GENDER AND THE EVOLVING REFUGEE REGIME

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In promulgating the 1990 Policy on Refugee Women and the 1991 Guidelines on the Protection of Refugee Women, the United Nations High Commissioner for Refugees took a universalistic position that gender-based persecution is an abuse of fundamental human rights. The United Nations High Commissioner for Refugees argued that when Governments are unwilling or unable to protect women from such persecution, the international community should provide asylum. This article argues that the position taken by the United Nations High Commissioner for Refugees in the early 1990s was fully consistent with the ways in which the refugee regime had evolved during the 20th century. Moreover, it has paved the way for similar approaches to be taken to new forms of displacement that necessitate protection responses. In this respect, it argues that the absence of meaningful protection by the State should be a core criterion in determining ways in which the refugee regime (meaning both laws and institutions responsible for refugees) can address the likelihood of new forms of displacement.

1. Introduction

Until the mid-1980s, little research or analysis of forced migration trends focused on gender issues. With the increasing recognition of the large number and proportion of female refugees and displaced persons, and the changing role of women more generally, significantly more attention is paid today to these issues by both researchers and policy-makers. The 1990 United Nations High Commissioner for Refugees (UNHCR) Policy on Refugee Women represented an important breakthrough in this process, as UNHCR committed to mainstreaming the needs and contributions of refugee women into its policies and operations.

An issue only briefly referenced in the 1990 Policy was the legal protection of refugee women, especially within the context of refugee status determinations. The Policy set out broadly “to ensure that the specific protection needs and the legal rights of refugee women are understood and that adequate measures are taken to respond”.1 It was not until the promulgation of the 1991 Guidelines on

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the Protection of Refugee Women\textsuperscript{2} that UNHCR set out more specific guidance on the handling of gender-based claims to refugee status. In setting out the problem faced by refugee women, the Guidelines noted:

The 1951 Convention Relating to the Status of Refugees defines a refugee as a person who is outside of his or her country of origin and is unable or unwilling to return owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, Article 1(A)(2). The claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society’s laws or customs regarding the role of women presents difficulties under this definition.\textsuperscript{3}

Gender is not included in the international definition of a refugee. Yet, the Guidelines recognized that women asylum-seekers may flee gender-based persecution such as rape, widow burnings, honour killings, domestic violence, forced marriages, and female genital cutting.\textsuperscript{4}

More specifically, the Guidelines urged adjudicators to:

– Promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status. Others may be seen as having made a religious or political statement in transgressing the social norms of their society;

– Promote acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish;

– Promote recognition that there may be a basis for granting refugee status where a government cannot or will not protect women who are subject to abuse for transgressing social standards. The government need not itself have been the instigator of the abuse.\textsuperscript{5}

Promulgation of the Policy and Guidelines raised questions at the time as to the extent to which international actors should respect or challenge traditional notions of female roles and relationships in the recognition of refugees as well as efforts to protect the rights of refugee and displaced women. While universality of human rights, particularly in relationship to women’s rights, need not necessarily conflict with respect for traditional values, the challenge is to change harmful practices that render women vulnerable to violence and repression when these are rooted in tradition. These practices may be the basis by which women become refugees or displaced persons, and they may disadvantage

\textsuperscript{2} In the interest of full disclosure, I was the principal author of the 1991 Guidelines.


\textsuperscript{4} Female genital cutting refers to the removal of part or all of a girl’s external genitalia, and, in a more radical version (infibulation), the stitching up of the vaginal opening.

\textsuperscript{5} UNHCR, Guidelines on the Protection of Refugee Women, para. 71.
women seriously once displaced. While the ideal is to arrive at an appropriate balance between protection of the individual rights of women and cultural and traditional norms regarding the role of women, reaching such a balance is often difficult, particularly in the context of repression, conflict, instability, and resulting displacement. Finding an appropriate balance between universal rights and cultural relativism is made more difficult because women have generally not had the power within their traditional societies to affect decisions regarding their own roles and responsibilities. In arguing for a weak form of relativism in his classic article, Jack Donnelly nevertheless noted, “appeals to traditional practices and values all too often are a mere cloak for self-interest or arbitrary rule”.

In recommending extension of protection to women persecuted because of their gender, UNHCR determined to err on the side of universal rights. As early as 1990, the Executive Committee of the High Commissioner’s Programme (Executive Committee) stressed:

[T]hat all action taken on behalf of women who are refugees must be guided by the relevant international instruments relating to the status of refugees as well as other applicable human rights instruments, in particular, for States parties thereto, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW].

In referencing CEDAW, the Executive Committee, composed of Governments (not all of whom signed CEDAW) recognized that UNHCR would be bound by universal human rights principles in its treatment of refugee women. UNHCR’s 1991 Guidelines reiterated that CEDAW and the other human rights instruments “provide a framework of international human rights standards for providing protection and assistance activities related to refugee women”.

This article argues that the position taken by UNHCR in the early 1990s was fully consistent with the ways in which the refugee regime had evolved during the 20th century and that understanding this process is useful as the
refugee regime (meaning both laws and institutions responsible for refugees) addresses the likelihood of new forms of displacement. The next section provides a brief survey of the development of the refugee regime from the end of the Second World War until the end of the Cold War. The following section describes the ways in which UNHCR and Governments have addressed gender-based persecution cases since the promulgation of the Guidelines. The final section provides a framework for analysing the ways in which UNHCR and the broader refugee regime should address new challenges, building on the legacy of its approach to gender-based claims.

2. Evolution of the refugee regime

The refugee regime is a 20th century invention, initially devised as a way to address the mass displacement caused by the First World War, the Bolshevik Revolution, and the collapse of the Ottoman and Hapsburg Empires. While having limited success in protecting those who were displaced by these events, it failed miserably in protecting the victims of Nazi persecution. With the allied victory in the Second World War, the modern regime was shaped to find solutions for those persecuted as well as those displaced by the conflict. As this section elaborates, the refugee regime was not static in dealing with displacement. It took on new roles in dealing with displacements caused by the Cold War, decolonisation, civil conflicts, and surrogate super-power conflicts. This flexibility enabled the regime to respond to new forms of persecution – specifically, in this context, gender-based persecution – as social mores shifted and such harm became increasingly unacceptable.

2.1. League of Nations

In 1921, the League of Nations established the first High Commission for Refugees, charged with assisting and protecting Russian, and later, other refugees. Headed by Fridjof Nansen, the Norwegian explorer and statesman, the High Commissioner’s mandate was to provide material assistance and legal and political protection. Nansen was asked in 1920 to direct the repatriation of prisoners of war, and then in 1921, to direct relief efforts to respond to the growing famine in Russia. Then, in 1922, he arranged an exchange of about 1.25 million Greeks living in Asia Minor and about 500,000 Turks living in Greece. In 1925, Nansen’s Office succeeded in constructing villages to house upwards of 40,000 Armenians in Syria and Lebanon and the resettlement of another 10,000 in Erivan.

After Nansen’s death in 1930, the Office of the High Commissioner ceased to exist and, instead, the Nansen International Office for Refugees, an autonomous body working under the authority of the League of Nations, was established. The office never had sufficient resources to function effectively, relying primarily on fees paid for Nansen passports, a substitute travel document issued to refugees who were unable to obtain documentation from their own
Governments, and private contributions. Nevertheless, the League Office provided material, legal, and financial help to about 800,000 refugees.

During the 1930s, with fascism and Nazism producing massive new refugee flows, the League established a High Commissioner for Refugees from Germany, which also gained a mandate to assist and protect refugees from Austria and the Sudetenland. During the course of the 1930s, it became evident that few countries were willing to provide refuge to the German refugees, particularly those facing growing persecution because they were Jewish. In July 1938, an international conference attended by representatives from 32 nations convened in Evian to discuss the problem of Jewish refugees. The participants established an Intergovernmental Committee on Refugees, to be based in London, to facilitate the emigration and resettlement of German and Austrian refugees, and later, refugees from other countries. The Evian Conference did not, however, lead to any real pledges for the resettlement of the Jewish refugees, with many countries expressing outright bias against admission of the refugees.

At the end of 1938, the Nansen Office and the High Commissioner for Refugees from Germany merged and moved their offices to London. The new organization was known as the Office of the High Commissioner for All Refugees under League of Nations Protection. The new organization had little success in assisting and protecting the vast majority of Jews and others facing Nazi persecution, but it continued to provide material assistance to those refugees it could reach throughout the Second World War.

The tragic ramifications of the failure of the international community to come to the aid of refugees became clear with the liberation of the concentration camps. The camp survivors joined millions of people uprooted by the conflict itself. During the 1940s, a number of distinct organizations were established to address the problem of refugees and displaced persons in Europe. The United Nations Relief and Rehabilitation Administration was founded in 1943 to give aid to areas liberated from the Axis powers. The International Refugee Organization took over in 1946. Its main mission was to care for, repatriate, or resettle those made homeless by the war. Also, in 1948, the United Nations Relief and Work Administration for Palestinian Refugees was established to provide assistance to Palestinians displaced from Israel. There was another system for dealing with refugees in Hong Kong.

One of the most important, but ambiguous developments in the refugee regime was the adoption of the 1948 Universal Declaration of Human Rights. Article 13 establishes the individual right to move and reside freely within one’s own country. That article also declares the right to leave any country, including one’s own, and to return to one’s own country. Having established a right to leave one’s own country, the Drafting Committee of the Declaration then turned to the problem that to be able to leave one’s own country, an individual must enter another one. Member States differed considerably on how to resolve this issue. 12

Some supported a right to asylum, but others, including the United States (US) delegation led by Eleanor Roosevelt, preferred to limit State obligations with regard to refugees. Article 14 affirms only a “right to seek and to enjoy in other countries asylum from persecution”. In a very close vote, States rejected any obligation to grant asylum.

2.2. UNHCR and the 1951 Refugee Convention

Within just a few years, States addressed this issue again. The 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol emerged in the early days of the Cold War, largely to resolve the situation of the millions of refugees who remained displaced by the Second World War and fascist/Nazi persecution. Defining refugees as persons who were unable or unwilling to avail themselves of the protection of their home countries because of a “well-founded fear of persecution based on their race, religion, nationality, political opinion or membership in a particular social group”, the Refugee Convention included geographic (Europe) and time limitations (persons displaced before 1951) that were lifted in the 1967 Protocol. Since 1967, the Refugee Convention has been a universal instrument, applying to refugees worldwide.

At its core, the Refugee Convention substitutes the protection of the international community (in the form of a host Government with UNHCR’s support) for that of an unable or unwilling sovereign. In effect, the agency was to provide alternative protection for those who had been persecuted by their own State, or who could not claim the protection of their State because of a well-founded fear of future persecution. This reasoning is based on the understanding that States produce refugees because they are unwilling or unable to protect their citizens from persecution. As Charles Keely explains, “[a] state is not behaving as a state when people flee or are forced out because of racial, ethnic, religious or political reasons”. He argues that the international refugee regime is “not based primarily on humanitarian feelings”. Rather, the refugee regime is designed to protect the “international system of states that is threatened when states fail to fulfill their proper roles”.

The Refugee Convention sets out the principal obligation of States – to refrain from forcibly returning (refouler) refugees to countries in which they would face persecution. States do not have the obligation to provide asylum or admit refugees for permanent settlement, and they may relocate refugees in

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15 Ibid.
16 Ibid.
17 Refugee Convention, Art. 33(1).
safe third countries that are willing to accept them. The Refugee Convention has been interpreted to require States to undertake status determinations for asylum applicants at their frontiers or inside their territories in order to determine if they have valid claims to refugee protection. While the only obligation towards refugees is non-refoulement, in practice this has often meant admission and asylum in the host country.

The Refugee Convention drafters recognized that among refugee populations would be found individuals whose actions made them undeserving of international protection. The so-called “exclusion” clauses of the Refugee Convention set forth two major kinds of such individuals – human rights violators and serious criminals. Thus, those who have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime are excluded from international protection.18

The Refugee Convention sets out the rights of refugees who have been admitted into the territory of another country.19 Fundamental human rights such as freedom of religion and access to courts are guaranteed to be at least those accorded to the citizens of the State hosting the refugee. Refugees lawfully residing in a host country are guaranteed public relief in this way as well. Rights regarding employment, property, elementary public education, and housing are accorded to refugees in a manner no less favourable than those accorded to citizens of other countries. In addition, the 1951 Convention cannot be applied in a discriminatory way regarding race, religion, and country of origin.

UNHCR was charged from the beginning to find solutions for refugees, generally in the form of voluntary repatriation when conditions permitted, integration into a country of asylum, or resettlement to a third country. These solutions reflected the aim of the refugee regime to restore the refugee to a sovereign authority that would provide protection. The ideal situation would be one in which conditions change and the refugee is willing and able to return. Otherwise, obtaining citizenship in another country would enable the refugee to enjoy State protection. Because those solutions were often not forthcoming, however, UNHCR’s day-to-day activity was generally to provide assistance to those who were unable to return, integrate, or resettle.

The first big expansion of UNHCR’s role in dealing with refugee issues came in 1956 with the Hungarian Revolution and the flight of Hungarian refugees into Western Europe. Although its mandate limited UNHCR’s responsibility to those displaced prior to 1951, the UNHCR offered its “good offices” to find solutions for the Hungarian refugees, generally via resettlement to the traditional immigration countries – the US, Canada, and Australia.

In the 1960s, a further expansion occurred as UNHCR was asked to assist and protect refugees in Africa and Asia who were displaced by various wars of liberation. As the numbers of refugees grew and solutions were elusive, more and more of the resources of a growing regime were spent on care and maintenance.

18 Ibid., Art. 1F.
19 The rights are contained in Arts. 3–34 of the Refugee Convention.
of large numbers of refugees who were forced out of their homes because of conflict, and were living in refugee camps with international assistance.

In recognition of the nature of the forced movements occurring regularly in Africa, the Organization of African Unity (OAU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) in 1969. While acknowledging the Refugee Convention as the basic and universal instrument regarding the protection of refugees, the OAU Convention broadened the definition and set out other important protection provisions. The expanded definition includes those 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.”

The OAU Convention explicitly forbids States from rejecting asylum-seekers at the frontier. The grant of asylum is declared to be a peaceful and humanitarian act, not to be regarded as unfriendly by other States. The Convention also establishes the importance of settling refugees at a reasonable distance from the frontier of their country of origin for security reasons. This regional treaty also states that no refugee shall be repatriated against his or her will. Most African States are parties to the OAU Convention.

In a similar vein, the Cartagena Declaration on Refugees expands the definition of protected refugees in the Latin American region. Like the OAU definition, it supports the Refugee Convention and adds protection to those who have fled their country “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” It emphasizes that repatriation of refugees must be voluntary, and embodies principles for their protection, assistance, and reintegration. Although a non-binding instrument, the Declaration has been endorsed by the General Assembly of the Organization of American States and some States in the region have incorporated this definition into their own national legislation.

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21 Ibid., Art. 2(3).
22 Ibid., Art. 2(2).
23 Ibid., Art. 2(6).
24 Ibid., Art. 5(1).
25 There are currently 45 States Parties to the OAU Convention.
27 Ibid., paras. 12, 1, and 11 respectively.
The OAU/Cartagena definitions increasingly characterized the population of concern to UNHCR wherever in the world they were located. UNHCR and most countries of asylum made no attempt to determine which among the large number of persons who fled conflicts also had a well-founded fear of persecution, instead treating those escaping conflicts as prima facie refugees. In effect, the refugee regime expanded its conceptualisation of “refugees” to respond to newly evolving situations. Large-scale refugee movements occurred from such places as Vietnam, Cambodia, Afghanistan, Ethiopia, Somalia, Sudan, Angola, Mozambique, Nicaragua, El Salvador, and Guatemala. In many of these cases, the military superpowers supported different sides in the conflicts, with the civil wars serving as surrogate Cold War conflicts. The international refugee regime, which was largely financially supported by the Western countries, became the protector of civilians who were forced to flee as the result of those conflicts, particularly when Communist Governments took control over territory.

In 1990, with the collapse of communism and the end to many of the surrogate Cold War conflicts, there was a major rethinking within the international humanitarian regime of how to deal with refugee issues. No longer was there a strong foreign policy rationale for a refugee regime that would support the civilian families of those fighting Communist Governments. As many of the conflicts of the 1970s and 1980s ended, refugees began returning to their home countries in record numbers. The UNHCR adapted, and in 1990, then-High Commissioner Sadako Ogata declared the 1990s to be the decade of repatriation.

At the same time, however, new refugee movements received international attention. They often occurred as the result of nationalist or ethnic conflicts, which were usually internal in nature and difficult for the Western powers to understand fully, such as in Bosnia, Kosovo, and Rwanda. Moreover, many of the peace agreements that ended the Cold War conflicts were very fragile, and they did not necessarily take into account the fact that there were deep-seated internal problems that could lead to the resumption of fighting. Refugees who repatriated during the 1990s often returned home to high levels of insecurity. In some places, such as Afghanistan, conditions deteriorated back into complete civil war and the takeover of such repressive regimes as the Taliban.

With the end of the Cold War, Governments found they were able to intervene internally in countries of origin, in order to be able to reach the displaced populations before they left, without risk of generating superpower clashes. This began in 1991, with a response in northern Iraq to the Kurdish refugees who were attempting to come into Turkey. Turkey, afraid for its own national security as a result of Kurdish insurgency, refused to allow the Iraqi Kurds to enter. The international community established a safe zone in northern Iraq so that the Kurdish refugees could return to the protected area.

Once more, the refugee regime began shifting its focus to respond to new realities. Although the Refugee Convention pertains only to persons who are outside of their countries of origin, the international community found itself increasingly confronted with issues of internal displacement. UNHCR initially was reluctant to expand its mandate to include the internally displaced but the
organization slowly recognized that many of those who fled within their State borders were otherwise indistinguishable from refugees. At the same time, UNHCR was called upon to address forms of persecution that had not previously been a prominent focus of its protection activities, as discussed in the next section.

3. Gender-based claims

Although they did not emerge until the early 1990s, the Policy on Refugee Women and Guidelines on the Protection of Refugee Women were long in the making. In December 1975, the General Assembly proclaimed 1976–1985 as the UN Decade for Women: Equality, Development, and Peace. A World Plan of Action was adopted at the first international Conference on women in Mexico City in 1985. By the end of five years, when a mid-decade review would be held, some minimum goals were to be met in terms of increased literacy, equal access to education, increased employment, equal eligibility to vote, greater participation of women in policy-making positions, increased provision of health services, and recognition of the economic value of women’s work at home. Special attention was drawn to the situation of migrant women in the World Plan of Action, recognizing that they faced special problems.

The mid-decade meeting took place in Copenhagen in July 1980. Specific resolutions relating to refugee and displaced women were adopted at that Conference. In addition to some general recommendations about the causes of refugee movements and the responsibilities of States to protect and assist refugees, Governments were strongly urged to bring to justice those who abuse refugee women and children and to take steps to prevent such abuses. It was also recommended that UNHCR, in cooperation with other concerned UN agencies, establishes programmes necessary for dealing with the special needs of displaced and refugee women, especially in the areas of health, family planning, education, employment, resettlement, and family reunification. Finally, the Conference recommended that UNHCR increases the number of women at all levels of its staff and establishes a high-level position or coordinator of women’s programmes.

Little progress was made in implementing these recommendations during the next five years. Some efforts were made, however, to gain greater understanding of the needs of refugee women. For example, in 1981 the

30 All of the UN World Conferences on Women are available at: http://www.un.org/development/ devagenda/gender.shtml (last visited 10 Jul. 2010).
32 Ibid., paras. 300 and 301.
Intergovernmental Committee for Migration held a seminar on the adaptation and integration of refugee and migrant women.\textsuperscript{34}

The meeting in Nairobi, marking the end of the decade on women, served as an impetus for further action in 1985. UNHCR organized a Roundtable on Refugee Women in April 1985.\textsuperscript{35} The Roundtable included a number of prominent women, including cabinet ministers, ambassadors, and others who would be involved in the Nairobi meeting. Also, a number of governmental delegations made the issue a priority for discussion at Nairobi. The US Government, for example, provided funds for a study of refugee women that was to develop recommendations its delegation could bring to the conference. Non-governmental organizations (NGOs) came with specific recommendations for improvements as well.

In the years after Nairobi and the inclusion of specific reference to refugee women in the Forward Looking Strategies, interest in the issue of refugee women grew further among donor Governments and within UNHCR. In October 1985, the Executive Committee of UNHCR, for the first time, included the issue of refugee women on its agenda and adopted a Conclusion on the protection of refugee women.\textsuperscript{36} In 1987, the Executive Committee called upon the High Commissioner to report in detail at its next session on the particular protection and assistance problems and needs of refugee women and on the concrete measures taken to meet them.\textsuperscript{37} In February 1988, UNHCR established a Steering Committee on Refugee Women, under the Chairmanship of the Deputy High Commissioner, to define, oversee, and coordinate a process of assessing, strengthening, and reorienting existing policies and programmes. Then, in August 1988, internal guidelines on the international protection of refugee women were issued to all substantive officers in the field and at headquarters.

A \textit{Note on Refugee Women} was prepared for the meeting of the Executive Committee in 1988.\textsuperscript{38} The Note summarized the various protection and assistance issues facing refugee women and described the current and planned action of UNHCR. Field offices were requested to provide more detailed information and follow-up on protection problems affecting refugee women. The data systems for collecting information on refugees were reviewed with an aim towards increasing their capacity to capture gender-specific information. Efforts also began to identify institutional changes needed to ensure that the needs of refugee women were systematically considered and addressed; to raise the level of visibility given to

\textsuperscript{34} Martin, \textit{Refugee Women}, 148.

\textsuperscript{35} Ibid.


\textsuperscript{37} Executive Committee, \textit{General Conclusion on International Protection}, EXCOM Conclusion No. 46 (XXXVIII), 12 Oct. 1987, para. (h).

refugee women’s issues; and to develop training materials to sensitize UNHCR, host country Government, and NGO staff.

A new position was created to ensure that these activities were productive: a Senior Coordinator for Refugee Women. Canada provided a major impetus for this appointment and seconded a senior staff member to fill the position. Her duties included coordinating and monitoring the process of integrating women’s issues throughout the organization; preparing a policy framework to include refugee women in all levels of program and project planning and implementation; reviewing existing programs and procedures to ensure full participation of refugee women; identifying appropriate action oriented research on specific women’s issues; contributing to the review and assessment of protection and assistance programs; and assisting in the development of training programmes on gender impact analysis. The office was subsequently renamed the Office of Senior Coordinator for Refugee Women and Gender Equality, as a way to emphasize the need to mainstream women and gender issues into the totality of UNHCR’s work.

In 1989, the UNHCR Executive Committee requested the High Commissioner to provide a policy framework and organizational work plan to be submitted at its next session. The major thrust of the policy statement approved by the Executive Committee in 1990 was the integration of considerations regarding the special needs and resources of refugee women into all aspects of UNHCR’s protection and assistance activities.

The 34th Session of the Commission on the Status of Women, also in 1990, provided a forum for heightening awareness of the situation of refugee women, particularly in the broader range of UN agencies. To prepare for the meeting, the United Nations Division for the Advancement of Women held an experts’ meeting that outlined specific recommendations to improve the responsiveness of the UN system to the needs of refugee women. The Expert Group emphasized the importance of ensuring that the civil, political, social, and cultural rights of refugee and displaced women and children are reaffirmed and backed by laws, policies, and programs. Governments, relevant UN agencies, and concerned NGOs were called upon to redouble their efforts to respond to the specific needs of refugee and displaced women and children, including by addressing the root causes of these situations in an urgent manner.

A direct follow-up to the Commission’s deliberations was the promulgation of the Guidelines on the Protection of Refugee Women. Although much broader in application than legal protection, the Guidelines acknowledged that women faced special barriers to gaining recognition as refugees. Whereas in many developing countries assistance and protection is afforded on a presumptive basis to everyone from a given country who has crossed the border, in most industrialised

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39 Executive Committee, Refugee Women, EXCOM Conclusion No. 60 (XL), 13 Oct. 1989, para. (c).
40 Executive Committee, Refugee Women and International Protection, EXCOM Conclusion No. 64 (XLI), 5 Oct. 1990, para. (a).
41 Martin, Refugee Women, 151.
countries and an increasing number of developing ones, individuals must show that they meet the refugee definition. With gender not included as a basis upon which an individual might be persecuted, it was not clear that women who faced harm because of characteristics related to their gender would qualify for protection.

Many refugee claims involve women who are victims of domestic violence or who fear harsh or inhumane treatment because of having transgressed their society’s laws or customs regarding the role of women. Even when they are able to demonstrate that the harm is so great that it constitutes persecution and they have exhausted all efforts to receive protection from their Governments, they are still faced with showing that the persecution is based on one of the protected grounds.

Even more problematic are situations in which women flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution under certain circumstances, the dividing line between discrimination and persecution is not a clean one. Discrimination can take on a number of forms. In some cases it is the fear of ostracism or retaliation not because of one’s own actions but because of having been the victim of a crime carrying a social stigma, such as rape, that causes a woman to flee.

Women who were the targets of military attacks also found difficulty in showing that they were victims of persecution rather than random violence. Similarly, women victimised because of the political activities of a male relative often had trouble demonstrating their claim to refugee status. Yet, in many conflicts, attacks on women are a planned part of a terror campaign.

As early as 1984, the European Parliament urged that women fearing cruel or inhumane treatment as a result of seeming to have transgressed social mores should be considered a “social group” for purposes of determining their status.42 In the Note on Refugee Women and International Protection submitted to the 41st Session of the Executive Committee in 1990, the High Commissioner also encouraged Governments to take this step, noting:

[I]n light of the increasingly universal character of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, severe discrimination, in disregard of this Convention, may justify the granting of refugee status in line with the reasoning [of the European Parliament]. In order to facilitate the task of determining the refugee claim of persons who are in such a situation, it is important that decision-makers involved in the refugee status determination procedures have at their

disposal background material and documentation describing the situation of women in countries of origin, particularly regarding gender–based persecution and its consequences.43

The 1991 Guidelines expanded on this conceptualisation, urging, as discussed above, that Governments use membership of a particular social group to define the basis of the persecution. The Guidelines emphasised that sexual violence against women, in particular, could be seen as a form of persecution when used to intimidate or punish. Recognizing that these actions often were inflicted by private parties, the Guidelines further stressed that when a Government cannot or will not protect women who are subject to abuse for transgressing social standards, the granting of asylum is appropriate.

During the 1990s, several Governments44 issued guidelines or regulations to guide asylum determinations in this area. They have touched on all three issues discussed above: the level of harm (whether the harm constitutes persecution), the nexus between the persecution and one of the Refugee Convention grounds (e.g., social group), and the failure of State protection (that is, is the Government willing and able to provide protection).

Persecution is generally defined to include a wide range of harms that may be detrimental to the safety and well-being of the woman. One court held:

[W]hat conduct may amount to persecution is a question of degree. At one end of the scale there may be arbitrary deprivation of life, torture and cruel, inhumane and degrading punishment or treatment. In such a case the conduct may be so extreme that one instance is sufficient. But less serious conduct may not amount to persecution unless it is persistent.45

The harm need not be physical. A US court case often cited in gender guidelines held that “the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs”.46 Some forms of persecution are in themselves gender-specific. UK Guidelines note that, “gender-specific harm may include but is not limited to sexual violence and abuse, female genital mutilation, marriage-related harm, violence within the family, forced sterilisation and forced abortion”.47

With regard to the nexus between the harm suffered and one of the protected grounds, Government guidelines generally follow the European Parliament’s recommendation to tie the persecution to the applicant’s “membership in a particular social group”. Social groups are usually defined as having

44 Among the Governments issuing guidelines are Australia, Canada, Ireland, the Netherlands, Norway, South Africa, Sweden, the United Kingdom (UK), and the US.
45 Demirkaya v. SSHD (CA) [1999] INLR 441, [1999] Imm AR 498.
46 Fatin v. INS 12 F. 3d 1233 (3rd Cir. 1993).
certain immutable characteristics (such as gender) that the members cannot change. Alternately, the characteristics are so fundamental to their identity, their human dignity, or conscience that they ought not to be required to change them. The social group cannot, however, be defined by the persecution suffered — that is, girls fearing female genital mutilation are not a social group if the female genital mutilation is the persecution that is feared. As the Canadian Guidelines emphasise, “the fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant [sic.] — race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”

UNHCR issued its own guidance in 2002, which defined social group as:

[A] particular social group is 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.

Perhaps the most important contribution of the gender guidelines is the focus on whether the applicant is justified in being unable or unwilling to accept the protection of her home country. If the persecution is carried out by governmental authorities — State actors — it follows that there is a failure of State protection. In many gender-persecution cases, however, the harm is carried out by non-state actors — family members, armed elements who are not sanctioned by the Government, or even community members seeking to hold up social norms.

The UK Guidelines note: “The State of origin is not expected to provide a guarantee against all risk of persecution, rather the level of protection to be expected is a practical standard in keeping with every state’s primary duty to provide protection to those within its jurisdiction.” The Guidelines emphasise, however, that State protection must be real. Just because there are laws on the books does not mean that protection is available to women. A landmark UK House of Lords case held that:

[I]t was useless for Mrs Islam, as a woman, to complain to the police or the courts about her husband’s conduct. On the contrary, the police were likely to accept her husband’s allegations of infidelity and arrest her instead. The evidence of men was always deemed more credibly than that of women. If she was convicted of infidelity, the penalties could be severe.

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48 Immigration and Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, updated 13 Nov. 1996.

49 UNHCR, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 7 May 2002.

50 UK Immigration Appellate Authority, Asylum Gender Guidelines, 27.
Even if she was not prosecuted, as a women separated from her husband she would be socially ostracised and vulnerable to attack, even murder, at the instigation of her husband or his political associates.\textsuperscript{51}

This stance is in keeping with the logic of the refugee regime as providing surrogate protection for individuals who cannot rely on their own Government for their security. In effect, the refugee system legitimates the Westphalian system of State sovereignty by providing an alternative for persons who are outside of the model – that is, those who have been abandoned by their own Governments. In keeping with this understanding of the refugee regime, the basis of the persecution (gender versus another protected ground), the instigator of the harm (a Government or non-state actor), and, even the geographic location of the potential victim (within or outside of their origin country) become less important factors in determining whether someone deserves international protection than the willingness of the home Government to provide protection.

4. Moving forward

From at least the 1950s, the refugee regime has enlarged its focus and, often, its formal mandate to address new forms of displacement. In recent years, in addition to its expanding focus on gender, UNHCR has increased the protection and assistance it affords to internally displaced persons in conflict settings and, in rarer examples, natural disasters (for example, in the cases of the Asian tsunami and cyclone Nargis in Myanmar/Burma).\textsuperscript{52} High Commissioner Guterres has raised the issue of climate change, as a potential for still greater displacement that may require international assistance and protection. In this context, UNHCR’s recent note, \textit{Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective}, states that:

\begin{quote}
[I]t is legitimate to ask whether new legal protection instruments might be needed for cross-border movements that are induced by climate-related reasons. UNHCR is not seeking an extension of its mandate, but it is our duty to alert the international community to the protection gaps that are emerging.\textsuperscript{53}
\end{quote}

UNHCR will no doubt be called upon to extend its good offices as new forms of displacement emerge and as social and political norms evolve as to which populations deserve international protection. The question is: by what criteria should UNHCR engage with these new situations? To answer this question, it is

\textsuperscript{51} Islam v. Secretary of State for the Home Department; R v. IAT ex parte Shah (HL) [1999] INLR 144, [1999] Imm AR 283.
necessary to identify UNHCR’s mandate and capabilities relative to the rest of the international community. I argue that UNHCR has evolved to protect persons whose own Governments cannot or will not provide such protection.

To use climate change as an example, one can divide persons who may be uprooted by its effects into four categories according to their relationship to their own Governments. In the first quadrant are individuals whose Governments are “willing and able” to provide protection. Generally, displacements in these contexts are internal, not international, since the forced migrants are able to find assistance from their own Governments and have few reasons to cross an international border. There is a limited role for the international community, although other Governments and international organizations may offer assistance – for example, in the form of search and rescue teams, financial aid for rebuilding homes, health professionals, and other experts in disaster relief. Those who move across borders would not be eligible for refugee status since those who face potential harm would be able to call upon their own Governments for their protection.

The second quadrant includes forced migrants in situations in which Governments are “willing but unable” to provide protection. Certainly, poor countries that do not have the financial capacity to provide assistance may fall into this category. They would like to protect their citizens from harm but do not have the capacity or resources to do so. If the affected population moves within the country of origin to find safety, a Government may well attempt to fulfill its protection responsibilities by calling upon the international community to assist. Again, there would be little role for the refugee regime because international protection is not at stake, but the international community has an important role to play in ensuring that it buttresses the willing State’s ability to provide protection by offering financial and other aid. Assuming sufficient international help is provided to assist the Government in fulfilling its protection role, there would be no grounds to consider those who move across an international border as eligible for refugee status.

The third and fourth quadrants include situations in which Governments are “unwilling” to provide protection to their citizens, regardless of their ability to do so. In the third quadrant, the Government has the capacity to provide protection, but is unwilling to offer it to some or all of its citizens. In the fourth quadrant, the Government is both “unwilling and unable” to protect its citizens. Failed States would fit into this category because they have neither the willingness nor the ability to protect their citizens.

These are the situations in which the refugee regime can and should play a constructive role in promoting protection for persons whose rights have been violated. As its role in gender-based persecution cases evolved to provide surrogate protection for women who could not call upon their own Governments to protect them, the refugee system could apply the same logic to persons displaced by natural disasters, climate change, and other events that are not persecutory but portend grave harm in the absence of State protection. The specific trigger for displacement is thus less important in generating a “refugee-like” response
than the Government’s wilful failure to protect its population. Victims who move across international borders would be eligible for protection from repatriation into the harmful situation. A number of countries already have temporary protection policies for people unable to return because of natural disasters. These programs may be models for new displacements although in some cases, a more permanent solution is likely to be needed (for example, in the case of low-lying island countries that are inundated by rising sea levels). As in conflict-induced displacement, UNHCR could offer its assistance as a way to encourage the country of destination to permit the cross-border migrants to remain until safe to return or other solutions are found for them.

5. Conclusion

During the past century, the international refugee regime has evolved, as the international community learned from its mistakes and slowly expanded the mandate of its refugee agency to protect persons displaced by persecution and conflict. At first focused on specific nationalities and events, in the years after the Second World War and the advent of the Cold War, the refugee regime became more universal in its scope, protecting refugees throughout the world. More specific to the focus of this article, the refugee regime also expanded to provide protection to individuals persecuted on the basis of their gender, even when that persecution was inflicted by private individuals, including members of their own family, if their own Government was unwilling and unable to provide safety.

As new forms of forced migration loom on the horizon, the international community may well see itself challenged to intervene to assist and protect others who are endangered. This article has attempted to set out criteria under which the refugee regime would appropriately be the mechanism through which the international community would respond to these new displacements. Building on the evolution of responses to gender-based persecution, I argue that the determining criterion should be the extent to which the country of origin is willing to provide protection to its citizenry faced by serious harm. To the extent that States are unwilling to protect their own citizens who are displaced from these causes, the refugee regime would legitimately have a role to play in advocating for and, when possible, assisting and protecting these forced migrants.