Refugee Law, Gender, and the Human Rights Paradigm

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> Underlying the [Refugee] Convention is the international community's commitment to the assurance of basic human rights without discrimination .... Persecution, for example, undefined in the Convention, has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" ....[1]
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> —Canada v. Ward, Supreme Court of Canada, 1993

I. INTRODUCTION: THE INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL REFUGEE REGIMES

International refugee law is coming of age.[2] As the Supreme Court of Canada signaled in *Ward*, refugee law increasingly refers to, and more explicitly acknowledges its foundation in, an international human rights paradigm. The refugee regime is generating a serious body of law that elaborates basic human rights norms and has important implications in—and beyond—the refugee context. Despite this growing synchronicity and long-standing, close connections between the two fields, international human rights law continues to distance itself from refugee law. Refugee law is often treated like a "poor cousin," as many human rights activists remain wary of engagement with refugee advocacy, especially individual claims to refugee

* Director, Harvard Law School, Immigration and Refugee Clinic. Special thanks to Lee Anne de la Hunt, Roger Haines, Jim Hathaway, Nancy Kelly, Paul Luskin, Rebecca Maxie, Jane Rocamora, Peter Rosenblum, John Wilshire-Carrera, and the Inter-University Committee on Migration.

1. Canada v. Ward, [1993] 2 S.C.R. 689, 733 (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 104–05 (1991)).

2. International refugee law is based on the Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, and the Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1976, 19 U.N.T.S. 6223, 606 U.N.T.S. 267 [together hereinafter Convention or Refugee Convention]. For a general description of the Convention, the Protocol and their predecessor international instruments, see HATHAWAY, *supra* note 1, at 1–13. States Parties to the Convention incorporate the Convention into domestic law (although incorporation is not uniform). Some states also have unique municipal law protections. In addition, there are regional refugee regimes. *See generally* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 20–25 (2d ed. 1996). For treatment of refugee law as part of the corpus of human rights law, see FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 632–94 (1996).

status. The tension is due, in part, to unfamiliarity (among human rights academics and practitioners) with the ways in which refugee law has been evolving as international human rights law.

The function of the international human rights regime is to judge whether states are fulfilling their duties under internationally agreed upon human rights norms[3] and, through monitoring and publicizing, to deter future abuse: in short, to change the behavior of states. The norms derive from the International Bill of Rights—the Universal Declaration of Human Rights (UDHR),[4] the International Covenant on Civil and Political Rights (ICCPR),[5] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6]—as well as the more specialized instruments related to race,[7] gender,[8] and children.[9] The regime's institutions are international monitoring bodies and it has no significant enforcement mechanisms.

Refugee law grants protection to a subset of persons[10] who have fled human rights abuses. Under the international Refugee Convention, a refugee is a person unable or unwilling to avail herself of the protection of her country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[11] Refugee law provides surrogate national protection to individuals

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3. The general applicability of these human rights norms is also supported by natural law, universalist theories. *See, e.g.*, Katherine Brennan, Note, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. J. 367, 371–72 (1989), *excerpted in* NEWMAN & WEISSBRODT, *supra* note 2, at 677–78 (discussing the difference between positivist and natural law theories).

4. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) [hereinafter UDHR].

5. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

6. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

7. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, G.A. Res. 2106A (XX), U.N. GAOR, 660 U.N.T.S. 195 [hereinafter Race Convention or CERD].

8. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women's Convention or CEDAW].

9. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1990, G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, at 166, U.N. Doc. A/44/25 (1989) (entered into force Sept. 2, 1990) [hereinafter Children's Convention or CRC]. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 3–983 (2000) (discussing various instruments and institutions of the international human rights regime).

10. Most importantly for purposes of this discussion, refugee status is limited by the requirements of international border crossing and discriminatory impact. In other words, proof of a prospective human rights abuse and failed state protection—"persecution"—is not sufficient to establish eligibility as a refugee. The person also must have left her country of citizenship or last habitual residence and she must establish that the violation she fears has a discriminatory impact based on one of the five grounds. Other restricting elements include proof of a "well-founded fear" of being subjected to the relevant human rights violation. This Article focuses only on the meaning of the Convention's criterion of persecution.

11. Convention relating to the Status of Refugees, *supra* note 2, at art.1(a).

when their states have failed to fulfill fundamental obligations, and when that failure has a specified discriminatory impact. As several jurisdictions now recognize in defining the concept of persecution, the nature of those obligations is determined by international human rights standards. But refugee law is not aimed at holding states responsible; its function is remedial.[12] To paint with a broad brush, the international community created two regimes to address human rights abuses: one, the human rights regime, to monitor and deter abuse, and the other, the refugee regime, to provide surrogate state protection to some of those who are able to cross borders.[13]

Human rights lawyers and scholars have viewed refugee law as too embedded in domestic immigration law and institutions. The great innovation of the international human rights movement of the past half-century was to bring human rights "out of the confines of domestic legal systems" and into the realm of international law and institutions.[14] Under the Refugee Convention, the responsibility to provide international protection—a surrogate to the ruptured, national protection—is placed on states that are parties to the Convention. Thus, refugee law is implemented by states and, to the extent possible, through domestic legal systems. In many other respects, the refugee regime seems different from the international human rights regime. For example, there is no regularized monitoring of states' compliance with their obligation to provide surrogate protection, although the United Nations High Commissioner for Refugees (UNHCR) serves an important supervisory function. No refugee-specific, international institutions hear interstate complaints or individual communications.[15]

Yet refugee law *is* international law, grounded in an international treaty. Over the past decade especially, refugee law has been claiming its international human rights roots and evolving across national borders. As refugee

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12. James C. Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection*, 8 J. REFUGEE STUD. 289 (1995).

13. The Convention's various articles define a range of rights that a State Party must grant to a refugee over whom it has *de facto* authority, including protection from return and basic civil and political rights, such as freedom of association and access to the courts. Some of these rights attach because a person fulfills the criteria of Article 1 and is under the authority of the state. Others attach only if a refugee is formally recognized and granted status by the State Party. *See generally* James C. Hathaway & Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 484 (2000). *See also* 2 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 195–397 (1972) (comprehensively describing and analyzing the rights of refugees, including rights under the Convention).

14. Louis B. Sohn, The Human Rights Movement: From Roosevelt's Four Freedoms to the Interdependence of Peace, Development and Human Rights 4 (1995) (lecture published by Harvard Law School Human Rights Program). *See also* STEINER & ALSTON, *supra* note 9, at vi.

15. Walter Kälin, however, also notes the extensive, positive impact of the UNHCR on the protection of asylum seekers and favorably contrasts the Refugee Convention with other human rights treaties in this regard. *See* Kälin, Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond, Part 1 (paper submitted for expert roundtables under the "second track" of the UNHCR Global Consultations on International Refugee Protection) (on file with author). "Unlike the [Refugee] Convention and 1967 Protocol, these treaties do not have an operational agency with a world-wide presence and 'protection officers' in a large number of countries working to ensure that these instruments are implemented." *Id.* at 11.

law matures, judicial bodies, including states' highest courts, are reviewing more refugee cases. There is also growing sophistication within some administrative systems.[16] The work of scholars and the UNHCR, which issues non-binding legal interpretations, have become particularly salient.[17] NGOs have played a significant role in articulating legal principles. For example, governments have relied on NGO analyses and cited them in major judicial opinions.[18] Furthermore, several states' administrative bodies and courts engage in productive dialog with one another: by borrowing, adapting, and building on each other's jurisprudence and instruments such as national guidelines, they are beginning to create a complex and rich body of "transnationalized" international law.[19]

The human rights paradigm has been critical to these developments. Not only are states interpreting key criteria of the refugee definition in light of human rights principles, but international human rights law is providing the unifying theory binding different bodies of national jurisprudence. For example, following the decision in *Ward*, some commentators and jurisdictions have embraced the Canadian Supreme Court's concept of persecution as serious human rights abuses, injuries reflecting systemic conduct, "demon-

16. This is true in the United States, where the Board of Immigration Appeals recently has been issuing a greater number of reasoned decisions, which provide better guidance for decision-makers. *See, e.g., In re* S-P-, 21 I. & N. Dec. 486 (U.S. BIA 1996) (relying extensively on State Department human rights reports and providing criteria for identifying a persecutory motive); *In re* H-, 21 I. & N. Dec. 337 (U.S. BIA 1996) (explaining the meaning of the past persecution standard, and specifying the burdens of proof in such cases); *see also* Carolyn P. Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to 'Investigate Its Enemies,'* 28 WILLAMETTE L. REV. 719 (1992) (discussing some problems in earlier jurisprudence). The New Zealand Refugee Status Appeals Authority has a long-standing, distinguished reputation as a refugee decision-making body. *See* MARK SYMES, CASELAW ON THE REFUGEE CONVENTION ii (2000) [hereinafter REFUGEE CASELAW].

17. One example is the UNHCR's major role in the development of the law related to the protection of women refugees. *See* Nancy Kelly, *Gender-related Persecution*, 26 CORNELL INT'L L.J. 626, 633 (1993); Hélène Lambert, *Seeking Asylum on Gender Grounds*, 1 INT'L J. DISCRIM. & L. 153, 162–65 (1995); Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 28–30 (1998) (all discussing, *inter alia*, the effect of UNHCR's pronouncements on this emerging body of law). *See also* Kälin, *supra* note 15, at 2–10 (discussing the exceptional role of the UNHCR, especially the authoritative character of its pronouncements and its 1979 Handbook, *see* UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter UNHCR HANDBOOK]). For a general discussion of current challenges facing the UNHCR and the refugee regime, see Joan Fitzpatrick, *Taking Stock: The Refugee Convention at 50, in* 2001 WORLD REFUGEE SURVEY 22 (U.S. Committee for Refugees 2001).

18. *See, e.g.*, Regina v. Immigration Appeal Tribunal, *ex parte* Shah, [1999] 2 All E.R. 545, 565 (H.L.) (U.K.) (citing gender guidelines of the Refugee Women's Group for definition of persecution). *See also* Memorandum from Phyllis Coven, International and Naturalization Service (INS) Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995) [hereinafter U.S. Gender Guidelines], *reproduced in* GENDER ASYLUM LAW IN DIFFERENT COUNTRIES: DECISIONS AND GUIDELINES 67 (1st ed., 1999) [hereinafter GENDER DECISIONS] (describing the U.S. guidelines as the "natural . . . outgrowth" of UNHCR, Canadian and draft guidelines of Women Refugees Project, Harvard Law School Immigration and Refugee Clinical Program, and Cambridge and Somerville Legal Services).

19. One of the best examples of such transnationalization is the interpretation of "particular social group" to include sex and gender. *See* Deborah Anker, *Refugee Status and Violence Against Women in the 'Domestic Sphere,'* 15 GEO. IMMIGR. L.J. 391, 391–92 (2001).

strative of a failure of state protection."[20] Most recently, the House of Lords in *Shah* solidified an analysis of persecution constituted by two distinct elements: serious harm and a failure of state protection.[21]

So far, this newer, internationalizing direction in refugee law has been limited to a conversation among only a few states. The degree of cross-fertilization and grounding of interpretation in a human rights paradigm is highly uneven, and there are numerous examples of inconsistencies and incomplete implementations of the Convention.[22] Moreover, the great majority of States Parties are not engaged in individual, legalized assessments of claims.[23] In these cases as well as others, however, UNHCR does play an active role in refugee status determinations.[24] Generally, the UNHCR tries to synthesize and advance the best practices of states, and mediates among different protection systems (although more formalized monitoring mechanisms, suggested by scholars and expert groups, are needed). Non-binding norms articulated by the UNHCR influence the standards for protection in both legalized and non-legalized settings. Moreover, a growing number of states (e.g., South Africa and countries in Eastern and Central Europe) are specifically incorporating the Convention into domestic law and developing domestic infrastructures for refugee status determinations.[25] They will rely on and develop other States Parties' interpretations of the refugee definition, especially to the extent that they reference a common international framework. They also may further enrich refugee law, embedding its interpretations of international human rights norms in a greater diversity of cultural and national traditions.

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20. Canada v. Ward, [1993] 2 S.C.R. 689, 733. The New Zealand authorities, for example, have held that, "[c]ore norms of international human rights law may be relied on to define forms of serious harm within the scope of persecution." Refugee Appeal No. 71427/99, [2000] N.Z.A.R 545, 564 (para. 51) (New Zealand Refugee Status Appeals Authority). The New Zealand authorities recently included the Race Convention, *supra* note 7, and the Women's Convention, *supra* note 8, as sources of those norms *Id.* Nicholas Sitaropolos argues that "[c]ase law in the U.K., France and Germany . . . has established a close relationship between human rights violations and persecution." NICHOLAS SITAROPOLOS, JUDICIAL INTERPRETATION OF REFUGEE STATUS 245–46 (1999).

21. This analysis is important for refugee claims where the direct agent of harm is a non-state actor. *See generally* Anker, *supra* note 19.

22. *See, e.g.*, Kälin, *supra* note 15, at 12–15 (highlighting problems of incomplete implementation and inconsistent interpretation of the Convention by States Parties).

23. This is largely due to the number of refugees involved and/or the lack of infrastructure for refugee determinations. *See* GOODWIN-GILL, *supra* note 2, at 34 (commenting that "[o]nly comparatively few States have instituted procedures for assessing refugee claims); HATHAWAY, *supra* note 1, at 12 (noting the impracticality of individual determinations in cases of large-scale refugee movements); UNHCR, THE STATE OF THE WORLD'S REFUGEES 310, Annex 3 (2000) (showing that the largest numbers of refugees arrived in countries in Asia and Africa).

24. *See* GOODWIN-GILL *supra* note 2, at 33–34 (noting that many State Parties allow the UNHCR to participate in status determinations and often require the certification of status under the UNHCR's own governing statute, especially where states have no domestic status determination processes).

25. *See* 1998 Refugees Act 130 (GG 6779) (S. Afr). In May 2001, the Hungarian Parliament passed four pieces of legislation affecting the regulation of asylum as well as migration matters. *See* http://www.helsinki.hu/eng/indexm.html (describing amendments to the 1998 Act on Asylum, including changes to determination procedures).

In many respects, refugee law crosses the threshold of justiciability and enforceability past which human rights law has found it difficult to proceed. Refugee law provides an enforceable remedy—available under specified circumstances—for an individual facing human rights abuses. Determinations of refugee status entail contextualized, practical applications of human rights norms. Increasingly, refugee law is confronting issues on the forefront of the human rights agenda, especially questions of gender and women's rights. The discussion below provides three examples: rape and sexual violence, female genital surgery (FGS),[26] and family violence. In many cases, states have applied a human rights paradigm in evaluating these instances of violence against women as serious harm within the scope of persecution. In so doing, refugee law has built on the work of the international human rights movement and has the potential to have a substantial impact on human rights law. As these examples illustrate, there are conflicts between human rights and refugee lawyers/activists, but proven opportunities for partnership also exist.

A. The Human Rights Paradigm and Gender-Based Persecution

The development of "gender asylum law"[27] has required a human rights framework. Gender asylum law has also been a catalytic force in itself, a major vehicle for the articulation and acceptance of the human rights paradigm. For example, the 1993 landmark decision in *Ward* (which, while not a gender case, elaborated the human rights paradigm) was issued at the same time as the landmark Canadian *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.[28] Additionally, the UNHCR, practitioners, schol-

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26. *See* Hope Lewis, *Between Irua and 'Female Genital Mutilation': Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 2–4 (1995) (describing the controversy over the terminology "female genital mutilation").

27. "Gender" refers to socially contingent divisions of roles between men and women, socially constructed notions of femininity and masculinity and resulting power disparities that implicate women's identities and status within societies. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW 3–4 (2000). Charlesworth and Chinkin opine that "sex," as well as "gender" may be used to refer to women's condition in society since sex also is a contestable category, resting on socially defined dichotomies between body and mind, nature and culture. *Id.* at 3–4. Heaven Crawley and others argue that the term "sex" should be avoided, since it suggests biological determinacy. *See* HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS 6–7 (2001). It should also be noted that while this Article focuses on women, gender-based claims may include cases involving the persecution of gay men. *See* CRAWLEY at 161–63. *See generally* Kristen Walker, *The Importance of Being Out: Sexuality and Refugee Status*, 18 SYDNEY L. REV. 568 (1996).

28. Canadian Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution (Mar. 9, 1993) [hereinafter Canadian Gender Guidelines], *reproduced in* GENDER DECISIONS, *supra* note 18, at 87. For Canada's subsequent update, see Canadian Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (Nov. 25, 1996) [hereinafter Canadian Gender Guidelines: 1996 Update], *id.* at 106. Australia, the U.K., and the United States, among others, have also issued national gender guidelines. *See* Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996), *reproduced in* GENDER DECISIONS, *supra* note 18, at 7 [hereinafter Australian Gender Guidelines]; NATHALIA BERKOWITZ & CATRIONA JARVIS, IMMIGRATION APPELLATE AUTHORITY: ASYLUM GENDER

ars and activists consciously have constructed gender asylum law on the edifice of international women's human rights law and the work of the international women's human rights movement. For reasons as much strategic as principled, they have argued that, in order to respond to women's experiences, refugee law needs to evolve, to transform in interpretation, rather than be amended. The bars to women's eligibility for refugee status lie not in the legal categories per se (i.e., the non-inclusion of gender or sex as one of the five grounds) but in the incomplete and gendered interpretation of refugee law, the failure of decision-makers to "acknowledge and respond to the gendering of politics and of women's relationship to the state."[29] Simply adding gender or sex to the enumerated grounds of persecution would not solve this problem, nor would it address cases such as those discussed below where the harm feared (an element of "persecution") was unique to or disproportionately affected women.

Thus, refugee law, in part, takes an integrative perspective on women's rights. By interpreting forms of violence against women within mainstream human rights norms and definitions of persecution, refugee law avoids some of the problems of marginalizing women's rights in international law.[30] This "mainstreaming" approach, most recently reinforced during the UNHCR global consultations, is embraced by both the UNHCR and national guidelines, which have served as the foundations for much of gender asylum law and have had surprising normative effect.[31]

GUIDELINES (2000) [hereinafter U.K. Appellate Gender Guidelines], *available at* http://www.ind.gov.U.K./GenInfo/Gender.pdf; U.S. Gender Guidelines, *supra* note 18. For a description of these and other guidelines, see CRAWLEY, *supra* note 27, at 12–16; Kelly, *supra* note 17, at 633–34; THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS 1–3 (2000). For a recent example of the use of such guidelines, see Jan O. Karlsson, DAGENS NYHETER/SWEDISH DAILY NEWS, Feb. 28, 2002 (stating that women's position in the asylum determination process must be strengthened and that the Swedish Migration Board has developed guidelines).

29. CRAWLEY, *supra* note 27, at 6–9. *See also*, Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518, 526 (1989) (evaluating feminist critiques of refugee law and suggesting a human rights approach which, *inter alia*, addresses the refugee's relationship to her state); Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, 6(3) REFUGE 3 (1987); Kelly, *supra* note 17, at 642 (suggesting an interpretive framework which, *inter alia*, examines "the political nature of seemingly private acts"). *See generally* SPIJKERBOER, *supra* note 28, at 65–93. There are equally important problems with asylum procedures and evidentiary rules that have a major impact on the ability of women to pursue refugee claims. *See* Kelly, *supra* note 17, at 629–30; CRAWLEY, *supra* note 27, at 199–223.

30. *See* CHARLESWORTH & CHINKIN, *supra* note 27, at 218–22 (discussing the problem of marginalization as well as particular weaknesses in enforcement and implementation under the Women's Convention).

31. The most notable example of this integrative approach is Rodger Haines, Gender-Related Persecution (paper submitted for expert roundtables under the "second track" of the UNHCR Global Consultations on International Refugee Protection) (on file with author). *See also* Australian Gender Guidelines, *supra* note 28; Canadian Gender Guidelines, *supra* note 28; U.K. Appellate Gender Guidelines, *supra* note 28; U.S. Gender Guidelines, *supra* note 18 (all analyzing gender issues in refugee law in terms of fundamental human rights and standards of persecution); Erika Feller, *Address to the Conference of the International Association of Refugee Law Judges at Bern, Switzerland*, 15 GEO. IMMIGR. L.J. 381, 382–83 (noting that violence against women is included in the concept of persecution and advances in human rights law have contributed to a gender-sensitive approach to refugee law).

B. Rape/Sexual Violence

Rape was one of the first issues affected by the articulation of the human rights paradigm within refugee law and the increased willingness to consider gender-specific abuses within the scope of persecution. Although there was relatively early Canadian precedent for treating rape as "persecution of the most vile sort,"[32] rape was privatized in many cases, especially before 1993; it was regarded as a manifestation of unrestrained—and unrestrainable—male sexual appetite ("exaggerated machismo . . . rampaging lust-hate" in the words of one U.S. jurist in a 1987 case).[33] In other words, the public/private distinction, which has so deeply affected international law, is reproduced in refugee law.[34] Even cases that fit the traditional paradigms of refugee law were being dismissed—largely because the physical harm involved was sexual and directed at a woman. For example, when a Salvadoran woman whose family was active in a cooperative movement was raped by death squads while they shouted political slogans and hacked her male relatives to death, she was deemed the victim of private violence.[35] Similarly, a U.S. Immigration Judge denied asylum to a Haitian woman who was gang-raped because of her support for the deposed President.[36]

Since these cases were decided, there has been a sea change in the assessment of claims involving rape and other forms of sexual violence. In a recent publication, Heaven Crawley suggests that "[r]efugee law doctrine is unanimous . . . in its opinion that sexual violence, including rape, constitutes an act of serious harm."[37] As a severe physical assault, rape should be treated as one of the least controversial forms of serious harm, and it is now so described in national gender guidelines,[38] as well as in the case law of several jurisdictions.[39]

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32. Maria Veronica Rodriguez Salinas Araya, No. 76-1127 [1977] (Canadian Immigration Appeal Board), at 8, *quoted in* HATHAWAY, *supra* note 1, at 112, n.109.

33. Lazo-Majano v. INS, 813 F.2d 1432, 1438 (9th Cir. 1987) (U.S.) (Poole, J. dissenting). For a discussion of this case, see Jane Connors, *Legal Aspects of Women as a Particular Social Group*, INT'L J. REFUGEE L. 114, 121 (Autumn 1997) (special issue on gender-based persecution).

34. *See generally* CHARLESWORTH & CHINKIN, *supra* note 27. An alternate feminist critique—that the public/private distinction can be overemphasized—also has been made in the refugee context. *See* Greatbatch, *supra* note 29, at 520 ("[the public/private dichotomy] roots women's oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the interconnnections of the public and private spheres.").

35. Campos-Guardado v. INS, 809 F.2d. 285 (5th Cir. 1987) (U.S.).

36. This U.S. decision was overruled in *In re* D-V-, 12 I. & N. Dec. 77, 79 (U.S. BIA 1993) (describing the Immigration Judge's reasoning).

37. CRAWLEY, *supra* note 27, at 44.

38. *See, e.g.*, Australian Gender Guidelines, *supra* note 28, at 16; U.K. Appellate Gender Guidelines para. 2A.18-2A.21, *supra* note 28, at 14–16; U.S. Gender Guidelines, *supra* note 18, at 9.

39. *See, e.g,* Re SDS, Refugee Appeal No. 2373/95 (1996) (New Zealand Refugee Status Appeals Authority), *reproduced in* GENDER DECISIONS, *supra* note 18, at 634; NM v. Swiss Federal Office for Refugees (2000) (Switzerland Asylum Appeals Commission), *available at* www.refugeecaselaw.org. *See also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 255–57 (1999); CRAWLEY, *supra* note 27, at 42–45, 131–33 (both providing examples of some of this case law).

Feminist critics of international law have noted that, at least until the last few years (and largely in the context of international criminal law), rape and sexual violence have not been analyzed as core human rights violations, although they have been recognized as violations of international law and even as human rights abuses.[40] There is a markedly different trend in some of the refugee law jurisprudence. The New Zealand, Canadian, and Australian authorities have found that rape and sexual violence violate the rights to security of person, and the prohibition against cruel, inhuman and degrading treatment under the UDHR.[41] Recent refugee law commentators similarly analyze rape not on the outskirts of traditional canons of human rights law, but within them, relating, for example, to the fundamental prohibition against cruel, inhuman and degrading treatment and torture, and the right to life and security of person.[42] All three of these core rights are specifically iterated in the Australian Gender Guidelines.[43] Furthermore, the U.S. Board of Immigration Appeals held in *Matter of Kuna* that a husband's continual brutal assaults on his wife, including years of rape and sexual violence, constituted torture within the terms of the Convention Against Torture.[44] The Canadian authorities have found that "matrimonial violence"—a woman imprisoned in her home, raped and beaten by her husband over a ten-year period—can be the most extreme form of torture because there is no respite.[45]

The work of women activists and jurists in publicizing the issues of rape and sexual violence in the context of the conflicts in Yugoslavia and Rwanda has been a major factor in changing the direction of refugee law. Refugee and human rights lawyers have also worked collaboratively to set important precedents on rape. Indeed, the first decision of a human rights body recognizing rape as torture (outside the context of detention or armed conflict) arose out of the experience of Haitian refugee women fleeing to the United States after the 1991 coup d'état, which overthrew the first democratically elected president of Haiti, Jean Bertrand Aristide. The illegal de facto regime committed a multitude of human rights abuses against the civilian

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40. *See* CHARLESWORTH AND CHISKIN, *supra* note 27, at 218–19, 234–35.

41. *See, e.g.*, No. U92-06668 (1993) (Canadian Immigration and Refugee Board), *reproduced in* GENDER DECISIONS, *supra* note 18, at 187, 194–95 (finding that rape violates, *inter alia*, the rights to life, liberty and security of person in the UDHR); Re SDS, Refugee Appeal No. 2373/95 (1996) (New Zealand Refugee Status Appeals Authority), *reproduced in* GENDER DECISIONS, *supra* note 18, at 634, 640 (stating that "fear of rape amounts to fear of persecution, rape being a violation of the fundamental right to be free from inhuman or degrading treatment . . . [that can] deny human dignity in a key way"); Australian Gender Guidelines, para. 4.6–4.7, *supra* note 28, at 22–23 (stating that rape and sexual violence may violate the prohibitions against torture and cruel, inhuman or degrading treatment, as well as the right to security of person and the right to life).

42. *See, e.g.*, CRAWLEY, *supra* note 27, at 44.

43. Australian Gender Guidelines para. 4.6, *supra* note 28, at 22.

44. Matter of Kuna, A76491421 (unpublished decision) (U.S. BIA July 12, 2001). *See infra* notes 92–93 and accompanying text.

45. U92-08714 (1993) (Canadian Immigration and Refugee Board), *reproduced in* GENDER DECISIONS, *supra* note 18, at 214, 221.

population aimed at destroying democratic movements and civil society, and creating a climate of terror. The primary instruments of the repression inflicted on women were rape and other types of violence committed by members of the army, police forces, civilian auxiliaries and paramilitary groups. Women were raped because they played an important role in the formation of democratic institutions, because of their status and role in helping civil society, because of involvement in activities to improve local communities, because of the political activities of male relatives—and because they were left behind.[46] As the Special Rapporteur on Violence against Women has commented, "to rape a woman is to humiliate her community."[47] In many cases, women were raped multiple times in their homes and in front of their families, as well as forced to witness the rape of loved ones.[48]

The flight of Haitian refugees to the United States during the 1970s and 1980s helped precipitate the contemporary refugee rights movement in the United States. When Haitian women fled the violence during the time of the illegal coup, there was a network in place to hear, bear witness and give voice to their stories. These stories became the basis for asylum claims, resulting in three simultaneous developments. To begin with, scholars and advocates obtained the first administrative precedent in the U.S. granting asylum to a woman and recognizing rape as serious harm that could constitute persecution.[49] Second, the United States issued its national gender asylum guidelines, which state that "[s]evere sexual abuse does not differ analytically from . . . other forms of physical violence that are commonly held to amount to persecution."[50] The U.S. guidelines were an important development internationally, building on the precedent set by Canada.

Third, these same Haitian women brought their stories in the form of asylum "affidavits" before the Inter-American Commission of the OAS, which, in its *Report on the Situation of Human Rights in Haiti*, made findings of various violations during the illegal regime, including sexual violence against women employed as a political weapon. The Inter-American Commission's report also contained a specific legal determination that "rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the [Inter-American Convention], but also a form of torture in the sense of Article 5(2) of that instrument."[51] This was

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46. Report on the Situation of Human Rights in Haiti, OEA/Ser.L/V/II.88, Doc. 10 rev. (1995), ¶¶ 119–123.

47. Radhika Coomarasamy, *Of Kali Born: Women, Violence and the Law in Sri Lanka*, *in* FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD 49–50 (Margaret Schuler ed., 1992). *See also Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences*, Ms. Radhika Coomarasamy, Commission on Human Rights Resolution 1994/45, 22 November 1994, UN Doc. E/CH.4/1995/42.

48. *See* OAS Haiti Report, *supra* note 46, ¶ 122.

49. *In re* D-V-, 12 I. & N. Dec. 77, 79 (U.S. BIA 1993).

50. U.S. Guidelines, *supra* note 18, at 75.

51. OAS Haiti Report, *supra* note 46, at ¶ 134. *See also id.* at 135 (finding violations of parallel provisions in other human rights instruments: "[i]t is clear that in the experience of torture victims, rape and

the first determination by a human rights body that rape outside the detention context constitutes torture *and* violates specific human rights-based prohibitions against torture.[52] It was not until 1998 that an international body, the International Criminal Tribunal for Rwanda, considered rape outside the context of detention or armed conflict as torture under international law.[53] The significance of the earlier Inter-American Commission's *Report on Haiti* has been lost in many human rights and women's international law treatises.[54]

As the example of rape and sexual violence suggests, refugee law can contribute to the elaboration of human rights norms, deepen understandings, and produce substantive changes—if it is embraced as part of human rights law. There has been some symbiosis, for example between the international women's human rights movement and gender asylum activists, but the commonalties between the two areas of law have been largely lost on the human rights community. In certain cases, such as those involving female genital surgery (FGS), refugee law addresses issues that are divisive and unresolved within the international human rights movement. Refugee law can also sharpen the focus of debates within the human rights discourse by grounding them in the circumstances of a real person seeking refugee law's particular, palliative solution.

C. Female Genital Surgeries

FGS has been extensively discussed in the human rights literature and elsewhere.[55] It is a traditional practice that involves removing parts of the female genital organs and, in some cases, stitching the two sides of the vulva

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sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects.") The Inter-American Commission also found that widespread, open and routine use of rape as a weapon of terror constitutes a crime against humanity under customary international law. *Id.*

52. *See* LOUIS HENKIN ET AL., INTERNATIONAL HUMAN RIGHTS 372–84 (2000) (discussing the treatment of rape by human rights bodies and the significance of the OAS Commission's Haiti Report). *See also* Fernando Mejía Egochiago and Raquel Martin de Mejía v. Peru, Case 10.970, Inter-Am. C.H.R. 157, OEA/Ser. L/V/II.91, doc. 7 rev. (1996) (elaborating further on rape as torture in decision following OAS Haiti Report). *Cf.* Aydin v. Turkey, App. No. 23178/94, 25 Eur. H.R. Rep. 251 (1997) (Eur. Ct. H.R.) (finding that rape committed in state detention violates specific torture prohibitions in the European Human Rights Convention).

53. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Int'l Crim. Trib. for Rwanda Trial Chamber I Sept. 2, 1998), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgment/akay001.htm (finding that rape and sexual brutality, in the context of massive violence and repression of an ethnic group, constitute torture and a crime against humanity). Decisions of the International Criminal Tribunal for Yugoslavia [ICTY] have also found that sexual assaults of women constitute torture within the meaning of crimes against humanity, but largely in the context of forced detention in camps and at least formally limited to situations of armed conflict. *See generally* CHARLESWORTH & CHINKIN, *supra* note 27, at 313–37 (discussing advances as well as problems in emerging international criminal law with respect to recognition of rape as torture and limitations of the armed conflict context for women's rights).

54. *But see* HENKIN ET AL., *supra* note 52, at 373–74 (discussing the significance of the OAS Haiti Report in recognizing rape as torture).

55. *See, e.g.*, STEINER & ALSTON, *supra* note 9, at 409–25.

together, usually without anesthesia or sterilized instruments.[56] "The range of physical effects resulting from FGS varies with the form of surgery but the physical complications of the most severe forms—clitorectomy and infibulation—can be disabling and life threatening."[57] There is a complex set of justifications for the continued practice of FGS. "The stated objective is usually the maintenance of some virtue such as chastity, piety and cleanliness rooted in centuries-old social, moral, and religious traditions. It is generally the case that these virtues are thought important to maintain the girl or woman's status as a suitable, potential spouse, maintain the social status of her family and thus maintain harmony in the community at large."[58] FGS is most often practiced by older women on girl children or sometimes on young women at the time of marriage or first pregnancy. Although FGS is a ritual practiced across cultures and religions, it is particularly well-documented in the Horn of Africa and in Muslim countries.[59]

FGS has been identified as a human rights issue in various international fora,[60] but the feminist analysis of FGS as a human rights violation is complicated because FGS exists at the "'intersection' of complex cultural, gender and racial questions in human rights jurisprudence."[61] Concern about the practice, even opposition to it, is broad-based, with African women in the forefront. Yet the practice has also been defended as a ritual that binds together communities, especially communities of women.[62] Many activists and scholars—most prominently Africans and African Americans—have been critical of the focus on FGS to the exclusion of other issues that are more important to African women, the sensationalized accounts of the practice, the racist and incomplete portrayals of African women, and Western feminist involvement, which raises questions about who should set the agenda for change and what should be the methods used to eradicate the practice.[63] Claims of cultural relativism have taken on renewed force in the 1990s, and FGS has been at the center of many of these debates, as have women's human rights more generally. "[T]he cultural-relativist challenge . . . presents a particularly acute challenge in respect of women's human rights since many denials of those rights are justified in terms of social and/or religious custom, sometimes enacted into law."[64]

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56. *See A Traditional Practice that Threatens Health—Female Circumcision*, 40 WORLD HEALTH ORGANIZATION CHRONICLE 31 (1986), *excerpted in* STEINER & ALSTON, *supra* note 9, at 409–11.

57. Lewis, *supra* note 26, at 13.

58. Bernadette Passade Cisse, *International Law Sources Applicable to Female Genital Mutilation* 35 COLUM. J. TRANSNAT'L L. 429, 432 (1997).

59. *See* CRAWLEY, *supra* note 27, at 176. *See generally* NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION (1992).

60. *See* Lewis, *supra* note 26, at 7.

61. *Id.* at 4.

62. For an example of a qualified defense, see Merwine, Letter to the Editor, N.Y. TIMES, Nov. 24, 1993, A24, *excerpted in* STEINER & ALSTON, *supra* note 9, at 421–22.

63. *See* Yael Tamir, *Hands off Clitoridectomy*, 31 BOSTON REV. 21 (1996), *available at* http://bostonreview.mit.edu/BR21.3/Tamir.html.

64. HENKIN ET AL., *supra* note 52, at 391.

There is a growing (but still small) body of law recognizing FGS as the basis for a refugee claim. Unlike the international human rights fora, which have identified FGS as a human rights abuse but not necessarily a violation of core rights,[65] several refugee decisions have linked FGS to mainstream human rights violations or serious harm within the meaning of persecution. The Immigration and Refugee Board of Canada has found that the return of a woman to Somalia to face involuntary infibulation violated, inter alia, numerous provisions of the UDHR and the ICCPR, including the right to life and the prohibition against cruel, inhuman or degrading treatment.[66] The UK authorities recognize FGS as a form of torture[67] and some Australian case law describes it as a serious harm within the meaning of persecution, which includes actions "in disregard of human dignity."[68] In a 1996 U.S. decision, *Matter of Kasinga*, the U.S. Board of Immigration Appeals found that FGS constituted serious harm "consistent with our past definitions" of persecution, and rejected the immigration authorities argument that in cases of cultural practices a heightened "shock the conscience" test should be applied.[69] Recent commentators and some prominent refugee decision-makers have taken a strong anti-relativist position, while also opposing a view of human rights "that precludes flexibility in [its] conceptualization, interpretation and application within and between cultures."[70] Bernadette Passade Cisse suggests that reasoned analysis based on human rights principles can and should substitute for sensationalizing reports and culturally biased judgments.[71]

Refugee law offers a different perspective on conflicts between individual and group rights, or individual autonomy and cultural enfranchisement, which are raised in cases such as FGS. Whatever cultural consensus exists, refugee law protects an individual who wishes to dissociate herself from that consensus, asserting that her choice is in line with international standards. For example, in the U.S. *Kasinga* case, a nineteen-year-old woman claimed that she faced an immediate threat of being forced to undergo FGS (infibulation), shortly before being married against her wishes to a forty-five-year-old man.[72] Commentators have argued that a claim against return to face forced FGS goes to the philosophical core of human rights, the protec-

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65. CHARLESWORTH & CHINKIN, *supra* note 27, at 225–29.

66. *See* M95-13161 (1997) (Canadian Immigration and Refugee Board), *reproduced in* GENDER DECISIONS, *supra* note 18, at 419, 425–26.

67. *See* U.K. Appellate Gender Guidelines, *supra* note 28, at 14, n.31.

68. *See, e.g.*, RRT V97/061456 (1997) (Australian Refugee Review Tribunal), *available at* http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/rrt/V9706156.html.

69. *In re* Kasinga, 21 I. & N. Dec. 357, 365 (U.S. BIA 1996).

70. CRAWLEY *supra* note 27, at 184. *See also* Haines, *supra* note 31, at 29 ("Breaches of human rights cannot be ignored, discounted or explained away on the basis of culture, tradition or religion.") Refugee Appeal No. 71427/99, [2000] N.Z.A.R 545, 565 (para. 52) (New Zealand Refugee Status Appeals Authority).

71. Cisse, *supra* note 58, at 451.

72. *Kasinga* at 358.

tion of individual autonomy and corporal non-interference:[73] "[w]hen an individual challenges societal norms by opposing FGM and his/her basic rights, as articulated in international instruments, are not or cannot be controlled by the de jure public authorities, international human rights principles are implicated."[74]

Since refugee law does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular practices, it avoids controversies that have been most sensitive and divisive in debates concerning FGS and cultural relativism in general. These debates within the human rights community have been, at times, almost immobilizing, reflecting an unresolved theoretical standoff. In avoiding such paralysis, refugee law manages to address an important part of the human rights question: whether an international human right is implicated. Indeed, because of the cultural relativist conundrum, the continued failure to take women's rights seriously and the complexity of the state responsibility question, gender asylum law is one of the few areas where the question of FGS as a human rights violation is confronted. As Hope Lewis notes, there is value to such direct confrontation of controversial human rights questions: "The engagement in active conflict on these issues at least removes FGS from the realm of a theoretical debate over whether westerners should ignore an exotic cultural practice and forces us to confront the question of how human rights law and policy could impact the lives of women on a day to day basis."[75] Lewis suggests that African American women should be concerned if refugee law ignores issues like FGS that affect African women. They should also be actively engaged in determining the content of gender asylum guidelines and policies "in fulfillment of international human rights obligations."[76]

Refugee law, applying a human rights paradigm and building on the work of the international human rights community, has identified key forms of violence against women—rape/sexual violence and FGS—as core violations. Making the relationship between refugee law and human rights law explicit creates opportunities for advances within both fields. In the case of FGS, the human rights issues may be more clearly identified in refugee law than under the international human rights regime, whose purposes are broader and directed at fundamental change. In other cases, however, refugee law and human rights law may need to struggle together to interpret critical issues common to both regimes, such as the scope of state responsibility.

D. State Responsibility and Family Violence

The discussion below only briefly touches upon the complicated question of state responsibility in the case of non-state actors, which is a central con-

73. CRAWLEY, *supra* note 27, at 184.
74. Cisse, *supra* note 58, at 434–35.
75. Lewis, *supra* note 26, at 25.
76. *Id.* at 23.

cern for women in human rights. In gender asylum law, the question is addressed in some of the most significant and most recent case law.

Much of refugee law—and especially gender asylum law—probes difficult problems of state responsibility. As a matter of doctrine, both human rights law and refugee law recognize state responsibility for human rights violations by non-state actors (although there is a dissenting, minority position in refugee law).[77] Developments in human rights law have supported longstanding trends in refugee law, which grapples with fundamental questions of whether the failure of state protection arm of "persecution" requires direct or indirect—or any—state complicity, and how to locate responsibility in collapsing states or at times when there is no functioning centralized authority. Although the refugee regime is not concerned with state accountability per se, both refugee and human rights law struggle with similar questions. For example, what should be the standard for assessing the adequacy of state protection (the "due diligence" standard in human rights law)? Should the state be required to provide some actual reduction in the level of risk (a question that must be addressed in refugee determinations where an individual makes a claim for protection, based on concrete, specific circumstances)? Or should formal or reasonable—however ineffective—actions of the state suffice?[78]

As noted, one of the most visible (and prolific) emerging bodies of refugee case law concerns family violence, which remains at the margins of human rights law although it is the most pervasive form of violence against women.[79] In cases of violence by husbands and male domestic partners, the

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77. *See* ANKER, *supra* note 39, at 191–99; Jennifer Moore, *From Nation State to Failed State: International Protection From Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81 (1999) (both discussing non-state actor doctrine in refugee and human rights law). *See also* Walter Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEO. L.J. 391 (2001) (describing the evolutions of the non-state actor doctrine, especially in Switzerland).

78. *Compare* Refugee Appeal No. 71427/99 [2000] N.Z.A.R 545, 568 (para. 62) (New Zealand Refugee Status Appeals Authority) (holding that the standard for assessing state protection requires the risk of serious harm to be below that of a "well-founded fear"), *with* Horvath v. Secretary of State for the Home Department [2001] 1 AC 489, [2000] 3 WLR 379 (U.K.) (suggesting that the refugee standard may be met when a state has a formal system of protection in place, irrespective of the applicant's well-founded fear). There is some indication that the U.K. authorities may be moving away from a stricter reading of *Horvath*. *See* Secretary of State for the Home Department v. Klodiana Kacaj [2001] INLR 354 (U.K.) (suggesting that the existence of state protection mechanisms, although presumptively adequate, may not be sufficient if the refugee claimant can show that they are practically ineffective and have not eliminated the reality of risk).

79. *See Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Comm'n Hum. Rts., U.N. GAOR, 52d Sess., Provisional Agenda Item 9(a) ¶¶ 36, 38, 39, U.N. Doc. E/CN.4/1996/53 (1996) (describing family violence as a human rights abuse). *See also* CHARLESWORTH & CHINKIN, *supra* note 27, at 12; Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994) (both discussing the pervasiveness of family violence as a human rights abuse against women and the failure of human rights law to address it seriously). *See also* Pamela Goldberg, *Any Place but Home: Asylum in the United States for Women Fleeing Domestic Violence*, 26 CORNELL INT'L L.J. 565 (1993) (discussing family violence basis for asylum claim); Lauren Gilbert, *Family Violence and the Immigration and Nationality Act*, 98–103 Immigr. Briefings 1, at 2 (1998) (discussing asylum and other remedies available to survivors of family violence under U.S. law). For examples of the case law on this issue, see GENDER DECISIONS, *supra* note 18. *See also* MARY CROCK,

question of state protection is especially complex due to different levels of interweaving responsibility and enabling of the "private" harm by the State. This complexity is paradigmatic of gender-specific violence, committed by private actors.[80] "For most women, indirect subjection to the state will almost always be mediated through direct subjection to individual men or groups of men."[81]

In *Shah and Islam*, the House of Lords considered how broader patterns of discriminatory treatment structurally enabled the specific violence the applicants feared from their husbands as well as the husbands' threatened use of anti-adultery laws.[82] In Refugee Appeal No. 71427/99, the New Zealand authorities analyzed in detail state patterns that condone family violence and discriminate against women, even where the state constitution does not formally relegate women to second-class status.[83] It evaluated the "cumulative effect" of various laws including legal provisions regarding marriage, divorce, custody, and provisions of the criminal code.[84] In *Minister for Immigration and Multicultural Affairs v. Khawar*, the Federal Court of Australia found evidence of state acquiescence in discriminatory enforcement of the law—the deliberate failures of the police to respond to a woman's complaints of her husband's violence.[85] These are some of the issues of structural discrimination that feminist critics of international law have identified as essential to an analysis of state responsibility that includes the experiences of women.[86]

The Convention against Torture (CAT or Torture Convention), which as a human rights instrument extensively addresses prevention of torture, also

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IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 148–51 (1998) (describing Australian asylum case law on family violence).

80. Macklin, *supra* note 17, at 25.

81. Shelley Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241, 249 (1992).

82. Regina v. Immigration Appeal Tribunal, *ex parte* Shah, [1999] 2 All E.R. 545 (H.L.) (U.K.).

83. Refugee Appeal No. 71427/99, [2000] N.Z.A.R 545, 570 (para. 74) (New Zealand Refugee Status Appeals Authority).

84. *Id.* at 571 (para. 78).

85. Minister for Immigration and Multicultural Affairs v. Khawar [2000] F.C.A. 1130, ¶¶ 191–93 (Austl.), *available at* http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/1130.html. This case is now pending before the High Court of Australia. *See* High Minister for Immigration and Multicultural Affairs v. Khawar, [2001] H.C.A. S232/2000 (Austl.). The transcript is available at http://www.austlii.edu.au/au/other/hca/transcripts/2000/S232/1.html.

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> [Violence against women] is caused by "the structural relationships of power, domination and privilege between men and women in society. Violence against women plays a central role in maintaining those political relations at home, at work and in all public spheres . . . ." The maintenance of a legal and social system in which violence or discrimination against women are endemic and where such actions are trivialized or discounted should engage state responsibility to exercise due diligence to ensure the protection of women.

See CHARLESWORTH & CHINKIN, *supra* note 27, at 235 (quoting CHARLOTTE BUNCH, PASSIONATE POLITICS ESSAYS 1968–1986: FEMINIST THEORY IN ACTION 491 (1987) and citing Rebecca Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUMAN RTS. J. 125, 126 (1994)).

contains a non-return provision.[87] Like the Refugee Convention, it prohibits States Parties from returning a foreign national to a country in which he would face torture.[88] The non-return obligation in the Refugee and Torture Conventions is an obvious point of contact between human rights and refugee law. Claims for protection from return to torture often go hand-in-hand with—or follow the denial of—claims for refugee protection and status.[89] Torture is also an extreme example of serious harm within the meaning of persecution. For both these reasons, the human rights corpus defining torture is incorporated into refugee law.

The CAT includes a requirement of official action, consent or acquiescence.[90] The Committee against Torture, which monitors compliance with the Torture Convention, as well as some regional bodies, has begun exploring the boundaries of this state action requirement.[91] In some limited instances, refugee claimants fleeing family violence have also been testing those boundaries. As noted, the U.S. Board of Immigration Appeals in *Kuna* granted a request for protection from return under the CAT to a woman fleeing years of violence by her husband. Her husband, who had governmental ties, had previously committed crimes with impunity. As a result, the Board found state acquiescence even where the wife did not seek state protection because she reasonably believed that it would be futile.[92] Although the relief granted initially was limited to her CAT claim,[93] it is significant that the Board found that the international legal definition of torture can, under some circumstances, include violence within the family. The failure of human rights law to clearly designate violence against women as torture (which is both a "paradigmatic" right and a norm of jus cogens), has been central to the feminist critique.[94]

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87. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, art. 3 [hereinafter Torture Convention or CAT].

88. *See* ANKER, *supra* note 39, at 469–70 (describing key differences between the two non-return obligations). Some regional human rights instruments contain similar non-return prohibitions. *Id.* at 473–76, 477–78.

89. *See, e.g.*, 8 C.F.R. §§ 208.3 (b), 208.16, 208.17 (2001) (providing under U.S. law that an application for asylum filed with the immigration court also will be considered a request for protection under the CAT). *See generally* ANKER *supra* note 39, at 465–522 (discussing, *inter alia*, some case law under the CAT and the European Human Rights Convention involving rejected asylum claimants seeking non-return protection under the CAT).

90. CAT, *supra* note 87, at art. 1 (requiring that the relevant acts be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

91. *See* ANKER *supra* note 39, at 500–07.

92. *See In re* Kuna, A76491421 (unpublished decision) (U.S. BIA Apr. 25, 2000) (on file with author)

93. The decision of the Board denying her claim to refugee protection was appealed to the U.S. Federal Court of the Third Circuit, but the INS has joined with counsel in requesting remand and reconsideration by the Board. *See* Kuna v. Ashcroft, No. 01-3120 (3rd Cir. Feb. 5, 2002), *granting* joint motion filed by both parties to remand proceedings to the Board of Immigration Appeals.

94. *See, e.g.*, CHARLESWORTH & CHINKIN, *supra* note 27, at 218–17, 246. *See also id.* at 234 (arguing that the CAT's state action requirement results in the exclusion of most cases of violence against women).

II. CONCLUSION

This Article only suggests some of the international women's rights issues that refugee law is now addressing. There is a growing body of refugee case law considering other forms of violence against women—including forced marriage, forced sterilization, forced abortion, forced prostitution, bride burning, and honor killings—and in gender, as well as other contexts, discriminatory denials of education, employment and health care.[95] The refugee status inquiry is deeply and necessarily contextualized. The case law, UNHCR interpretations, and governmental guidelines all emphasize the intensely factual nature of any refugee determination. In the discrimination context, for example, the violations often must be cumulative and of an extreme nature.[96] In all cases, the violation must be sustained or systemic. To require a state to provide surrogate protection, the normal relationship between the state of origin and the citizen or resident must be ruptured. The refugee is fundamentally marginalized, unable to enjoy basic rights or vindicate them through change or restructuring from within her society.[97]

The next—or current—stage in refugee law may increasingly implicate economic and social rights.[98] As refugee law continues to mature, it may raise new state responsibility questions and interact more closely with other human rights instruments, including not only the Convention against Torture, but other conventions as well.[99] Trafficking cases and refugee cases under the CAT, as well as refugee claims based on the right to health, hold some promise of shifting the focus away from practices in the sending countries of the South and shining the spotlight on receiving countries of the North.[100]

With respect to some human rights issues, refugee law has been innovative. Of course, refugee law will only continue to contribute to the elaboration of human rights norms to the extent that it develops within a human

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95. For examples of this case law, see ANKER, *supra* note 39, at 252–66, 365–75, 388–93; CRAWLEY, *supra* note 27, at 107–29, 147–60; GENDER DECISIONS, *supra* note 18, at 155–57, 169–70; SYMES, REFUGEE CASELAW, *supra* note 16, at 114–16.

96. *See* SYMES, REFUGEE CASELAW, *supra* note 16, at 114–16; UNHCR HANDBOOK, *supra* note 17, at ¶¶ 54–55.

97. *See* HATHAWAY *supra* note 1, at 135. *See generally* Andrew Shacknove, *Who is a Refugee*, 95 ETHICS 274 (1985).

98. *See, e.g.*, Chen Shi Hai v. Minister for Immigration and Multicultural Affairs [2000] HCA 19, para. 29 (Austl.) (recognizing that denial of access to food, shelter, medical treatment as well as education for children "involve such a significant departure from the standards of the civilized world as to constitute persecution"), *available at* http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html.

99. *See, e.g.*, Kälin, supra note 15, at 11–12.

100. In asylum claims based on trafficking, some of the harm the claimant fears may be from traffickers located in the country of refuge. Similarly, the country that returns a person to face substantial health risks may be the more significant agent of harm, as the country of origin cannot provide the needed care. For example, the European Court of Human Rights back to his home country and depriving him of the treatment he was receiving constituted inhuman or degrading treatment or punishment under the European Human Rights Convention. *See* D. v. United Kingdom, 24 Eur. H.R. Rep. 423, ¶ 49 (1997) (Eur. Ct. H.R.).

rights framework. Explicit and structured application of a human rights paradigm in refugee law is new and limited. Indeed, all the developments described in this Article are nascent, contingent, and fragile. Commentators have worried that harmonization in Europe may narrow the interpretation of refugee doctrine to that of the most restrictive member state and even result in the shaping of refugee law by intra-state bodies accountable to human rights institutions.[101] The solidification of non-entrée regimes[102] has been contemporaneous with progressive evolutions in doctrine. There are many limitations to refugee law, and its embeddedness in domestic immigration law and structures has been one of the most salient. Refugee law is especially vulnerable to political backlash. At times, refugee law and policy has been highly politicized, especially during certain ideologically charged eras such as the Cold War.[103] We may be entering another such era, and it will be interesting to see how much of a buffer the new refugee law, which came of age during the interim years, will provide.

Civil society has been an important force in the refugee field. The case of Haitian women in the United States, discussed above, is one example where broad political activism has contributed to the advancement of more inclusive and internationalized interpretations of the law. The Canadian gender guidelines were the direct product of the work of NGOs and women in the government.[104] The U.S. Guidelines, inspired by the Canadian model, were the product of a continuing political and legal movement for refugee rights that began (at least) twenty years ago. Those efforts resulted in protection and status for tens of thousands both within and outside the formal terms of the Refugee Convention.[105] The Refugee Women's Legal Group, an NGO founded in part by refugee women living in the United Kingdom, wrote

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101. *See* CRAWLEY, *supra* note 27, at 15.

102. *See* James C. Hathaway, *The Emerging Politics of Non-entrée*, 91 REFUGEES 40–41 (UNHCR) (1992).

103. *See* GIL LOESCHER & JOHN A. SCANLON, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986); NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, THE GUARDED GATE: THE REALITY OF AMERICAN REFUGEE POLICY (1987); Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243 (1984) (all describing problems of politicization in U.S. refugee policy, including during the Cold War). *See also* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990) (arguing that the interests of Western states dominated in shaping the Refugee Convention).

104. *See* Lisa Gilad, *The Problem of Gender-Related Persecution*, *in* ENGENDERING FORCED MIGRATION: THEORY AND PRACTICE 334, 335 (Doreen Indra ed., 1999).

105. In the United States, for example, the INS and the Executive Office of Immigration Review (including immigration judges) granted over 16,000 asylum cases in FY 2000. Refugee protection has generated various subsidiary remedies. *See* Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 A.J.I.L. 279 (2000). U.S. law has various subsidiary protection laws, including laws for groups that were disproportionately excluded under past asylum policies. *See generally* ANKER, LAW ON ASYLUM, *supra* note 39, at 572–74 (describing subsidiary protection laws). Under program for Central American refugees ("NACARA"), over 36,000 persons have adjusted their status to permanent residents in FY 2000. *See* INS statistics on asylum, available at http://www.ins.usdoj.gov/graphics/aboutins/statistics/msmay01/ASYLUM.HTM, and http://www.ins.usdoj.gov/graphics/aboutins/statistics/ IMM2000AR.pdf. Under another one of these programs for Haitian refugees, estimates are that between 15,000 and 40,000 will benefit. 75 INTERPRETER REL. 2 (1998).

gender guidelines that became the basis for those of the UK Immigration Appeals Authority.[106] Critical to all of the political/legal refugee rights movements has been the human rights conceptualization of refugee law, including the call for States Parties to meet their international obligations under the Refugee Convention.

The human rights and refugee rights movements are intrinsically connected. Increasingly, contact between the two regimes—and especially between human rights and refugee practitioners—is becoming unavoidable. Refugee lawyers and adjudicators are making extensive use of human rights reports. Human rights monitors are being called upon to give expert testimony and affidavits in refugee cases.[107] Human rights NGOs are focusing more on states' compliance with their obligations under the Refugee Convention, such as the treatment and protection of refugees, especially in countries of the North.[108]

Nevertheless, tensions continue to exist between the refugee and human rights movements. The Western media have, at times, used refugee cases to sensationalize practices such as FGS. In family violence cases, caricatured stories have been told of women at war with their cultures.[109] Refugee lawyers can advocate for their clients with awareness of the larger human rights context, and try to guard against cultural judgments. Refugee and human rights activists can work together on issues such as trafficking, which implicate polices in the North as well as in the South.

The problem of cultural relativism may lie at the heart of these conflicts between the two regimes. While refugee law may be formally non-intrusive and non-judgmental, it does make a determination of a state's willingness and ability to protect a particular citizen or resident, and in so doing lays claim to an *international* human rights standard. When the legalized refugee regime consists almost exclusively of states in the North determining refugee claims from the South, these purportedly international human rights-based judgments seem one-sided, patronizing, and hypocritical. This dis-

106. *See* U.K. Appellate Gender Guidelines, *supra* note 28 (acknowledging on the back cover that the appellate guidelines are based on the guidelines for first instance decision-makers written by the Refugee Women's Group).

107. Academics and medical professionals, among others, are also providing such testimony and becoming involved in the complex ethical issues surrounding advocacy and human rights. *See, e.g.*, Sidney Waldron, *Anthropologists As 'Expert Witnesses' in* Indra (ed.), *supra* note 104, at 343 (describing the tensions in providing expert testimony for a Somali refugee claimant).

108. *See, e.g.*, Press Release, Human Rights Watch, Refugee Summit: States Must Reaffirm Commitments (Dec. 11, 2001), *available at* http://www.hrw.org/press/2001/12/refcon1211.htm; HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES (1998), *available at* http://www.hrw.org/reports98/us-immig. *See also* AMNESTY INTERNATIONAL, LOST IN THE LABYRINTH: DETENTION OF ASYLUM SEEKERS (1999), *available at* http://www.rightsforall-usa.org; LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES (2000), *available at* http://www.lchr.org/refugee/is_this_america_toc.htm.

109. *See, e.g.*, Adam Pertman, *'I Want to Be Treated Like A Human': Rejecting Subservience and Abuse—and Fearing the Price—A Turkish Woman Files What Could Be a Precedent-Setting Asylum Claim*, BOSTON GLOBE, Apr. 15, 2001, at D1 (stating, based in part on her lawyer's comments, that the claim is unique because it is against "the very culture" of her country).

crepancy is especially pronounced in gender persecution cases since violence against women (including intra-family violence) is prevalent throughout the world. As Audrey Macklin has commented, Western countries may be unwilling to believe that their own mechanisms of protection are inadequate, as "the phenomenon of gender persecution challenges the self-understanding of so-called 'non-refugee producers.'"[110]

In a similar vein, Peter Rosenblum has argued that refugee law's human rights claim may send a destructive message to women's rights communities in the South by making judgments that lack nuance and even stereotype under cover of an international standard.[111] But in this respect, refugee law is not unique. Like all legal regimes, it makes a particularized assessment that tends towards bounded categorizations and incomplete portrayals of individuals' and societies' circumstances. While refugee law uses limited, legal categories, its factual scope is necessarily broad and complex—more so perhaps than many other areas of the law. "'[Refugee law's] adjudication is not a conventional lawyer's . . . exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.'"[112] Refugee law does embrace some of this complexity; it recognizes, for example, that identities may be socially constructed and multifaceted. The refugee definition does not fix a refugee claimant's individual or group identity. Rather, it emphasizes the persecutor's *perception* of the refugee claimant's social status or opinion.[113] Furthermore, it does not force a choice of one particular ground of persecution, as claims can be based on any combination of the five grounds.[114]

Refugee law reflects the human rights community's own analyses of human rights conditions in various countries. It also reflects the human rights community's own tensions and dilemmas, as the FGS example illustrates. Lewis, for one, has commented, "[t]he social, economic, and political conflicts that underlie the conflict over Western feminist involvement on FGS are as deeply rooted as the cultural basis of the practice itself. The discussion must be restructured to expose the conflicts in order for progress to be made on this issue."[115] Refugee law offers a particular structuring that confronts the human rights questions, but less contentiously than under the human rights regime's more ambitious framework. Refugee law does not

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110. Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17(2) HUM. RTS. Q. 213, 264 (1995).

111. Discussions with Peter Rosenblum during his seminar on Human Rights Advocacy at Harvard Law School (Fall 2001).

112. Regina v. Immigration Appeal Tribunal, ex parte Shah, [1999] 2 All E.R. 545, 561 (H.L.) (U.K.) (Lord Hoffman quoting Judge Sedley in an earlier decision, Ex Parte Shah, [1997] Imm AR 145)

113. *See generally* HATHAWAY, *supra* note 1, 135–89.

114. UNHCR HANDBOOK, *supra* note 17, at paras. 66, 67.

115. Lewis, *supra* note 26, at 21.

seek to reform states and does not address root causes. Its role is palliative; it represents the interests of the individual in dissociating herself from her community and her State. This is not to deny that the broader goals of the human rights community are important or that refugee law may at times make an indirect contribution to them.[116] Refugee law may also complicate the work of human rights lawyers and activists, especially when its purposes are misunderstood. Moving forward will require greater clarity about the differences, as well as the similarities, between the two regimes.

116. It could be argued, for example, that the U.S. government's support of the 1993 return of President Aristide to Haiti was motivated in part by concerns regarding refugee arrivals and related publicity and litigation. For background on the treatment of Haitian refugees and this litigation, see Harold H. Koh, *Reflections on Refoulement and Haitian Centers Council,* 36 HARV. INT'L. L.J. 1 (1994).