoria.

services offices dwindles the further into South Africa one travels. This may reflect the difficulties women face with internal transit in South Africa or perhaps the availability of services or employment in the various South African cities.

A total of 679 female client files were examined from twenty-five countries of origin with the majority of clients originating from Democratic Republic of Congo (DRC) (30%), Somalia (27%), Zimbabwe (11%), Burundi (10%) and Rwanda (6%). Each file was reviewed in detail to ascertain the reasons the woman left her country. Six percent of the cases were identified as involving some sort of gender-related persecution, even if this was not the basis of the claim. Such cases included the following: domestic violence (1 case), forced marriage (6 cases), sexual harassment (1 case), rape (including rape used as tool of persecution during war, or on the basis of political position, ethnicity or sexual orientation, 19 cases), fear of rape/attempted rape (12 cases), and human trafficking[7] for purposes of commercial or sexual exploitation (5 cases).

About 40 % of women's files, however, did not include any indication of the circumstances causing the client to flee her country. Furthermore, many files listed just "war," "violence" or "insecurity" without a detailed description of the events that transpired (12%). Many of these clients may have experienced gender-related persecution, yet were unwilling to communicate their story or did not believe that it was necessary in order to access basic legal services. It is also possible that women experiencing persecution on more traditionally accepted grounds, such as on the basis of their political activities (including their own political activities and those of their family members) or their ethnicity, may have also experienced rape or sexual violence as a tool of persecution and choose not to disclose these details in their often brief interactions with lawyers. Other studies suggest that the levels of gender-related persecution, in particular rape, indicated by this study may be underestimates (CSVR, 2001)[8]

Male client files:

A total of 3,693 male client files were examined from 48 countries of origin with the majority of clients originating from DRC (29%), Somalia (23%), Burundi (11%), Zimbabwe (9%) and Ethiopia (5%). Male cases pertaining to gender-related persecution were few and far between with a total of three files indicating that the male client had experienced rape or sexual abuse in his country of origin and two suggesting forced marriage and potentially forced sterilisation. Three male client

[8] For example, a 2001 study conducted by the Centre for the Study of Violence and Reconciliation based on a sample size of 163 women and 214 men found that 15% of girls age 10-14, 13% of women age 15-19, and 24% age 20-24 had been raped. The study also revealed that 4% of men age 15-19 and 6% between age 20 and 24 had been raped. This suggests a higher level of gender based violence among the South African refugee and asylum seeker population when the population is specifically questioned on the topic.

files indicated that they had fled their country due to persecution on the basis of their sexual orientation.

While South Africa has seen a number of gender-related persecution claims from men, due to the disproportionate effect of gender-related persecution on women, as well as the particular challenges women face in the asylum process, this study primarily focuses on women. It does, however, acknowledge that men can also be victims of gender-related persecution, and a number of these cases were examined.

Interviews with asylum seekers

Fifty-five individuals (44 female and 11 men) were identified by their files as possibly having experienced gender-related persecution. They were then approached by the legal services provider involved. The clients were given the choice to participate in a confidential, voluntary interview concerning their asylum claim and their experience of the South African asylum process. Attempts were made to contact all fifty-five individuals, although the majority of individuals were not able to be contacted due to outdated contact information; a few had been resettled or repatriated and two refused to be interviewed. Twenty-two asylum seekers agreed and were interviewed, including three men and nineteen women. Most interviews were conducted in English although two were conducted in French, two with Swahili interpreters, and one with a Somali interpreter. Participants received 40 Rand towards their transportation costs to attend the interview, which ranged from thirty minutes to one hour. Nine interviews took place in Cape Town, while eight interviews were conducted in Durban, and five in Pretoria and Johannesburg. No interviews took place in Port Elizabeth as none of the files indicated that gender-related persecution was involved. The interview participants originated from ten different countries with the most from the DRC (6), followed by Rwanda (3) and then two from Burundi, Cameroon, Ghana, Uganda and Somalia and one participant each from Kenya, Ethiopia, and Tanzania. A tape recorder was used for most of the interviews.

Of the nineteen women who were interviewed, one case was not relevant, three reported they had been raped by members of the opposition or a rebel group because of the imputed political opinion of their husband or father; six reported rape or fear of rape by soldiers; two said they feared being forced into marriage with chiefs; two feared being forced to marry private citizens; two reported they had been raped by soldiers and forced to become their ‘wives’; one said she was raped by rebels and threatened with forced marriage; one feared being forced to marry a soldier; and one reported sexual assault by the police because of her sexual orientation.

Overall, three men were interviewed in connection with their cases. One reported being raped by soldiers because of his imputed political opinion; one fled because he feared becoming a chief and having to be castrated as a result, and the other fled after he was persecuted by private citizens because of his sexual orientation.

The research questions posed to participants focused on their experiences with the asylum process in South Africa. The transcripts of the interviews were entered into a matrix and evaluated according to the major themes identified, including:

1) The type of gender-related persecution experienced
2) Domestic measures sought before leaving
3) Reason for choosing South Africa
4) Knowledge of ability to make a claim based on gender-related persecution experienced
5) How legal representation was secured
6) Asylum claim made
7) Whether claimant shared story of gender-related harm with RSDO
8) Whether an interpreter was used, and any problems experienced
9) Whether claimant was given information on the asylum process
10) Was there an option of being interviewed by a man or a woman
11) If appeal was made, what was the argument, and whether an interpreter was used
12) If the claimant filed for resettlement, on what grounds.

Phase 3:

After the first two phases of the study, the researchers were able to identify some of the concerns of the lawyers, a sense of the types of asylum determination decisions being made, as well as the experiences of some of the claimants, both male and female, in making claims. This helped to inform the researchers of the types of questions that should be asked of officials involved in the asylum determination process.

Interviews with Refugee Status Determination Officers (RSDOs)

RSDOs are the frontline of the asylum process in South Africa. They conduct the initial interviews (after the application has been completed) with asylum seekers and make decisions based on their testimonies and cursory research. Interviews were conducted in October 2007 with twelve RSDOs - four of the interviews took place in Johannesburg (Rosettenville) and eight in Pretoria (Marabastad). In January 2008, an additional sixteen RSDOs were interviewed - eight in Cape Town, four in Port Elizabeth, two at the permanent Durban office and an additional two at the Durban Backlog Project office. At the Pretoria office, six of those interviewed were temporary

contract staff, or “interns.” One intern was interviewed at the permanent Durban office. Although referred to as interns, these staff members received the same training as permanent RSDOs, and were likewise responsible for conducting refugee determination interviews and passing decisions on cases. All of the RSDO interns, however, had only been conducting refugee determination since June-July 2007. Of the permanent RSDO staff, three had been working as RSDOs for over four years, eleven for three years, four for approximately one year and three for under a year. Of the twenty-eight RSDOs, twelve were women and sixteen were men.

All the RSDOs were each interviewed in regards to their understanding of gender; the validity of gender-related claims; whether they have encountered such claims; their attitudes towards such claims; the type of training they receive related to gender; the constraints and challenges they encounter in processing claims and the interview method and procedure. All the interviews were tape recorded. The information from their interviews were entered into a matrix and evaluated according to the following main themes:

1) Problems with interpretation
2) Differences in their treatment of men and women
3) Whether they would ever refer a claimant to a female/male interpreter
4) Understanding of gender-related persecution
5) Encounters with gender-related persecution (divided into – rape/ domestic violence/ forced marriage/ female genital mutilation / sexual orientation / imputed opinion)
6) Opinion on possibility of claiming asylum on gender-related persecution (divided into – rape/ domestic violence/ forced marriage/ female genital mutilation / sexual orientation / imputed opinion)
7) Training on gender
8) Opinion on quality of country information provided

Standing Committee for Refugee Affairs

A key informant interview was conducted with the Chairperson of the Standing Committee for Refugee Affairs, Mr. Claude Schravesande. Among other duties, the Standing Committee reviews “manifestly unfounded” decisions made by RSDOs, and advises RSDOs on matters of law and reviews their decisions.[9] He was asked about the types of cases the Standing Committee encounters, his understanding of the legitimacy of gender-related persecution cases, and the training the Standing Committee receives. The interview was tape recorded.

[9] Other powers and duties of the Standing Committee include to, formulate and implement procedures for the granting of asylum; regulate and supervise the work of the Refugee Reception Offices; liaise with representatives of the UNHCR or any non-governmental organisation; advise the Minister or Director-General on any matter referred to it by the Minister or Director-General; determine the conditions relating to work or study in the Republic under which an asylum seeker's permit may be issued.

Refugee Appeal Board

The Refugee Appeal Board is tasked with reviewing decisions by RSDOs when appeals are lodged. The Board ordinarily consists of five members and a Chairperson, all appointed by the Minister of Home Affairs. A group interview was conducted with the Chairperson of the Refugee Appeal Board, Mr. Tjerk Damstra and three current Board members, Mr. Hassim, Ms. Morobe and Mr. Mohale. They were asked questions about the types of cases the Board encounters, their understanding of gender and the legitimacy of gender-related claims, and how appeal decisions are made.

Letters of rejection from Department of Home Affairs / RSDO

In some cases, the asylum claimants who were interviewed were able to provide a copy of the letter of rejection they received from the Department of Home Affairs following their RSDO interview. The letters vary in format, but usually contain the decision on whether to grant asylum; background on the applicant's claim; reference to the laws employed; an argument on the well-foundedness of the claim or reference to the burden and standard of proof; the finding or decision and notice of the applicant's right to appeal. Lawyers also provided access to additional rejection letters of claimants who were not interviewed by this study. The letters are extremely valuable, especially when used along with the interview with the claimant, as it clearly shows the reasoning behind a RSDO's decision. The researchers were able to use these letters to evaluate whether the RSDO's decision considered gender-related persecution as legitimate grounds for asylum, and the reasoning behind the rejection.

Ethical Considerations

In conducting this research, we ensured the study met the ethical standards addressed in the University of the Witwatersrand's ethical guidelines. The researchers obtained informed consent for the interviews and accessing lawyers' case files. Prior to interviewing key informants and refugee determination officers, we ensured a) they knew we were researchers, b) they understand the goal of the study, c) they know their interviews are anonymous, and their names will not be shared with anyone d) they will only receive R40 to assist with transportation (only in the case of asylum seekers – other interviewees did not receive any payment), e) the information will not be used for anything other than this study, f) they are comfortable with the interviewer using a tape recorder, and g) the tapes will be destroyed. In addition to the above, we asked the claimants to only share as much information as they are comfortable with, so as to avoid causing them any additional suffering and trauma. We also assured them that any details of their case which would identify them would not be used in the report.

Representation

The nature of this research is that it hopes to inspire further studies, geared towards altering the construction of gender and treatment of gender-related claims in the South African asylum system. Because of this, some form of generalisability was required. The challenge, however, was to resist essentialising the experiences of the men and women we interviewed, while enabling the analysis to articulate politically significant claims. This is further complicated by the intrinsic link between asylum and legal categories and definitions, which by their nature demand the stereotyping of experiences (Bhabha, 2006). In writing the analysis, I have made a conscious effort to ensure the experiences of each man and woman are shared in the fullest way possible, while pulling out and emphasising the common threads from their stories.

In addition, I was also concerned with ensuring the men and women whose stories are discussed here are not represented as either solely victims or, alternatively and perhaps even more detrimentally, as "playing the system." As many of the individuals discussed by this study have lived through terrifying events which have forced them from their homes and away from their families, it is difficult to not cast them as victims. In addition, the nature of the asylum system is that it demands victims. As Shuman and Bohmer (2004) state, portraying oneself as a victim without dignity is the necessary price of asylum. Harm is only persecution if the asylum seeker is portrayed as lacking agency and choice, when the reality of overlapping reasons for flight is much more complicated. Asylum seekers from Zimbabwe, for example, often have both political and economic reasons for fleeing, but the South African system deems them economic migrants, ineligible for refugee status (de la Hunt & Kerfoot, 2007). The individual asylum seekers who were interviewed are presented here according to their country and the unique elements of their stories. While certain types of gendered harm are identified as unacceptable, they are not pegged on the essentialising categories of culture, religion or tradition, but assessed against the effectiveness of local laws and authorities. It is my hope that such an approach allows asylum seekers to be not just victims, but persons who have survived tragic events through a series of choices, including leaving their countries. Therefore, I have attempted to negotiate this discursive space throughout the research.

In the final chapter, I examine the seemingly blanket acceptance of claims based on female genital mutilation (FGM). The inherent risk is that such a discussion could create a backlash against women who claim asylum based on FGM. Asylum officials could view future FGM claims with even greater suspicion, and perceive claimants as playing the system. In an effort to prevent this, I ensure I applaud the acceptance of FGM claims, but express concern over the contradictory treatment of other cases of gender-related persecution.

In reviewing literature relevant to this study, I have maintained a critical eye to issues that seek to represent women through essentialising categories. Not surprisingly, it is the legal documents – laws, guidelines and court cases - that most often rely on stereotypes and squeeze complicated struggles into convenient pigeon holes. While there is a need to rely on some of these documents, as sources of influence and authority, they are tempered by considerations of how they represent asylum seekers, particularly women.

Reflexivity

The emphasis of the analysis is on the experiences of asylum seekers and it is written solely in the third person, however, I have not attempted to extract us, as the researchers, from the research process. As Fine (1998) suggests, I have sought to position us at the hyphen between self and other. I acknowledge the analysis is a co-production between the researchers and those we interviewed. During interviews with lawyers, asylum officials and asylum seekers, we emphasised certain themes more than others, and extracted specific meanings from sentences and dialogues. We went into the interviews with assumptions related to past knowledge of the refugee system, and recognition of barriers facing those who have experienced gendered harm. Each researcher also recognised the political purpose of the research, to uncover barriers and expose faulty application of the law and construction of gender in the asylum system. This inevitably influenced the original selection of questions, and those that were followed up more than others. Because three researchers were involved in the collection of accounts, the manner in which they were conduced likely also varied.

Much feminist research begins with a self-disclosure about one's own subjectivity, Palmary (2005) advises researchers go beyond such simple statements, towards analysing how it might render a particular account dominant. She suggests looking at different ways it is embodied (such as through race or gender) and institutionalised (such as position and funding, among others). There were three researchers involved in this study – all were young white women, and non-nationals of South Africa. One of the researchers was a law student, the second a masters student, and the third a consultant. They all presented themselves as researchers with the University of the Witwatersrand. Such identities carry with them a position of an 'outsider' both as researchers (not lawyers or officials involved in the asylum process) and as foreigners (particularly privileged foreigners, ie. from Canada, the USA and UK). Depending on the interpretation of those interviewed, such identities could be seen as intimidating positions of authority, neutral observers, or even comrades in a strange land. Regardless of reassurances and attempts to make the interviewees comfortable, the researchers could also have been seen as removed evaluators, if not judges, particularly in interviews with asylum officials. Hailing from

the USA, UK and Canada, the researchers could also have been viewed by the asylum seekers as ‘a way out’ of South Africa, who could secure them a place as a refugee in their countries.

Interviews with asylum seekers were conducted by two of the researchers, and the interviews with asylum officials were conducted by all three researchers. There is a possibility that this may have influenced the information both asylum seekers and asylum officials provided, and their levels of comfort in speaking with the researchers. During interviews, some of the RSDOs, in particular, expressed concern that the information collected would be used to discredit the Department of Home Affairs. After hearing that their responses would be kept anonymous, however, most seemed to become more comfortable. Although interviewers originally asked RSDOs about gender-related persecution, they often failed to understand the meaning of either gender or its position in asylum. Researchers then encouraged responses by asking about specific types of gendered harm – such as FGM, domestic violence, rape, forced marriage and persecution based on failure to conform to social norms (such as sexual orientation). While such a tactic resulted in responses, it could also have eliminated types of harm (such as forced sterilisation, honour killings, etc) that were not specifically asked about.

During interviews, asylum seekers often asked the researchers whether they were there to assist with their cases. While researchers explained their role as merely conducting research and encouraged them to speak about their experiences, there is a chance the asylum seekers may have attempted to present their story in the most legally compelling way possible (as previously coached by their lawyers). As a result, asylum seekers may have withheld the multiple nuances of their experiences that a legal case file does not necessarily require. In addition, the questions asked by the researchers were shaped to allow for an assessment of the asylum seeker’s experience of the system, determining and shaping the nature and content of the responses provided. Interpretation and the necessity to speak through a language other than a mother tongue could also have affected the stories that were told. Although most of the twenty-two interviews were conducted in English and French by the researchers, three used interpreters that were friends or relatives. Clearly these intersecting subjectivities influenced both what the researchers and asylum seekers said during the interviews, and the meanings each drew from their respective questions and responses.

The accounts used in this study, were also influenced by the way interviewees were selected. The selection of asylum seekers to interview was based upon the files of law clinics. Only a minority of asylum seekers in South Africa seek legal representation, and fewer still bring their

cases to the Refugee Appeal Board.[10] The fact that the study used case studies from lawyers' offices means it examined some of the few that actually had legal representation in their appeal hearings – however none of those interviewed had legal representation at the initial RSDO level. As this study will show, even with the help of lawyers, many cases at the appeal level still fall prey to a lack of understanding of gender-related persecution by adjudicators. For the majority without such assistance, the probability of having their claims rejected would likely be even higher. While this study discusses some of the difficulties facing asylum seekers who have experienced gender-related persecution, there is a good chance that it represents only a fraction of the barriers actually encountered.

Situating the research

The feminist method of research allows for connections to be made between individual accounts and their relations to overall institutions and systems in society. It is necessary to locate the research in the wider social and political context, the *"the macroprocesses and microprocesses of power and inequality"* (Palmary, 2005: 42). Because of this, it was important to examine and situate the findings of this study within broader discourse on asylum, as well as in the South African context (Palmary, 2005). The research has attempted to explain the construction of gender in asylum in South Africa within the global context of increased awareness on gender-related persecution, and its normalisation in law and policy. It has related some of the concerns from other countries, often Northern, and the failure of asylum systems to adequately consider gender. Bringing such concerns to the South African context, the study has reflected on South Africa as the only country in Sub-Saharan Africa that has a formal policy of integration for refugees, unlike its neighbours which often rely on policies of containment in camps and settlements.

In addition, the accounts recorded by this study must be considered within the context of a South Africa's flawed asylum system, xenophobia and a culture of disbelief, reliance on a particular narrative of trauma, and high levels of violence against women in South Africa. As mentioned in the following chapters, there are numerous procedural hurdles faced by asylum seekers that are a result of a poorly managed system – lack of official interpretation, backlog of asylum cases and fast tracking of claims, overburdening of asylum officials, and inadequate technology. Such problems inevitably affect the way claims are assessed and decisions made. As in many asylum systems, because of increasing pressure to cut down on the numbers of those successfully seeking asylum, officials engage in a culture of disbelief in which they deny asylum to all but few

[10] The members of the Refugee Appeal Board estimated that a minority of asylum seekers, perhaps 10 percent at the most, have attained legal representation for their appeal hearing. Far fewer asylum seekers, if any, would have legal representation during their application and initial interview with RSDOs.

(Shuman & Bohmer, 2007). Lawyers in South Africa have noted the manner in which asylum seekers are handled gives the impression that the country is trying to discourage people from seeking asylum (de la Hunt & Kerfoot, 2007). This, combined with negative statements towards migrants made by South African government officials, and continued xenophobic violence, certainly affect how migrants are viewed and the sway of asylum decisions. Who is deemed acceptable as a refugee, is also determined by the particular narratives demanded by the asylum system. *"An applicant's failure to represent personal traumatic experience in political terms can have disastrous consequences"* (Shuman & Bohmer, 2004: 394). As noted above, to be successful, asylum seekers must cast themselves as victims. The reality, however, is much more complicated. Applicants portray *"themselves as victims as well as heroes and as people living ordinary lives turned unimaginable"* (Shuman & Bohmer, 2004: 410).

Beyond the asylum system, the current levels of violence against women in South Africa necessarily affect how gendered harm is viewed by asylum officials, and the sense of security women can find within such a country. There is a certain irony that South Africa, a country with one of the highest levels of gender based violence in the world, seeks to offer asylum to those fleeing similar harm (Amnesty International, 2005). Granting asylum provides merely contingent protection at best (Macklin,1995). Although South Africa can offer its borders as protection from a perpetrator, it cannot guard against gender-related violence absolutely. It only protects a particular woman from a particular abuser or situation in another country. It cannot guarantee adequate protection, or even an appropriate response by the police or legal system, should she become victim of gender violence in South Africa.

This study is situated within a contested and flawed system in South Africa, much of which shares similarities with others around the world. In challenging the construction of gender in the South African asylum system, the study places itself both within this system, reflecting on the varying influences affecting how decisions are made and the law is applied.

Gender-Related Persecution. A Basis for Asylum?

It has been eight years since the South African Refugees Act, with an explicit mention of gender, came into effect - almost a decade to provide training to asylum officials on the meaning of gender and the types of harm that could be considered gender-related persecution. While this study shows that some types of gender-related persecution are understood as possible grounds for asylum, the manner in which decisions are being made is often arbitrary and inconsistent. The reasons for the lack of understanding are many, but most point to a lack of training and the failure by South African authorities to provide clear guidelines to asylum officials on gender-related persecution. The training that does exist seems to emphasise gendered harm which is perpetrated by authorities, exotic in nature or occurs during wartime. As a result, a reliance on such types of harm emerges as trends in the decision making of asylum officials.

While specific training and guidelines on gender are extremely important, this study recognises that in practice gender is neither a static or clearly defined concept. Like all social creations, gender is constantly being negotiated and challenged. The contradictions in the responses of South African asylum officials, as seen below and throughout the next few chapters, can be spotted throughout studies in the UK (Ceneda & Palmer, 2006) and in the USA (Oxford, 2005), despite more thorough training programmes and clear guidelines on adjudicating gender-related claims. Likewise, interpretations of what is considered political and the cultural are also dynamic, and continually shifting. In addition, the very legal rules of asylum are also the product of a historical process that is *"constantly evolving as a reflection of social and political values"* (Shuman & Bohmer, 2004: 396). The actors involved in the asylum system are inevitably affected by such fluid notions, and are informed by their individual perceptions and experiences of gender, culture and politics, and their levels of tolerance of interpersonal violence (Bhabha, 1994; Palmary, 2003; Shuman & Bohmer, 2004). The fluidity of such concepts have in fact allowed for gender to become an internationally accepted basis for asylum, while at the same time leading to challenges and misunderstandings around the legitimacy of such claims.

As set out in the Refugees Act, No 130 of 1998, Refugee Status Determination Officers (RSDOs) hold the responsibility for deciding on the validity and credibility of all asylum applications in South Africa. The first step for asylum seekers is to fill out an application form at a Refugee Reception Office, assisted by a Refugee Reception Officer. The asylum seeker then returns for an interview with a RSDO. RSDOs hold the responsibility for deciding on the validity and credibility of all asylum applications in South Africa. They interview applicants and determine whether their claims can qualify for asylum under the definition of a refugee as set out in Sections 3 of the Refugees Act. They are the frontline, and as a result, they are essentially the gatekeepers of asylum determination in South Africa. Under the current Act, they have three options, they can either

accept the claim, or they can decide it is unfounded, or manifestly unfounded. If it is unfounded, the claimant then has the right to appeal to the Refugee Appeal Board. If it is manifestly unfounded, meaning that it falls outside the definition of a refugee, the case is sent to the Standing Committee on Refugee Affairs. The Standing Committee reviews the case and decides whether it falls within the definition. If it doesn't the application is rejected, and if it does it is sent back to the RSDO to either accept or reject the case.[11] Although asylum seekers who are initially rejected at the RSDO level are able to appeal their case, only few actually do so. RSDOs are thus the most crucial actors in the system. Their understanding of gender-related persecution determines how such cases are evaluated, and eventually whether they are accepted as valid.

Although many RSDOs have encountered cases of gender-related harm, when specifically asked about the meaning of gender or gender-related persecution, or how it fits into the Refugees Act their responses revealed uncertainty and a lack of awareness. Frequently, their reaction was a pause, and then a cautious, *"I don't know"* or *"I'll have to refer to my documents."* Some replied that they had never come across claims related to gender, but when prompted on questions regarding rape, domestic violence, female genital mutilation or sexual orientation, they would recall examples of such cases. Four RSDOs, when asked about gender, replied with examples of cases of persecution based on sexual orientation. Three explained it as sexual violence during war. An additional four explained that gender was closely aligned with cultural issues. Finally, one RSDO suggested that gender might fit in one of the five grounds for asylum listed in the Refugees Act, *"particular social group,"* – the category under which gender can indeed be included. While questions on specific types of gender-related harm elicited more informed responses from RSDOs, it is indeed concerning that the concept of gender was somewhat unclear for the majority of those interviewed.

The Gender Guidelines

The South African 1998 Refugees Act incorporates the 1951 UN Refugee Convention and its 1967 Protocol, and the Organisation for African Union 1969 Refugee Convention (OAU, 1969) in its definition of a refugee. The Refugees Act explicitly recognises a refugee as someone who, among other reasons, has

a) *"a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of*

[11] The Refugees Amendment Bill, currently awaiting endorsement by the President, seeks to dissolve the existing Standing Committee for Refugee Affairs and the Refugee Appeal Board and establishes the Refugee Appeals Authority. It also removes manifestly unfounded as a possible category for decision.

the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;[12]

b) *owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere" (Refugees Act, 1998: Articles 3a & b).*

The Refugees Act currently defines a social group as including, *"among others, a group of persons of particular gender, sexual orientation, disability, class or caste."* (Refugees Act, 1998: Article 1xxi). How the gender should be understood within the Refugees Act, however, is less clear. The Act itself does not define the meaning of gender, nor what types of harm could qualify. Recognising this, in 1999 the South African non-governmental organisation (NGO), the National Consortium for Refugee Affairs (NCRA), (now the Consortium for Refugees and Migrants in South Africa)[13] proposed gender guidelines for asylum determination, based on similar guidelines introduced in Canada, the USA and the UK. It attempted to further define the meaning of gender as a basis for asylum, and suggested methods immigration officials could use in supporting disclosure and assessing such claims (Valji & de la Hunt, 1999). Although useful for the refugee field in South Africa, the NCRA guidelines were never officially adopted, and the regulations to the Refugees Act promulgated in 2000, failed to include any mention of the guidelines or any discussion on the meaning of gender whatsoever (Refugee Regulations, 2000).

The UNHCR also published gender guidelines in 2002, meant to inform and guide adjudication around gender-related persecution. Although not binding, they were introduced to complement the UNHCR Handbook (UNHCR, 1992), a soft law document frequently used and quoted in refugee determination decisions around the world, including in South Africa. Although the NCRA guidelines are a valuable resource and are occasionally quoted throughout this paper, it is the UNHCR guidelines which are most widely recognised and distributed and, hence, the ones against which South African practices can be most fairly evaluated.

In interviews with asylum determination officials there was a general lack of awareness of either the NCRA or the UNHCR guidelines. Only the Chairperson of the Standing Committee expressed a definite knowledge of both the NCRA and the UNHCR Guidelines. He also said, however, that

[12] The Refugees Amendment Bill changes 3a to read "owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group,

[13] Consortium for Refugees and Migrants in South Africa. More information about CoRMSA is available at http://www.ncra.org.za.

there was little attention paid to the guidelines. *"If you went into a Refugee Reception Office and asked an RSDO, 'where are your gender guidelines?' they wouldn't know what you were talking about,"* he said. This assertion was demonstrated in conversations with RSDOs, as only two of the twenty-eight interviewed could recall reading or hearing about either set of gender guidelines, even during their initial training. The Refugee Appeal Board members indicated that although they had heard about both sets of guidelines, and probably read them at some point, they did not use them on a regular basis. They said the guidelines would be referred to if they encountered a gender-related persecution case. Interestingly, and somewhat telling, the two RSDOs who recalled the UNHCR gender guidelines (both from the Durban Offices) provided much more thoughtful and insightful responses regarding gender. According to one RSDO, *"during our training we had come across a few issues on gender - it can be either due to sexuality of the person or the inferiority given to women."*

Training of asylum officials

Changing the law is just one aspect of making the asylum processes more inclusive of gender-related persecution cases - training is another essential component. While asylum officials are inescapably influenced by society's understandings of gender, training on gender and the gender guidelines can work to assist in providing guidance and reducing inconsistencies in asylum determination decisions. In the UNHCR gender guidelines, states are in fact encouraged to *"ensure a gender-sensitive application of refugee law and procedures"* (UNHCR, 2002: 38). Without appropriate guidance and support, it is unreasonable to expect officials to make decisions which demonstrate an understanding of how to fairly evaluate and reason claims based on gendered harm.

While some of the training for asylum officials is conducted by the Department of Home Affairs, the majority of initial and in-service training is carried out by the UNHCR in South Africa. All the RSDOs interviewed indicated they had received initial training, primarily on adjudication of cases, by the UNHCR when they took up their positions. Most of the RSDOs, with the exception of those at the Cape Town office, responded that gender, particularly the treatment of women's cases, had received some attention during their training with the UNHCR. Three said that there had been some mention of female genital mutilation (FGM) as grounds for asylum. Five mentioned that there was some discussion about rape during war and sensitivity towards women who had experienced rape.

One RSDO said the training indicated they should allow women to the front of the queue, particularly those with young children and babies, as they are often harassed by male asylum seekers and young children grow restless and hungry if forced to wait long periods. The UNHCR

representative in Pretoria confirmed that such a suggestion is in fact included in the training. Demonstrating the impact of training, most of the RSDOs at the Pretoria and Johannesburg offices reported they do actually prioritise women in the queue. A similar practice, however, was not reported at any of the other refugee reception offices.

The Chairperson and three current members of the Refugee Appeal Board, all of whom are qualified lawyers, said they received an initial training by the UNHCR, including specific sessions on issues related to "gender sensitivity." However they indicated that this training occurred during the time the UNHCR was involved with the backlog project, but they were doubtful any new Appeal Board members would receive the same training. The members of the Standing Committee, however, have not received any training, aside from that which they provided for themselves. They had approached the UNHCR, but they have been unable to arrange for training.

A representative from the UNHCR explained that the training sessions provided to RSDOs include a discussion on all forms of gender-related persecution, both those committed by state and non-state actors. From the descriptions provided by RSDOs, however, it appears that the training lacks substantive discussion of gender-related abuses perpetrated by private citizens, aside from FGM, such as rape, domestic violence, forced marriage and condemnation for challenging social norms (for example, sexual orientation).

While there is little room in this study to discuss the numerous procedural hurdles facing both asylum seekers and asylum officials, no comment on the asylum system in South Africa would be complete without mentioning their possible effect on the quality of decisions. The lack of official interpreters in many offices means that asylum seekers are forced to rely on either other asylum seekers or an informal network of interpreters. Both RSDOs and claimants report a lack of trust both in the abilities of such interpreters as well as their confidentiality. In addition, RSDOs are overburdened by demands for a higher turnover of cases in less time, leading to rushed interviews and ultimately often inappropriate decisions. By overloading RSDOs, disregarding their need to thoroughly examine country research and consider an appropriate decision, the Department of Home Affairs risks not only overwhelming the Refugee Appeal Board with cases, but also that many genuine refugees are not receiving the protection they are entitled to under the Refugees Act.

Although gendered harm is negotiated and framed by a variety of competing and fluid influences within the asylum system, adequate training can improve the consistency of decisions, as well as the depth of understanding of gender and the political. While most of the RSDOs interviewed

reported receiving some training on gender-related cases, there seems to be little emphasis on ensuring they understand both the concept of gender-related persecution and how to adjudicate these cases, particularly when harm appears to arise out of personal motives or is perpetrated by private citizens. In the next few chapters, the impact of official understandings of gender and asylum is played out through the manner in which decisions are justified.

Persecution in the Aftermath

"Violence against women happens in peacetime, is intensified during wartime, and continues unabated in the aftermath" (Pillay, 2001: 36).

Over the past couple decades, violence against women during armed conflict has gained recognition as both a war crime and human rights violation. Gender crimes, once marginal to the judgements of war crimes courts and tribunals, now constitute a growing focus of documentation (Bhabha, 2007). The International Criminal Court recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisations and other forms of sexual violence as possible war crimes, or even crimes against humanity. These successes have occurred alongside the international legal recognition of gender-related persecution as grounds for asylum, and acceptance that violence against women during wartime, previously thought of as private and outside the responsibility of the state, is both systematic and public in nature. The implementation of this acceptance, however, has faltered. Asylum practice in South Africa, and many other countries, continues to see gendered harm as largely personal, and official distinctions between when war ends and peace begins remain defined along gendered personal/political lines.

While popular notions of war depict men fighting on battlefields, away from civilian homes communities, in reality conflict blurs such boundaries, rarely ever distinguishing the public from the private (Giles and Hyndman, 2004). In most modern wars, civilian men, women and children are the main causalities. The all-encompassing nature of conflict means that the continuum of violence transcends the simple diplomatic dichotomy of war and peace, and resists any division between the private and public realms (Giles and Hyndman, 2004). Neatly-drawn diplomatic concepts of peace as simply the absence of armed conflict are misleading and artificial. Such a stance views peace solely in the public realm, the space of typically male-dominated armies, political negotiations and peace deals, and ignores the less obvious violence that takes place in homes and communities and may continue long after the official end of a war. By looking at security only through the lens of political stability, such evaluations ignore the fact that heightened sexual violence often outlives the period of armed conflict itself (Valji, 2001; Bhabha, 2007). Reporting on women's experiences in war, Pillay (2001: 35) notes, *"They reported that violence during war escalated into the most atrocious and heinous acts of brutality and torture and intensified in the aftermath of conflict. Mass rapes become gang rapes, mass murders turned into serial killings."*

In South Africa, asylum officials have shown a willingness to grant asylum to women who have fled rape or other gendered violence, often by soldiers or rebels, during war. As the discussion below will show, however, asylum officials appear to designate countries as at war (therefore not-

safe and refugee producing) and at peace (therefore safe and not refugee producing). Once a conflict is deemed to be over from a diplomatic point of view, regardless of how much violence remains, such claims are rejected en masse. RSDO decisions make blanket assumptions that 'peace' automatically means a country can provide effective protection against gender violence, without conducting adequate investigation into the capabilities of local authorities. As a result, asylum decisions seem to be based solely on political representations of peace as negotiated at official levels, and ignore the impact and relevance of persistent levels of violence against women.

The South African Refugees Act has two elements to its definition of a refugee. One is based on the definition included in the 1951 United Nations Convention Relating to the Status of Refugees and its 1966 Protocol (hereafter, UN Convention)[14], which requires that an asylum claimant fear persecution on an individual level. The other is based on the definition of a refugee as included in the 1969 Organisation of African Union (OAU) Convention Governing the Specific Aspect of Refugee Problems in Africa (hereafter, OAU Convention), which specifies that a refugee can also be a person who has fled a more generalised mass disturbance in their country, such as war.[15] Section 3b of the Refugees Act refers to the OAU definition. According to Section 3b of the Refugees Act, a person qualifies as a refugee, if: *"Owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere."* In practice, section 3b is legitimately used to give asylum seekers to South Africa "prima facie" refugee status – meaning that refugee status can be granted to an asylum seeker based on their flight from particular country in turmoil without having to prove they have experienced individualised persecution (Tuepker, 2002).

South Africa does not, according the officials questioned, designate countries as not-safe or safe, however, in examining the decisions made by asylum determination officials, there is a definite distinction based along the lines of war and peace. As noted by Tuepker (2002) in her comparison of how the UN and the OAU definitions of a refugee are applied in South Africa, it is those asylum seekers who flee generalised persecution, generalised violence or violence on the basis of generalised ethnic persecution whose claims are most readily accepted. Conversely,

[14] Article 1(2) of the UN Convention states, "As a result of events occurring before I January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." The 1966 Protocol directed signatory states to consider asylum seekers even after 1951.

[15] Article 1(2) of the OAU Convention states, "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"

asylum applications from countries recognised as safe are then often automatically rejected. The same seems to be occurring with claims involving rape, where those from war torn countries are automatically accepted, not on the basis of gender-related persecution, but on the generalised violence included under section 3b. Similarly, claims from countries recognised as no longer at war, and hence allegedly safe, are then rejected without consideration of the persecution they have experienced and may still face.

Of the women asylum seekers who were interviewed for this study, those who had experienced rape during war were recognised as refugees under 3b. Six of the women interviewed said they had fled because they were raped or feared rape by soldiers. Two others were raped by soldiers and then forced to become their "wives." Of the five who were accepted – two from Burundi, one from the DRC, one from Rwanda and one from Somalia – only the woman from Somalia actually disclosed her fear of being raped and forced to marry. The remaining four only mentioned the conflict and the deaths of their family members, but neglected to tell the RSDO about their experiences of rape and forced marriage. It appears that the RSDOs who heard their cases based their approval on section 3b, which does not require individualised experiences of persecution, but only flight from a country that is recognised to be engulfed in conflict. The rape or fear of rape experienced by the women was not, in itself, the reason why they were given refugee status.

Once a conflict is deemed to be over or the country safe for return, section 3b no longer applies, even if an asylum seeker divulges a story about persecution which occurred during the war. The claim is then supposed to be evaluated according to 3a of the Refugees Act which asks whether the claimant faces persecution as an individual. Although most of the RSDOs said that they would accept a case of rape if it was committed by a soldier, their decisions appear largely arbitrary. In reality, it seems even if an asylum seeker divulges that she was raped by a soldier or police officer, the claim is not accepted unless the country is at war and thus eligible for 3b status. Of the twenty-eight RSDOs interviewed, twelve said they had encountered rape cases. Four RSDOs said they had approved asylum for women who had reported rape by soldiers or militia that had occurred during conflict. Four RSDOs also said that rape during war was mentioned during their UNHCR training as grounds for asylum.

If a country is no longer officially at war, RSDOs seem to automatically assume it is safe for people to return and therefore deny asylum applications from its nationals. There is a failure to evaluate such claims instead under section 3a, which would require officials to assess the country situation and whether, realistically, authorities are able and willing to provide any substantial protection. As a result, women who flee to South Africa after being raped by soldiers and rebels

during wartime are not given refugee status if their asylum claims come up for evaluation only after 'peace' – no matter how tenuous - has been declared.

According to an RSDO, *"You must look at the causes of the rape. You find that she was raped because of section 3b because of foreign domination, aggression, violence…Because those rape cases are due to uncontrollable situations in his or her country…Because of foreign aggression, rebels, maybe there was an attack on the village and raped women, I believe that such a person, I would give that person status. The claim is not based solely on the rape, but you've checked on 3b and it falls within the 3b, so that person deserves status. But based on 3b"*

Another RSDO said, *"Most ladies from the Sudan will claim that they have been involved by the soldiers when they were trying to run away, when there was violence. And some are having kids from the rape. Others they are suffering with HIV because of those rapes…. [but] no, it's not just the rape…they are fearing the events when there was violence."*

Commenting on a Zimbabwean case, an RSDO said, *"There was this one in Zimbabwe where they are forced to go to this national service. When they are there, the men will propose to them, and then if you refuse, they will rape you…You can classify it under section 3b."*

In these comments, RSDOs use the assumed dichotomy between war and peace to draw a corresponding division between rape as persecution and rape as a 'normal' part of life. During war, rape is seen as atrocious, a random act of violence associated with political upheaval. When there's peace, rape is accepted as commonplace, a normal form of interpersonal violence. As shown in the quotes above, according to asylum officials, asylum cannot be "based solely on the rape" but on the existence of conflict. By relying on such distinctions, the asylum system creates and perpetuates the myth that persecutory rape can only happen during war, and as a result, denies and trivialises the majority of rape cases (Lorsway & Fitzgerald, 1994). Burt (1998:27) has defined the concept of the rape myth as *"the mechanism people use to justify dismissing an incident of sexual assault from the category of 'real' rape…such beliefs deny the reality of many actual rapes".* Outside the asylum system, studies on the tolerance of violence have noted that respondents (police, judges, general public) often dismiss sexual assaults that do not conform to the stereotypical rape scenario (ie. an armed stranger leaping out from a dark alley) (Du Mont & Parnis, 1999). Such societal acceptance has serious consequences, especially when it influences the views of law enforcement and legal professionals, prejudicing the treatment of victims of rape within judicial systems (Du Mont & Parnis, 1999). Among asylum officials in South Africa, rape myths appear to similarly influence who is deemed to be a refugee. In the above comments, RSDOs clearly articulate that asylum is never dependent on the fact of the rape alone, but the

circumstances of war in which it has occurred. No matter how heinous the individual experience of violence may be, the overriding factor is the existence of conflict. The significance of a specific act or acts of violence are thus diminished, without the legally required evaluation of available local protection. Rape itself, outside war, is seen as a normal or even 'personal' part of life, and thus is dismissed as an invalid basis for asylum.

Many of the women interviewed, as well as case files reviewed, by this study were from the Democratic Republic of the Congo (DRC), a country where a fragile peace has been negotiated but conflict is omnipresent. Between the five women from the DRC who were interviewed, one was given refugee status (although she did not convey her story of rape), and four were rejected even though they shared their stories of rape or fear of rape. In a further seven rejection letters obtained by this study, sent between April and November 2007, RSDOs systematically rejected refugee claims of rape and forced marriage to rebels. As is demonstrated below, RSDOs seemed to merely 'cut and paste' one rationale for each of the decisions – that negotiations in the DRC are underway between the government and the rebels, so therefore the country is safe - ignoring the possibility of ongoing violence against women in the country.

According to the International Crisis Group (2008), despite the faith RSDOs place in the negotiation process, peace in the DRC remains elusive. *"The [DRC] is the site of one of the world's worst ongoing humanitarian crises. Although the country emerged from what has been called 'Africa's first world war' in 2003 when the former warring belligerents came together to form a transitional government, credible mortality studies estimate that up to 1,200 people continue to die each day from conflict-related causes, mostly disease and malnutrition but ongoing violence as well. Rampant corruption and pervasive state weakness allows members of the national army and members of armed groups alike to perpetrate abuses against civilians"* (ICG, 2008).

In a rejection letter from August 2006, an RSDO states that country reports from the Department of Home Affairs claim the DRC is able to offer protection and assistance to all its nationals. In addition to suggesting the claimant - who arrived in 2004 - could approach the authorities for assistance, or move to a more peaceful part of the country, the RSDO wrote, *"The applicant claims that the rebels were raping girls in your area. There can be no well founded fear of persecution that be established from the fact that the rebels were raping girls. Rape is a crime that appears to be rampant all over the world. There appears to be no indication that the applicant experienced or witnessed the incidents that she claims was taking place…The circumstances that compelled the applicant to flee from the DRC are not justifiable considerations that would lead a reasonable person in the circumstances of the applicant to flee from her country of origin."*

One woman fled the DRC after she was raped and forced to become the 'wife' of one of the rebel soldiers. Solely based on the political negotiations between the ruling party and rebel groups, the RSDO who interviewed her wrote, *"The government protection is easily accessible to people who avail themselves for state protection. The government of DRC will protect you against any ill treatment."*

Another woman explained that both her parents had been killed by rebels. Two days after their deaths, both she and her cousin were raped when they refused to become the 'wives' of the rebels' chief. They fled shortly after, in November 2004. Due to what appears to be insufficient interpretation, however, the RSDO misunderstands her story, *"You have no well-founded fear of persecution…You admit that you were never beaten or raped. You only had an imputed fear because your cousin was raped. You heard about the raping of your cousin."*

An additional rejection letter recognised the claimant "*fled her country of origin because she was running away from the soldiers who wanted to rape her*." But the RSDO rejects the claim because *"there are some places of the country that have shown enough stability. These places include Kinshasa and other central parts of DRC. In other words, the applicant could seek protection on more peaceful parts of the country."*

What is most disturbing about these decisions is not the mistakes in understanding the women's stories, but the assertion that rape on the scale which is been seen in post-war DRC is not a form of widespread persecution and the insinuation that it is something normal. The RSDOs clearly disregarded their experiences, rejecting the possibility that rape, a crime "rampant all over the world" could be the basis of a legitimate asylum claim. They blatantly failed to consider or recognise that rape, when the government is not able or willing to prevent it or apprehend its perpetrators, can be considered a form of gender-related persecution. The assumption that rape is persecution only during wartime prejudices the judgment of the asylum officials, accepting as normal and apolitical those rapes that occur during 'peace'.

An October 2007 feature in the New York Times calls the level of sexual violence in the DRC a "rape epidemic". *"Eastern Congo is going through another one of its convulsions of violence, and this time it seems that women are being systematically attacked on a scale never before seen here. According to the United Nations, 27,000 sexual assaults were reported in 2006 in South Kivu Province alone, and that may be just a fraction of the total number across the country."* (Gettleman, 2007).

Elsewhere in the same article, aid workers report an increase in the number of cases and the brutality of sexual violence in the DRC, as well as a jump in domestic violence and homicides. A European aid organisation interviewed said that in one town, Shabunda, also in South Kivu, 70 percent of the women had reported experiencing sexual violence (Gettleman, 2007). While peace negotiations may have occurred in Kinshasa, the situation is far from safe, particularly for women. None of the RSDO decisions, however, indicate an awareness of the remaining insecurity in the country. While the New York Times labels the ongoing gender violence in the DRC a "rape epidemic," the asylum system refuses to see it as an atrocity, preferring to accept and frame the occurrence of gender violence outside wartime as normal.

Demonstrating a lack of cohesiveness and understanding across the South African refugee system, the Standing Committee actually claimed to recognise the ongoing nature of the conflict in the DRC. When Mr. Schravesande of the Standing Committee was interviewed in June 2007, he said that cases from the DRC continue to be seen as falling under Section 3b. *"The majority of the cases that we are getting are Angolan, DRC and Somalia which are mostly 3(b) OAU…DRC we are currently approving by and large because the elections are not so far gone."* While RSDOs heard the twelve cases of the women from DRC before June 2007, only one was in fact accepted as a refugee. The cases from the DRC examined in this study contradict both what is said by officials and what is promised by the Refugees Act. While asylum officials assert that rape during war is almost always seen as a basis for asylum, it's less clear what happens once the war is over and sexual violence continues unabated.

There are also disturbing allegations from South Africa's neighbouring country, Zimbabwe that rape and sexual torture are being used against women activists and relatives of political opposition as a form of punishment (Valji, de la Hunt & Moffett, 2006). Despite the deteriorating political, economic and humanitarian situation, officials have been reluctant to consider asylum seekers from Zimbabwe under either section 3a or 3b of the Refugee Act. By and large, most Zimbabwean cases are being seen as "economic migrants" and so classified as manifestly unfounded. In a recent study, the Zimbabwe Torture Victims/Survivors Project (ZTVP) at the Centre for the Study of Violence and Reconciliation in Johannesburg reported that women had made up 32 per cent of all torture survivors seen by the project from February 2005 to September 2006. Sixty seven percent of the women said they had been politically active in some way. Significantly, 15 per cent of those women reported they had been subjected to rape. Beatings, sensory over-stimulations, burnings, falanga (beating of the soles of the feat) and electric shock were other forms of torture also reported by the women. Only two per cent of the women interviewed had succeeded in gaining refugee status. Another 36 per cent had temporary Section 22 Permits, allowing them to remain in the country until a decision has been made on their

application for asylum (ZTVP, 2006). In a scathing conclusion to the report, ZTVP writes, "*Given the strong prima facie grounds* [ie. 3b OAU] *that these women have for acquiring asylum, it is a disgrace that so few have been accorded such status.*" (ZTVP, 2006: 15).

Conclusion

It is positive that women who flee to South Africa because of rape and forced marriage during war seem to, by and large, be granted asylum under 3b of the Refugees Act. Many asylum determinations, however, are overly dependent on the existence of an officially recognised war, meaning that countries deemed to be stable or peaceful (even if violence remains) are seen as safe. In contrast, rape outside the wartime is viewed as commonplace and even normal, dismissing the possibility that it could be a basis for asylum. As a result, claims from these countries are often rejected and claimants are chastised for not duly approaching authorities or relocating within their own country – both of which are assumed to be fully functioning alternatives to flight immediately after peace, no matter how fragile, is declared. Such decisions are based solely on diplomatic concepts of peace, as defined in the political realm of peace deals dominated by male dominated armies and rebel groups. They fail to consider that political stability and an absence of recognised conflict may not necessarily mean freedom from gender-related persecution, and rarely evaluate the capacity and willingness of local authorities to provide assistance to women who suffer from such crimes.

The Personal is Political

While there are some promising trends in the recognition of gender-related persecution in South Africa, there is inconsistency in how it is applied throughout varying levels of the asylum system. The asylum system relies on narratives which emphasise a narrow definition of the political (public) rather than personal (private), and fails to grasp the indivisibility of these artificial categories. As a result, officials fall short of understanding the principles behind gender-related persecution as a basis for asylum. Where claims are based on seemingly personal harm (such as domestic violence, rape, forced marriage, and non-conformity to social mores) asylum officials automatically assume such violence is 'normal' and local domestic authorities can provide protection, even without an assessment of their capability and willingness to respond. In cases where the perpetrator is a private citizen, asylum seekers are required to demonstrate they have exhausted all domestic remedies, regardless of whether any are available or may place them at further risk. If perpetrated by a state agent, asylum officials appear to see gendered harm as a less severe form of harm and therefore expect the claimant to approach those same authorities for protection. As the discussion below elaborates, the bias against so-called 'personal' harm as well as the unreasonable expectations placed on those who experience it, unfairly impacts the success of gender-related persecution claims. Gendered harm is either judged as not persecutory, or viewed as a secondary level violation, affording it a category of lesser importance, and ultimately preventing those affected from accessing asylum.

According to the UNHCR Handbook, asylum cannot be granted solely on the basis of personal injury (UNHCR, 1992), creating a hierarchy of harm where only overtly political violence committed by the state is undisputedly accepted as a basis for asylum. Referring to the "privatisation" of violence in the Dutch asylum context, Spijkerboer (2000: 98) observes that domestic and sexual violence are often viewed as private by adjudicators because they are seen as taking place in the family context, or because of the personal motives of the perpetrator. Such crimes are dismissed as common and arbitrary acts by which women around the world are affected. As a result, adjudicators often fail to recognise that domestic violence and rape and the lack of protection from abusers are actually systematic, societal and political in nature. This emphasis on public (political) forms of violence and the dismissal of gendered harm as private (personal) or common inevitably influences the way decisions are made by officials. It alters and shapes the way questions are asked, what parts of the applicant's story get noticed and ultimately the decision that is made (Palmary, 2003).

During the interaction between an official and an asylum seeker, the asylum seeker may emphasise certain parts of her story, and neglect other aspects, while the official may only pick up on outwardly political connotations. Asylum seekers often interpret their experiences of

gendered harm as personal, rather than political, and as a result fail to present their experiences in political terms. Rape victims, for example may see their rape as a personal attack rather than an example of gender violence (Shuman & Bohmer, 2004). As Shuman and Bohmer (2004: 396) note on their study of the US asylum system, to meet criteria for political asylum, *"applicants need to reframe what they often understand as a personal trauma into an act of political aggression."* Although it is impossible to absolutely separate the personal from the political, the asylum system frequently neglects to interrogate the political in seemingly personal accounts.

Recognising this, the role of immigration lawyers is often to guide applicants *"to frame the trauma in political terms, emphasising their membership in a persecuted group rather than their victimisation of personal trauma. This is a long process for anyone who has undergone trauma, and many victims never reach the stage of being able to use a political narrative to describe their personal situation"* (Shuman & Bohmer, 2004: 397). While claimants in Northern countries are often entitled to free legal representation from their first interview, most asylum seekers in South Africa do not consult a lawyer until after their application has been rejected. Even then, most who appeal do so without legal representation, either because they cannot afford it, they are unaware of their right to counsel, or they do not know where to find pro-bono legal assistance (Human Rights Watch, 2005). As a result, many asylum seekers slip through and are rejected by the system without ever recounting the most important part of their stories.

The experience of a Ugandan asylum seeker illustrates this. Her application was rejected because she failed to fully tell the RSDO about her experiences. Her first husband, a former member of the Lords Resistance Army (LRA), was killed when he refused to rejoin and, at the same time, she was also beaten and raped. Her brother in law inherited her as his wife, but he was later also killed by the LRA along with her son. During the RSDO interview, she *"decided not to tell anyone because it is a shame and it is hurting, and I thought maybe it is not necessary to mention. The only question was why I left my country so I just said the things that I was comfortable with. And I didn't know where those information was going."* When asked how officials could make the process clearer, she said, *"They just have to explain what this information is going to do for us and how important it is and how we are supposed to say every single detail that happened. I thought that telling that thing that happened to me was so hard to mention so I thought just leave it aside and say other things."* Her story is certainly political, but she was unaware of the need to share something she interpreted as so very personal. Like her, asylum seekers who fail to frame their experiences in political terms are similarly rejected, without officials ever attempting to dig deeper into seemingly personal experiences. This artificial and misleading distinction between personal/political serves to undermine and delegitimise the

experiences of asylum seekers, as well as discriminating against those who are unaware of the necessity of portraying their experiences through political lens.

Additionally, most modern feminist writers, such as Greatbatch (1989) argue assumptions of a public/private dichotomy ignore the diverse contextual realities of women's experiences. While something may appear to occur in the 'private' sphere, it may be extremely political. African feminist writers have also argued the public/private dichotomy is inapplicable in Africa, as women have traditionally inhabited both spheres simultaneously, determining social organisation and hierarchy through other social constructions, such as seniority (Bakare-Yusuf, 2003). Despite arguments against such a dichotomy, a reliance on it continues to exist throughout the South African asylum system, relegating gendered harm into the untouchable realm of the personal and private.

Harm by non-state actors

In the 1998 Refugees Act there is no legal requirement that the harm be perpetrated by the state, in fact, like the UN Convention, it is silent on this matter. The generally accepted interpretation is that persecution only needs to be carried out by an individual from whom the government is not willing or able to offer the victim adequate protection (UNHCR, 1992). An immigration judge in the United States, also succinctly explained the connection between non-state perpetrators of harm and government responsibility to protect, *"when the persecution is caused by society rather than the government, but the government is unable or unwilling to stop the abuse, then the abuse can be attributed to the government"* (Seith, 1997: 1825). In evaluating domestic violence as a basis for asylum, Seith (1997) notes that such violence functions as a reinforcement of male power and control over women, hence forcing women into a subordinate position (Seith, 1997). The violence itself is gender-motivated because the abuser punishes the victim because of negative views he or she holds of a particular gender, in most cases women. In signing the Convention on the Elimination of All Forms of Discrimination Against Women, the South African government has in fact recognised domestic violence as a violation of human rights. *"Contrary to the argument that such violence is only personal or cultural, it is profoundly political. It results from the structural relationships of power, domination, and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work, and in all public spheres."* (Bunch, 1990: 491) When a government is not willing or able to intervene, "domestic violence becomes de facto public persecution" (Seith, 1997). By not providing reasonable protection from this abuse, the state itself perpetuates this form of gender subordination.

While South African asylum officials acknowledge that persecution can be committed by either a state or non-state actor, such as domestic violence and forced marriage, in practice, the

emphasis is clearly on cases where the state is the perpetrator. Only two of twenty-eight RSDOs interviewed for this study reported encountering domestic violence claims. They both said they had rejected the claims because they did not fall under the definition of a refugee, clearly disregarding the possibility of a gender-related claim. It was so improbable to one RSDO that she said if she had approved the claim her supervisors would have accused her of taking bribes. *"It's manifestly [unfounded]. If I approve this, then they are going to ask me – maybe they would think she told me something, maybe I bribe her, that she gives me money to approve her case. There is so much corruption."*

The Chairperson of the Standing Committee said that they have seen a number of domestic violence cases, however such cases are not seen as fitting under the definition of a refugee, and so are usually rejected. *"Domestic abuse we have difficulty in setting aside the RSDO decision. We have a number of domestic violence cases, but the domestic violence is not easily covered by the definitions. So we would get a case where the woman claims her husband beats her up or the husband's family doesn't like her or something like that, but seeing her as a particular social group and suffering domestic violence is difficult to currently bring into the Refugee Act. Those that we have seen have been decided as manifestly unfounded."*[16]

Similar to the previous chapter, where RSDOs implied that rape outside the time of war is too normal to be persecution, here the Chairperson of the Standing Committee diminishes the harmful impact of domestic violence. He compares "her husband beats her up" to "the husband's family doesn't like her or something like that," trivialising the significance of a claim based on domestic violence. Such claims are rejected, not based on the merits of the cases, but because violence in the home or family is perceived as private and accepted as too commonplace to be persecution. In her criticism of multicultural policy, Okin (1999) observes that violence against women, such as domestic violence, is often also seen as cultural, and so tolerated the name of relativity and group rights. Similarly, as Spijkerboer (2000: 131) notes, there is a clear tendency in asylum case law to see *"what women do and what is done to them as related to culture."* The institutional discrimination of women is seen *"as a matter of the general situation in the country and thus of indigenous culture. And somehow, that which is cultural is considered as non-political" (*Spijkerboer, 2000: 132). In this study, asylum officials did not explicitly explain their dismissal of domestic violence because it is cultural; however, they certainly implied its commonness – both in South Africa and around the world - make it a strictly personal issue, and thus an unlikely basis for persecution.

[16] Manifestly unfounded according to the Refugees Act, Article 1, means "an application for asylum made on grounds other than those on which such an application may be made under this act." The UNHCR (1983) states that these cases are those "which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure."

Unlike RSDOs and the Standing Committee, the Refugee Appeal Board said they would consider cases of domestic violence under particular social group (gender) grounds. So few asylum cases, however, get to the appeal stage. If the case is rejected at the RSDO level (as well as the Standing Committee level) than it is unlikely the asylum seeker will appeal it.

"It's the same as what you get with female genital mutilation, we would classify that as social group and we would allow those appeals. Obviously if the facts proved, it's really, you know. Obviously we would, we would probably not do a case like that in front of a male, but for argument's sake if I was the presiding officer in a case like that I would want medical evidence, that she, you know, what the situation was with this woman," said a member of the Board.

Despite the Refugee Appeal Board expressing some openness to domestic violence as grounds for asylum, the requirement that medical evidence be submitted is concerning. The Board reported that although they had yet to make a decision on a domestic violence claim, at the time of the research, several cases on domestic violence were pending.

Within the South African Refugees Act, the ground of social group is defined to include, along with gender, sexual orientation. While it is explicitly mentioned in the Refugees Act as separate from gender, sexual orientation is clearly related to gender. Under the UNHCR Guidelines (2002), *"Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex"* Most of the officials interviewed said they recognised that a claim based on persecution for sexual orientation could be accepted under South Africa's asylum law. As discussed earlier, however, the individual prejudices of asylum officials inevitably influence their decisions. For example, a Tanzanian man was interviewed who claimed persecution on the basis of sexual orientation. In his rejection letter from the RSDO, it states, "*You said you left your country because of your family problems. You said that your family chased you out because you are a gay. You also said that according to your religion (Muslims) does not accept gays, even your tribe doesn't (Sukuma)."* When handing him his rejection letter, the RSDO reportedly told him, *"you don't look like a gay,"* with little other explanation. The rejection letter not only does not address the substance of his claim, it also trivialises it, describing it in purely domestic (ie. personal) terms as "family problems," rather than questioning whether such harm is actually symptomatic of broader societal or legal discrimination. In addition, the RSDO's assertion "you don't look like a gay" demonstrates how individual

stereotyped perceptions, in this case of gay men, negatively affect the reasoning in asylum decisions.

Turning to forced marriage claims, six of twenty-eight RSDOs said they had heard forced marriage cases, and almost all of them had rejected the claims. Only one said she had approved the claim. Two said that although they had not encountered such cases, they would not recognise them as persecution. Despite reluctance by RSDOs to accept or recognise forced marriage claims as a basis for asylum, the Refugee Appeal Board appears willing to consider such cases. As mentioned earlier, however, few cases will ever actually reach the appeal level.

In a July 2007 decision, the Refugee Appeal Board approved a claim based on forced marriage. The appeal concerned a Cameroonian woman whose uncle sold her into marriage with an older man at the age of fourteen after her parents passed away. Her husband and his other wives abused her for several years, prompting her to flee to South Africa. She had approached the Cameroonian police on several occasions, but they had refused to intervene. In this presumably landmark decision[17], the Legal Resources Centre in Cape Town who acted on behalf of the woman argued that she was a member of a particular social group, in particular, according to the heads of argument, *"women forced to marry in exchange for bride price and who are subjected to severe and prolonged physical abuse at the hands of their husbands and who are unable to seek protection from the State because they are customarily considered the property of their husbands."* The decision is a breakthrough for gender-related asylum in South Africa as it accepts she is a member of a particular social group, specifically utilising information from a U.S. State Department country report looking at the position of women in Cameroon. In his decision, Mr. Damstra, Acting Chairperson of the Refugee Appeal Board states "*It is accepted that the appellant falls within this category i.e. she is a woman and as a group they are unprotected by the state in Cameroon."*

While the above decision presents hope for other women in similar situations, the emphasis placed on the appellant's decision to approach the Cameroonian police for help is worrying. It is questionable whether the Refugee Appeal Board would grant such a decision if the woman involved had not reported the situation to the police. In fact, asylum officials appear to require that claimants report the matter to the authorities, even when it is well known that they will do little to help. The decision to present "Cameroonian women," generally, as a vulnerable social group, while successful, also presents a possibly unreachable standard for other gender-related persecution cases (Bhabha, 2006). In order to prove persecution, the lawyer and adjudicators

[17] The Refugee Appeal Board could recall no other cases of forced marriage being granted.

were forced to essentialise *all* women in the country as vulnerable to persecution. Such expectations may make future successful gender-related persecution claims all the more unlikely.

One RSDO reported that she had spoken with Ethiopian women who claim they are being forced into marriage. But it would not qualify as grounds for asylum because *"they didn't report it to the authorities. The judiciary has to [be allowed to] take its own [course]."*

In domestic violence cases, as with forced marriage, RSDOs emphasised the need for claimants to prove local authorities could not provide such protection. One RSDO said, referring to domestic violence, *"Usually, that is an internal matter. Because there are legal advisors in their country. There are counsellors, there are social workers. And when you ask the person whether they went to any of these she will say no, I only decided to leave….Why are you afraid to go to the police? Sometimes they don't have a reason. They will just say, I was afraid and decided to come to South Africa. Did you do anything to solve your problem while you were still in the country?"*

Referring to domestic violence, one RSDO said, *"You mean she has run away from the country because her husband is beating her? That claim is not credible because…I don't know the constitutions of all countries, but anywhere where someone can be dealt with, they can deal with that…What did you do before coming to South Africa? Did your parents know. Did his family know? Before even you can go to the police. That's really where you need clear information – about what she did."* This response seemed to imply that domestic violence would not be a legitimate reason for women to flee their country, underestimating and trivialising its possible impact. The RSDO also falsely assumed that women could acquire assistance for such a common crime "anywhere someone can be dealt with."

However, despite the assertions of asylum officials that asylum seekers who experience gendered harm should approach local authorities, few of the people interviewed for this study went to their local police for help before leaving their countries. When asked why they had not, all said they knew the police would refuse to intervene to help them. As demonstrated in the statements below, both the local police as well as the asylum officials appear to be participating in a process of undermining gendered violence as a rights violation. The asylum seekers who experience such harm are left caught between two systems – one that refuses to protect because of unwillingness or discriminatory laws, and another that, ironically, refuses to offer refuge because of its belief in the former's ability to protect.

"*The police in my country would not help. Anything traditional in my village, the police can't intervene in it*," said a Cameroonian woman who had fled after her uncle tried to force her to

marry the local chief, threatening that if she didn't, she would be ritualistically killed according to tribe tradition. After running from her village, she travelled by bus and truck for two days to another village where she stayed with friends. Only two weeks later, she was kidnapped by people from her village and brought back. She was kept captive for three days and then again escaped to another village. She stayed in the other village only long enough to earn some money to flee to South Africa.

A Kenyan woman said she had fled because her father wanted to force her to get married and had threatened to kill her if she did not. She said that other people in the community were afraid of her father, and it wouldn't have helped to approach the police. "*The problem is when you go to the police, sometimes you can go for help but they can't help you. Sometimes they think you are joking, sometimes they think you are not normal."* Based on her knowledge of the police, it is not reasonable to expect that she would approach them for assistance. The expectation she would issue a complaint with them regardless assumes she has prior knowledge of the expectations of the South African asylum system. By rejecting her claim, the asylum system disregarded the realities of her particular context, leaving her in limbo without the protection of either state.

RSDOs insisted claimants should absolutely exhaust domestic remedies, even when it was not obvious that police would assist. For example, a Tanzanian man described the torment and discrimination he faced from his family and community because he is gay. Shortly before he fled to South Africa, he was even threatened by seven men who said they would kill him and throw him in a river full of crocodiles. He left Tanzania, a country where homosexuality is illegal, without reporting the threats to the police. "*If you go to the police, they gonna chase you away. They can even put you in jail. It's not that they say that we don't need you, we don't want you here, there's just no laws protecting you. If you tell someone they gonna look surprised and they not gonna be helping you."* His case was rejected at the RSDO level because he did not seek domestic remedies, despite the existence of a law that clearly functions to discriminate against gay men. By rejecting his case and demanding that he approach local authorities, the asylum system essentially takes the side of the discriminatory state, sending him back to a situation where he will likely face punishment under an unjust law.

According to another RSDO, *"Like last week, I had another case from Ghana. A man claims he run away from his country because in Ghana they don't recognise the rights of homosexuals… What does the government say? I don't want to know, he said, because they can't help…So that person has never tried to solve it inside. There is no agent of persecution."* Although the state – which uses the law to discriminate against homosexuals – is clearly the agent of persecution in this case, this is not recognised by the RSDO. When asked what someone should do if the police

refused to help, the RSDO said the *"police are not the final step."* What is the final step? *"The government, you can take this to the government,"* he said. How and whether someone would actually "take it to the government," however, is not clear. This assertion shows an unreasonable expectation on the ability of an abused individual to competently appeal their case – especially on the taboo and illegal topic of sexual orientation - to the highest levels of government, and the willingness of the government to even receive such an appeal.

Interestingly, when pressed further and asked what would happen if the police could not provide protection, one RSDO said, *"I believe it is automatic. It is the law. I think there are some human rights that are universal, whereby it is protected. And many countries aim to protect human rights. So in such circumstances, there are something like NGOs that can intervene where the state doesn't exercise its duties."* Although in this case, the RSDO recognises that gendered harm is a violation of human rights, he does not acknowledge it as grounds for asylum. Without noting that protection for gendered violence varies dramatically between countries, he assumes "it is automatic". Unlike 'political' forms of human rights abuses, gendered harm remains too personal, too private, and too common to be seen as persecution.

Harm by state actors

Even where state agents such as the police are perpetrators of harm, gender-related persecution claims are not taken seriously and gendered discrimination is cursorily dismissed. Although the harm is committed by official actors, the basis or nature for the harm is seen as personal, and thus does not seem to be considered political or systematic enough to qualify as a basis for asylum. Similar to harm committed by non-state actors, gendered harm by state actors also requires unrealistic proof of exhaustion of local remedies.

In 2005, a Rwandese woman filed an asylum application, based on harassment she faced as a result of her adopted father. She reported that her adopted father is a former high level government official who fled into exile after receiving death threats from the government. After he left the country, she remained in his house with his brother until he was arrested. She was repeatedly harassed, until one day the police came to the house and beat and raped her. The woman told her story to the RSDO, but shortly afterward received a rejection letter, advising, "*You should have moved to another part of the country and you should have reported the rape matter to the state, which is something you never did."* The woman claimant then approached the Lawyers for Human Rights office in Durban and gained their assistance in appealing the decision. The Refugee Appeal Board then echoed the thoughts of the RSDO, stating that although she was raped by the police, she should have approached the authorities for assistance. They also rejected her claim that police would have targeted her because of the position of her adopted

father. *"After extensive research, the Board found no evidence indicating that the government of Rwanda is unable or unwilling to assist someone in the appellant's position,"* said the Board in its decision (RAB, 2006). Despite claims that the Board conducted extensive research, the decision contains no indication of how or whether the authorities respond to cases of rape, particularly those committed by members of the police force. The decision failed to acknowledge that the police may not assist someone they were already regularly harassing, and ignored the particular circumstances of the woman.

In 2002, the Refugee Appeal Board rejected another claim by a man who had fled Nigeria because of persecution based on sexual orientation (RAB, 2002). Despite two arrests and occasional harassment by both police and non-state actors, as well as the existence of a law specifically outlawing homosexuality, the Board said overall, gay men in Nigeria are not persecuted, as long as they avoid public displays of their sexual orientation.

In its decision, the Refugee Appeal Board stated that although there are draconian laws regarding homosexuality in Nigeria, they are never enforced, and according to research, gay culture is *"thriving in Lagos".* "*It appears from all available information that prosecutions for homosexual behaviour in Nigeria are possibly and presumably discussed but never seen in criminal courts. The main reason for this is one relating to the law of evidence…The result is that homosexual persons are possibly harassed by police officials but nothing more than that."* While it is positive that such a law is not used, consistent arrests even if leading to eventual release can be a sign of intolerance and discrimination by the state. As noted in the UNHCR Handbook, a cumulative series of discriminatory measures could give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity regarding his future (UNHCR, 1992).

The Board's decision notes that every individual has the right to privacy and sexual preference, but argue that *"such rights are not absolute. In the interest of society there are always checks and balances."* The Board argues that the 1951 UN Convention did not intend to "*provide international protection for groups of homosexuals who consider that they are discriminated against if they make public the fact that they are homosexual."* Essentially, the Board stopped just short of condoning the persecution of gay men if they are open about their sexual orientation. Comparing it to a 1993 case in the United States, a woman who regarded the imposed dress code and morality code of Iran as persecutory was denied asylum on the grounds that any persecutory penalties could be avoided by obeying the rules, and compliance would not be "profoundly abhorrent" to her (Macklin, 2004). This finding, as Macklin (2004) points out, would presumably defeat the claim of any applicant, regardless of the authenticity of her opposition to

the laws in question. If all dissenting opinions should be kept private, no person regardless of their disapproval with political, social or cultural policy or practice could receive asylum. It should not matter how easy it is to obey the law and avoid persecution (ie. refraining from making public his sexual orientation), if in doing so he must forsake a protected freedom, in this case freedom of expression and freedom from discrimination[18] (Macklin, 1995). The fact that asylum officials view sexuality as something which is personal (ie. private) and should therefore remain private, neglects the reality that legislation outlawing homosexuality and abuse by law enforcement officers brings it into the realm of the political, no matter how narrowly defined. The statements by the Appeal Board demonstrate a failure, not of the refugee law itself, but in the way in which resistance to discrimination based on gender is conceptualised (Crawley, 2004). The refusal of the Nigerian man to hide his sexual orientation is in itself a public act of defiance against political and legal systems which discriminate against gay men.

Assessing state assistance

As the above discussion shows, South African asylum officials depend heavily on the ability of asylum claimants to prove they have completely exhausted local remedies before fleeing their countries. Kerfoot and de la Hunt (2007: 96) quote a member of the Appeal Board, *"the onus is on the asylum seeker to discharge the burden of proof that all domestic remedies, including the relocation alternative, have been thoroughly exhausted before surrogate protection is justified*." As a result South African asylum authorities often neglect to adequately examine the ability of local authorities to respond and protect their citizens against gender-related harm.

The fact that individuals who have experienced or fear gender-related harm choose not to approach authorities, as they know enough not to expect help, should not automatically result in the rejection of their claim. While in most circumstances, citizens should fairly be expected to first approach domestic authorities before leaving for another country, in some cases, particularly in countries where police are not known to be responsive to situations of gender-related harm, it is irresponsible to expect asylum seekers to have sought local help. Quoting a 1993 Supreme Court of Canada decision (Canada v. Ward), Macklin (1995) notes that ordinarily a claimant must prove that she sought the protection of authorities unless it would be "objectively unreasonable" to do so because state protection would not be forthcoming. As one of the judges noted, *"it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness"* (Quoted in Macklin, 1995: 234). Such an expectation would arguably serve to extend the duration of her persecution even further. Rather than immediately reject such cases, it is the responsibility of asylum determination officials to adequately examine the laws and practices of local authorities.

[18] South African Constitution, Chapter 2, Section 9 specifies that the state may not unfairly discriminate against anyone on various grounds, including sexual orientation.

In a number of cases from the DRC, claims were rejected because they were based on a fear of being raped, rather than an actual rape. According to the UNHCR Handbook (1992: 43), the applicants' knowledge of the authorities' capacity and willingness need not be based on their own experience. *"What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant."*

The requirement to approach authorities when it is known they will not assist, or in the case of the women from Rwanda described above, even when they are the perpetrators, seems to be both cruel and unreasonable. According to the UNHCR gender guidelines (2002), *"serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection."* If asylum officials recognise that such harm has occurred (as in the Rwandan case), clearly, if the claimant returns they will again face the same harm. It is possible, however, that because gendered harm is not viewed as unbearable, unusual or political by asylum officials, returning such a claimant is not seen as contradictory. There would only be a contradiction if gendered harm was indeed seen as political, rather than dismissed as merely personal and common.

Country research

Some of the RSDOs interviewed said they would recognise gender-related persecution and grant asylum if their research provided evidence that such a practice exists in the country, and women are not able to get help from the police. For example, in their Heads of Argument to the Refugee Appeal Board, lawyers for the Cameroon woman whose uncle tried to force her into marriage, successfully used a State Department Report to argue "*Cameroonian civil law is notably silent on specific family issues, including forced marriage…'The lack of a national legal code covering such family issues [leaves] women defenceless against these male-oriented customs.* The reality is, however, that there is often a lack of country information available on a country-by-country basis on the prevalence of violence against women (Crawley, 2004). In many countries, the true scale of sexual violence against women is unknown because numerous cases are never reported. In some countries, there is little documentary evidence and even the most basic statistics regarding violence within the family are unavailable. Because of this, immigration officials and judges are often not able to accurately substantiate claims of violence against women and legal practices in a particular country (Crawley, 2004). According to the UNCHR gender guidelines (2002: 37),

"It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research."

As also mentioned elsewhere in this report, RSDO decisions, as well as some of those by the Refugee Appeal Board, fail to adequately examine the prevalence of violence against women, as well as appropriately gauge the authorities' responses to such crimes. Often in letters of rejection the decisions appear to "cut and pasted" from one case to another, without considering the specific details and the possibility of future protection from gender-related persecution experienced or feared. None of this information, however, is based on an evaluation of the authorities' response or willingness to protect women from gender-related harm.

At the moment, according to RSDOs, country information is sent directly from the research unit at the head office of the Department of Home Affairs. While some country reports from the Home Office in the UK and USA are regularly provided, all other information must be requested by fax from the research unit. The RSDOs mentioned concerns that this information often does not provide reference to a source and it frequently takes longer than a week to receive. In addition, the RSDOs are also expected to do their own country research on the internet. None of the RSDOs could recall receiving reports specifically published by the Department of Home Affairs for asylum determination. During the research, only one report published by Home Affairs was discovered, a June 2006 report on Ethiopia. In a specific section on women, the report says that *"Although women have recourse to the police and courts, societal pressures and limited court facilities reduce the availability of these remedies particularly in rural areas"* (South Africa Department of Home Affairs, 2006: 9) The rest of the section goes on to describe the prevalence of FGM. While it is encouraging to note that women's access to legal remedies is specifically mentioned, it provides little detailed information. From the decisions being made on cases in other countries, such as the DRC, it appears not even such little information is considered.

Conclusion

The asylum cases and decisions discussed in this chapter show the tendency of the South African asylum system to privilege claims where the harm is described or perceived in political terms, frequently dismissing claims of gender-related persecution as commonplace, or personal in nature. Even where officials recognise gender violence as a human rights violation, they make unreasonable demands on claimants, demanding proof he or she has approached local

authorities for protection – regardless of perceived risk and likelihood of assistance. Those who have experienced gender-related persecution are then placed in limbo, unprotected by both their local authorities and the South African asylum system.

Persecution by Culture

Female genital mutilation (FGM), also known as female circumcision or female genital cutting has received tremendous attention around the world and in South Africa.[19] Although FGM is not practiced in South Africa (UNICEF, 2005), it is practised in at least 28 countries stretching across the centre of Africa north of the equator (Althaus, 1997). In South Africa, FGM seems to be the most recognised and frequently encountered type of gender-related persecution among asylum officials. When asked whether FGM would qualify as a legitimate ground for asylum, almost all asylum officials reassured researchers that it would. In fact, while questions about other types of gender-related claims perpetrated by private citizens evoked apprehension and doubt from RSDOs, those regarding FGM were met with confident affirmative responses. In contrast to other forms of gender-related persecution discussed, asylum officials tended to describe FGM as a cultural practice. Revealingly, whether the harm can be associated with a foreign culture seems to be a determining factor in how cases of gendered harm are assessed. As has been also noted in other asylum systems, South African officials fall into the trap of cultural essentialism and ethnocentrism when assessing the legitimacy of gender-related persecution claims. Unfamiliar types of gendered harm are condemned as unacceptable and thus persecutory, while those that exist in South Africa are dismissed as unfortunate but too common to be persecutory.

Of the twenty-eight RSDOs interviewed, ten said they had previously encountered cases of FGM, and a further six said they had heard about such cases. Only one RSDO said he had never heard of FGM. The RSDOs reported they had encountered FGM in cases of women from Cameroon, Ghana, Kenya, Ethiopia, Cote d'Ivore and Rwanda. Unlike other gendered harm discussed, FGM was described as a violation of human rights. *"In Ethiopia, mostly it's about the politics, but the women, they will tell you about the genital mutilation."* Another said, *"There are differences in some countries like in Ghana, where I encounter sometimes cases where women face female genital mutilation that is a violation of their rights,"* said an RSDO.

Nine of the RSDOs responded that they would definitely approve such cases, while others said it is an eligible ground but they would first have to check on chances of internal relocation or domestic remedy. Only one replied that it wouldn't be eligible, *"I don't think it is a basis for a claim, I know it's a gender thing but it's a female, family thing and is practical for everybody."*

[19] Female genital mutilation/cutting (FGM/C) involves the cutting or alteration of the female genitalia for social reasons. Generally, there are three recognized types of FGM/C: clitoridectomy, excision and infibulation. Clitoridectomy is the removal of the prepuce with or without excision of all or part of the clitoris. Excision is the removal of the prepuce and clitoris along with all or part of the labia minora. Infibulation is the most severe form and consists of removal of all or part of the external genitalia, followed by joining together of the two sides of the labia minora using threads, thorns or other materials to narrow the vaginal opening.

According to an RSDO at the Pretoria office, "*I haven't yet met someone who came with that sort of claim. But I know of the fact that if that is the case…that is what we are told when we are undergoing the training. If it is FGM normally we approve. And then I came across that thing in a number of the sources that I ordinarily check whenever I am doing adjudication. That is something serious. Female genital mutilation is very serious."*

Another RSDO said, "*I think they could also approve it. If they find country information that that one is true. And then also if they find that this story is true and then we approve them."*

The Chair of the Standing Committee on Refugee Affairs, Mr. Schravesande said FGM cases are the most commonly seen and approved gender-related persecution claims. If the Standing Committee receives cases of FGM from RSDOs that have been deemed manifestly unfounded (not within the definition of a refugee), they would then review these cases and *"almost invariably say female genital mutilation is a ground, and therefore you must consider the case on its merits*[20]*,"* he said.

"The most that we have are mutilation cases or mutilation claims. Those are the ones that we see most often. When I say those, I'm talking about those that we believe have some kind of a claim, whether it has merits or not is another question. But of the cases that we would set aside where the RSDO has decided that the claim is manifestly unfounded, those cases that involve genital mutilation we set aside and ask them to consider the case fully," said Mr. Schravesande.

While the Refugee Appeal Board spoke about FGM, the female member of the Board, Ms. Morobe said that since she took up her position in 2002, she has only encountered one woman claiming to have fled Ghana because of fear of FGM. None of the other Board members mentioned hearing a case concerning FGM on appeal.

Based on the interviews with the RSDOs, the Standing Committee and the Appeal Board, it appears as if FGM is widely recognised and in most cases is accepted as a legitimate basis for asylum. As the Appeal Board only reports encountering one FGM case, it seems that either most FGM claims are being approved at the RSDO level, or women who are rejected are unaware or unable to appeal or choose not to appeal. This is confirmed by the desktop review of cases at lawyers' offices across the country. Despite a review of 677 female files, no cases related to FGM were found.

[20] The case's merits would refer to the credibility of the claim and whether it can be objectively substantiated by available country information.

The difference in how asylum officials see FGM, versus other forms of gendered harm, seems to be a reliance on culture. Forms of gender violence which are only perpetrated outside South Africa, by cultural Others, are viewed as more acceptable reasons for asylum than those which South African women also experience. FGM is practiced by Other Africans and so more easily judged as barbaric and clearly unacceptable. Domestic violence and rape, which occur at an equal or even greater prevalence inside South Africa, even if assumed to be cultural, are less likely to be seen as gender-related persecution and a basis for asylum. An explanation by Mr. Schravesande provides an illustrative example. When questioned on the distinction between female genital circumcision and domestic violence claims, Mr. Schravesande explained that FGM is a cultural practice and therefore requires a greater degree of state protection.

"We see a difference; domestic violence would very seldom cause you to leave your country, whereas genital mutilation can quite easily cause you to leave your country. Domestic violence, you don't usually have to depend on any state assistance to avoid it, whereas mutilation you would almost definitely need state assistance to avoid it, active and successful state intervention. It's two very separate things. FGM is more of a cultural thing."

As discussed in the previous chapter, however, domestic violence is often dismissed by other asylum systems, exactly because it is considered cultural. Any practice that is cultural is seen to be something which is common and personal, therefore affecting everyone equally. In fact, even in the above statement, domestic violence is seen as so common it does not even require state assistance. Culture, it seems, is a dynamic concept that can be used interchangeably to both undermine and justify asylum claims. As Homi Bhabha (2004) argues in The Location of Culture, concepts of culture can never been assumed to be static or uncontested, it is constantly being renegotiated and reasserted. Similarly, the use of culture as an explanation within the asylum system is also fluid, being redefined according to the situation. *"The borderline engagements of cultural difference may as often be consensual as conflictual; they may confound our definitions of tradition and modernity; realign the customary boundaries between the private and the public, high and low; and challenge normative expectations of development and progress"* (Bhabha, 2004: 3). While in other circumstances culture may be used to justify the exclusion of asylum seekers, here it is used to argue for their inclusion. Rather than a fact of life and commonality, culture is demonised and on par with the political as justification for asylum.

More than a decade after the introduction of the gender guidelines in the USA, researchers have also found a differentiation based on culture arising between the types of gender-related persecution that are more likely to recognised by asylum officers and judges, and to some extent even legal services providers. Certain types of harm, such as female genital mutilation and

honour killings, that are seen as only occurring outside the country of asylum, are more readily accepted as grounds for asylum, while domestic violence and rape, that also occur in the country of asylum, are less likely to be seen as gender-related persecution or considered a legitimate basis for asylum (Oxford, 2004; Sinha, 2001). According to Oxford (2004), the American asylum system demonstrates insecurity with ethnocentric harm and fear of exotic harm. *"Female circumcision, unlike domestic violence, signifies cultural backwardness – a cultural practice exclusive to migrant women"* (Oxford, 2004: 24).

Using the example of the first three prominent gender-related persecution cases following the introduction of the US gender guidelines, Anita Sinha (2001) argues that that asylum practice is rooted in racialised discourse that returns to the orientation of colonialist feminism by fighting sexism with racism. In order to secure asylum based on gender-related persecution in the US, migrants must cast themselves as the cultural Other. In 1996, American judges granted asylum to the young Togolese woman Fauziya Kassindja (Kasinga) based on her fear of FGM, and shortly after denied asylum to a Guatemalan woman (Re R-A) who suffered for years at the hands of her abusive husband. The immigration authority denied her asylum because her experience of "private acts of violence" did not warrant political asylum protection (Sinha, 2001). In 2000, the court granted asylum to a Moroccan girl (Re S-A) who had been continually abused by her father, based on the role of religious fundamentalism. The courts granted asylum in the Kasinga and S-A cases, because they were able to rely on the existence of a "cultural hook", religious fundamentalism or traditional practice, whereas in the R-A case was denied because it had no apparent cultural basis (Sinha, 2001). Rather than acknowledging that claims involving gender fit within asylum jurisprudence, Kasinga and S-A were granted because of their connection to non-Western culture (Sinha, 2001).

While these studies critique cultural essentialist and ethnocentric views among asylum officials in Western countries such as the USA and the UK, the same sort of views are evident in South Africa's asylum system, a country not ordinarily classified under any definition of the West (Huntington, 1996). Such ethnocentrism and cultural essentialist views of the other are not perhaps unique to the West, but to others, even so called 'developing' countries. The decisions of South African asylum officials appear to arise from a similarly ethnocentric stance, where the type of gender violence that occurs inside the country is seen as normal and absent of cultural influences. The 'rest' of Africa is viewed as having culture, especially detrimental culture, while the cultural practices of South Africa becomes the norm by which others can be judged. This may be symptomatic of the fact that South Africa is frequently viewed by the world and by South Africans themselves, as distinctly different from the rest of Africa – as a regional leader and even hegemon. South Africa has an economy at least four times greater than the rest of Southern

Africa combined, and it has the highest intermediate and final manufactured goods market in Africa (McGowan & Ahwireng-Obeng, 1998). South Africa's African Renaissance, as articulated and promoted by former president Thabo Mbeki, has in part been an effort to re-integrate South African within Africa, and to define its identity as African (Lazarus, 2004). Despite these efforts, however, South Africans continue see themselves as distinct from the rest of Africa – politically, economically, and as is seen in the decisions of asylum officials, also socially and culturally.

The South African asylum system appears to lacks critical insight into whether forms of gender violence which occur inside country could in fact constitute gender-related persecution. As discussed in the last chapter, cases of rape have been rejected by South African asylum officials because according to one rejection letter, *"Rape is a crime that appears to be rampant all over the world."* While FGM is not practiced in South Africa, it is home to extremely high rates of rape and domestic violence, and cases of forced marriage also occur. The South African Police Service (SAPS) reported 52,733 rapes in their 2003-2004 released data; however the true extent of sexual violence in South Africa is unknown. StatsSA found that one in two rape survivors is estimated to report being raped to the police (Hirschowitz, et al, 2000), while the Medical Research Council (MRC) stated that one in nine women reported being raped (Jewkes & Abrahams, 2002). Based on the above studies, the SAPS figures could be calculated as falling somewhere between the region of 104,000 and 470,000 actual rapes (Vetten, 2005). National figures for intimate femicide (men killing their intimate partners) suggest that 8.8 per 100,000 women 14 years and older were killed by their intimate partner in 1999 (Mathews et al, 2004). Forced marriage, known as ukuthwalwa, is also practised by some in rural areas of South Africa, including Limpopo, KwaZulu-Natal and the Eastern Cape. (van Schalkwyk & Mhlanac, 2007). There have been reports of young women or girls as young as nine being abducted and forced into marriage. A reliance on ethnocentrism has meant that because gendered crimes such as rape, domestic violence and even forced marriage occur in South Africa, such asylum claims are not deemed persecutory by officials. Cultural explanations, however, allow FGM to be seen differently. Both tendencies skew the judgements of asylum officials, permitting quick, often uninformed, decisions based on ethnocentric preconceptions and culturally essentialist stereotypes.

The reality for those who claim asylum based on gender-related persecution, is that the legal system relies on and expects simplified and stereotyped views of culture, countries and practices, as well as an appeal to colonial responses, to establish a basis for intervention. Refugee law requires that to prove persecution in cases where the perpetrator is a non-state actor, it must only be shown that there is serious harm in conjunction with inattention or inaction by the state to provide adequate protection. A state's failure to make or enact appropriate laws begs the

question of “why?” Rather than attributing the state’s failure to poor policy or lack of political will, Visweswaran (2004) argues that it is often blamed on the force of culture. Hence culture is equated with the political, and acts previously seen as personal therefore become recognised as political. In her analysis of gender-related persecution cases, Jacqueline Bhabha (2006), states that the US legal system requires lawyers to simplify and use stereotypes, to depict countries as backward and undeniably oppressive of women. She asks, addressing fellow lawyers, *“How many of us have not pressed ‘our’ country experts to simplify their affidavits, to present as clear a black and white picture as possible of a culture, a situation, a danger, in an effort to persuade a court?”* The implicit danger in using stereotypes and ignoring the complex understandings of culture within any one country is that it sets too high a benchmark for access to asylum. An asylum case will not succeed unless it is able to establish that within the applicant’s country all cultural views on gender are homogeneously oppressive. Such a requirement jeopardises the basis of future asylum cases, as background depictions become more and more exaggerated and removed from reality (Bhabha, 2006).

Human rights reporting and feminist literature have succeeded in casting FGM as a detrimental and oppressive cultural practice unique to Africa. While this “arrogant perception” has been criticised as obscuring complexities and the relations within individual societies (Gunning, 1992), the demonisation of FGM as a cultural practice has allowed women who flee FGM to be granted asylum in a number of countries. Despite its effectiveness in persuading courts and officials, the reliance on culture has serious repercussions for those women whose claims involve persecution that cannot be blamed on culture, or a cultural practice. As Kapur (2002) warns, such portrayals of culture distract away from the real issues, the failure of the state to provide real protection for human rights. When women are seen as victims of their own cultures, the state is excused, and broader questions regarding more prevalent forms of violence against women are deflected. Rather than focusing on culture itself, Visweswaran (2004) asserts it would be a much more effective to place the emphasis on political systems’ denial of rights and the intrinsic interface between culture and politics, putting the responsibility to protect human rights back on the shoulders of the state.

Conclusion

It is encouraging to note that South African asylum determination officials view women who flee FGM as eligible for asylum. It is concerning, however, that more familiar forms of gendered harm receive contradictory treatment. Because South African asylum officials view FGM as culturally specific they seem more willing to judge it as a legitimate, and even a political rather than personal, asylum claim. Those rights violations that also occur in South Africa, such as domestic violence, forced marriage and rape committed by private citizens, are not assigned nearly as

much legitimacy or credibility. The dependence on cultural explanations for gender-related persecution claims dangerously skews the judgements of asylum officials, resulting in the discrediting of legitimate claims not seen as based on culture.

Conclusion

Pending amendments to the Refugees Act may soon promote gender from its current position under social group to an independent ground for asylum. Department of Home Affairs officials believe such a move will help to increase the visibility and hence improve recognition of gender-related persecution. Creating further visibility within the law, however, is only one step in the process. How the law is implemented determines its real worth and effectiveness.

The South African refugee system is unique – it integrates the best practices of Northern countries while attempting to situate itself within a middle-income African country. It is the first developing country to consider gender as a basis for asylum, as well as only African country aside from Egypt, to consider integration, rather than encampment as a refugee policy. In addition, South Africa uses both the UN and OAU Conventions when defining a refugee, allowing applicants to be assessed on both an individual and group basis. While such policies are applauded, they are also not without their difficulties and challenges. Home Affairs officials struggle to meet the promises laid out in the ambitious Refugees Act. Asylum offices saw a backlog of almost 90,000 cases by the end of 2007, symptomatic of chronic understaffing (CORMSA, 2008). Asylum decisions often lack proper analysis, show a distrust of applicants, and seem to 'cut and paste' reasoning from one decision to another, regardless of whether it is applicable. Interpretation is frequently either unavailable or inadequate, and few applicants understand the functioning of the system. Within and outside the application process, asylum seekers face xenophobia, and even official scapegoating. In addition, South Africa has the unfortunate distinction of having one of the highest rates of gender violence in the world, making the country a tragically ironic place of refuge for those fleeing such harm.

It is within this complex context that asylum officials must understand and apply often disputed and fluid concepts of gender. Even within Northern contexts, where the infrastructure and resources far exceed those of South Africa, gender-related persecution remains a disputed area. Despite its differences, South Africa's asylum system retains many similarities to its Northern counterparts. The system relies on ethnocentrism and a strict definition of what can be perceived as political. Asylum decisions demand forms of harm that are specifically framed as political, while gendered harm is often dismissed as too personal or common a crime to constitute persecution. In addition, decisions on gender claims often reflect an over-reliance on the capabilities and willingness of local authorities, and lack critical analysis of the quality of state protection actually available.

As has also been found in studies of other systems, South African asylum officials appear more likely to accept an application where it is based on an unfamiliar, or even exotic harm or 'culture,'

that is only practiced in Other countries. By and far, this study found FGM – a practice not usually seen in South Africa - to be the most successful gender-related persecution claim. In contrast, claims based on gendered harm seen in South Africa, such as domestic violence, rape and forced marriage, were often held up to a much higher standard of proof, and frequently described as too normal or even acceptable to be persecution. In this manner, the system displays clear ethnocentrism and essentialism – dismissing all familiar gender violence as normal, while declaring those from more 'exotic cultures' as unacceptable human rights violations

Unlike other systems, South Africa employs the OAU convention, which allows for blanket refugee status to be given to those fleeing war, invasion, or mass disturbances in their countries. While during war, the asylum system seems to judge rape is persecution, once a war is over, rape is no longer seen as a valid basis for asylum. Rape during peacetime is viewed as normal and accepted, while 'rape during war' is seen as the only unusual, and thus eligible, form of rape. As a result, asylum officials fail to assess real levels of safety along gender lines, granting or denying refugee status simply based on the absence of war or peace.

While much of this study critiques the essentialism found in the South African asylum system, it also recognises that much of the same essentialism is in fact central to its operation, and that of the international refugee regime. Refugee law as it is currently practiced requires essentialised definitions of refugees. To be successful, applicants inevitably have to play into a system which demands stereotypes (for example, 'Cameroonian women' at risk), bases defences on the demonisation of culture and religion, and understands harm in only clear political terms. Aside from setting the standard unreasonably high, such a system also fails to hold the state accountable for the prevention and protection against gender violence, and instead places the blame on failures of the applicant and her 'culture'.

Although efforts to ensure the visibility of gender within the Refugees Act should be applauded, without an improvement in both knowledge and procedures, any enhancement in the legal protection of women in South Africa's refugee law may sadly go unnoticed by those responsible for its implementation. Instead, the application of asylum law must be reframed towards a political understanding of why women flee and a clear recognition of the responsibility of states to protect against gender violence. At the same time, improved training on the adjudication of gender-related claims for officials in all levels of decision making and the development of clear guidelines will go far in enhancing understanding and improving decision making. Only with greater emphasis on understanding and implementation, in addition to legal assurances, will those who flee to South Africa be able to realise the protection the Refugees Act promises.

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