

The Politics of Gender Asylum in the U. S.: Protection of Women Asylum Seekers in the Context of Global Inequalities

DOI: 10.11567/met.30.1.1
UDK: 341.43-055.2(73)
351.756-055.2(73)
Izvorni znanstveni rad
Primljeno: 6.2.2014.
Prihvaćeno: 4.6.2014.

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SUMMARY

This article examines the changes towards more gender-sensitive interpretations of refugee status in international and national asylum laws and policies within the context of contemporary and historical global power relations. It also analyzes the changes in the language that can be found in the international UNHCR guidelines for the protection of women asylum seekers, U.S. national guidelines for assessing gender-related asylum claims, and recent U.S. court decisions assessing the gendered claims of women. Among the analyzed court cases, the focus is on the 2005 Mohammed case due to its problematic court decision and legal interpretations. Finding the Western countries' instrumentalization of the international refugee protection system crucial for understanding the contemporary asylum system and women asylum seekers, the argument connects the historical conditions with the way in which the protection of women refugees from "cultural" gendered violence has been articulated in asylum politics in the U.S. The author's overall findings are that international law, governmental organizations, and liberal women's human rights NGOs have shaped the international and national legal protection of (women) asylum seekers in such a way that it reproduces global inequalities in its representation of "Third World" women and their culture, uses women asylum seekers fleeing from violence for the purpose of exercising Western cultural superiority, and covers up the restrictive and racist Western asylum politics towards immigrants and asylum seekers.

KEY WORDS: gender-based asylum, protection of asylum seekers, orientalism, international law, women's human rights

INTRODUCTION

In 2006, the Croatian government granted its first asylum, as it was stated on the Ministry of Internal Affairs website, to a woman from Sudan who was fleeing gender-based persecution, that is, female genital mutila-

tion (FGM), among other things.¹ She was the first asylum seeker whose application was accepted in contemporary Croatian history after more than 400 asylum claims had been declined. This decision awoke the activists and researchers concerned with issues of asylum and the human rights of asylum-seekers from a years-long doze, in which several hundreds of applicants were previously refused. Although the first asylum-seeker applied for asylum in 1997, the law on asylum was not passed until 2003 (Župarić-Ilić, 2013). This breakthrough was particularly puzzling since the grounds for granting the first asylum, i.e. gender-based persecution, were in 2006 still debated on the international level. Croatia, as a country still unprepared, both legally and practically, for recognizing various types of asylum, had in fact put itself at forefront of gender-asylum recognition. Even more puzzling was the Ministry's reference to different countries (Canada, Sweden, France, Great Britain and U.S.) and international regulations that give grounds for asylum to persons fleeing such persecution, while at the same time refusing more than 400 cases of asylum-seekers up to that point. Although many national policies in Europe and around the world still do not recognize it, this novel practice, primarily in the international legal system but also adopted in some Western countries, initiated both jurist and feminist debates on the role of gender and sexuality in asylum systems. Furthermore, it initiated debates among feminist scholars and activists on how this inclusion, in instances where it appeared, affected the already existing cultural discourses on the East (or South)/West divide in which women and the concepts of gender equality had taken a central place. This article will inquire into how gender-based asylum as a concept that entered international regulations transformed into a national legal system, namely the U.S. court practice, and what consequences can be seen from such transformation, particularly in shaping different cultural discourses and creating the cultural identities of the asylum-seekers on the one hand and of the host countries on the other. Finally, this article will present an analysis of the appropriation of international regulations into a national legal and social system that perhaps can be used for analyzing similar adaptations in other countries in which the shaping and re-shaping of identitarian concepts such as gender, sexuality, culture, and ethnicity play a central role.

¹ The Croatian Ministry of the Interior (MUP) granted its first asylum on November 15th, 2006, to a claimant on the grounds of religious persecution and female genital mutilation. MUP explained that this decision had been made due to the international and national legal practice, listing states like Canada, the U.S. and others, that recognized violations of women's rights as grounds for accepting asylum claims (MUP, 2006).

GENDER ASYLUM AS A FEMINIST ISSUE

Women's human rights conferences and conventions² have contributed greatly to the recognition of gender-based persecution as a legitimate claim for international refugee protection under the UN's definition of the refugee. Gender-sensitive asylum regulations entered international law, and consequently national asylum laws, in response to the advocacy of both the international women's movement and local activists such as refugee advocates. In the mid-1990s, asylum was granted for the first time in the U.S., Canada, and Sweden to women fleeing from female genital mutilation. These states, responding to the UNHCR's recommendations, also issued guidelines for dealing with gender-based asylum claims for its officers. The UN's *Guidelines on International Protection: Gender Related Persecution* (UNHCR, 2002) today function as a recognized legislative recommendation for all UN member states. In 2005, in the case *Mohammed v. Gonzales*, the U.S. appeals court ruled in favour of granting asylum to Khadija Mohammed exclusively on the grounds of gendered persecution, that is FGM (female genital mutilation). More precisely, the asylum was not granted on the grounds that the claimant expressed opposition to practices of the dominant regime, but "on the fact that the victim is female in the culture that mutilates the genitalia of its females" (*Mohammed v. Gonzales*, 2005).

Advocates in the U.S., who work for the legal improvement of the status of women refugees as well as scholars who deal with the recognition of women's specific needs in the asylum systems, have welcomed this trend in the U.S. asylum policy. Feminist scholars that were repeatedly pointing out the gender bias in the international and national regulations argued that international conventions as well as national laws and policies on asylum have frequently overlooked or ignored the gendered nature of asylum claims or do not fully comprehend and act upon gendered structures and relations of power (Chisholm, 2001; Lieberman, 2002; Randall, 2002; Arnett, 2005; Freedman, 2007, 2010). Gender and age barriers in the recognition of asylum claims, as well as lack of recognition of persecutions taking place in the "private" sphere proved to be grave at the expense of women and girls

² Such as the Convention of All Forms of Discrimination Against Women in 1979, Declaration on Elimination of Violence Against Women in 1993, the UN's World Conference on Human Rights in Vienna that recognized gender-based violence as a specific form of violation in 1993, the Beijing Platform for Action adopted by the Fourth World Conference on Women in 1995 and, finally, the ICTFY's (International Criminal Court for Former Yugoslavia) recognition of war rape as torture and persecution in 2000.

fleeing violence and persecutions that are untypical for male refugees. The opponents of the expansion of refugee protection law to include women's and girls' specific asylum claims argued that asylum was and should remain exclusively a political refuge for those seeking positive change in their countries of origin (Stein, 1996). Such argumentation is rooted in the spirit of post-WWII refugee protection that, strengthened by Cold War rhetoric, saw asylum as a principle tool for instigating political transformation in Eastern Bloc countries. Nevertheless, the argument hits the nail on the head in as much as it underlines what much feminist scholarship claimed all along, namely that gender-based persecutions and consequently protection for it should be seen primarily as a political issue, inclusive of a variety of different types of oppression. The debates about gender asylum quickly became an internal feminist issue. For instance, Grewal (1998) argued that strategies of implementing gender-sensitive policies in asylum-seekers protection by many Western women's groups failed to avoid falling into discursive nationalism, such as the use of Third World women, represented as victims of religious and cultural backwards societies, for legitimizing the "superiority" of Western-based feminist and human rights discourse. Visible most clearly in some of the first cases of granting asylum to women fleeing gendered persecution, the discourse created in and around the courtrooms echoed with culturalist and nationalist underpinnings, while failing to address the multiplicity of oppression that women experienced.

Western academic feminism in the past has not hesitated to approach issues of gender-based violence in different "cultures" and parts of the world without considering the potentially different "situatedness" of these cultures within a system of global hierarchy/hegemony, even if this has resulted in severe accusations from Third World women and men of about how these approaches support imperialism. Since the extensive critiques in the 1980s and the 1990s that engaged in dismantling the "universalism" of feminist claims that obscure global, cultural, and class inequalities, many authors have systematically pointed out the "skeleton" in the closet called: the feminist struggle to save Third World women (Spivak, 1988; Mohanty, 1988). For Western feminists today, it is important not to slip into "'colonialism' as a discursive practice" or into a "mode of appropriation and codification of 'scholarship' and 'knowledge' about women in the third world by particular analytic categories employed in writing on the subject which take as their primary point of reference feminist interests as they have been articulated in the U.S. and western Europe" (Mohanty, 1988: 65). Gendered persecutions originating in "cultures" of the Third World as violations of

international and universal human rights as they are articulated in the international and national systems of protection of asylum seeking women, therefore, have to be re-read taking into account feminism's and the women's movement's own past. After all, gender asylum was a result of the international women's movements advocacy for more intense protection of fleeing women. Unfortunately, in many cases, the claim of women fleeing multiple oppressions have been misused for arguing the case of universal patriarchy or even worse the existence of a "Muslim", "African" or other non-western patriarchy. Such "discursive colonization" of the material and historical heterogeneities of the lives of women in the Third World resulted in the production and reproductions of singular monolithic categories and images, and indirectly reinforced the discourse of building the western women's agency at the cost of Third World women (Mohanty, 1988: 66).

In many court cases central to attaining asylum and, therefore, the claims of women, usually written by their advocates from activist organizations, was the use of the term "culture". Culture was central when referring to the persecution of women in their native countries and when speaking about cultural differences between the host country and the country of origin. Taking into account that most of the feminist scholarship in migration studies points only to the universal female gender as excluded from international refugee law, one possible approach for transforming transnational feminisms is to reconstruct the dominant value-system. As suggested by Inderpal Grewal and Caren Kaplan (1994), feminism should always take into account that power is *scattered* depending on different national, historical, social, and other contexts. "If feminist political practices do not acknowledge transnational cultural flows, feminist movements will fail to understand the material conditions that structure women's lives in diverse locations" (Grewal and Kaplan, 1994: 17), and it will further reproduce universalizing claims of dominant Western cultures. The reasons for the material oppression of women is not only the "inhuman" patriarchal culture and religion of the Third World, but it also includes the international hegemonic oppression of women as a part of the Third World, or as part of global inequalities, local nationalisms, the local structures of domination, state-judicial oppression, and their influence on each other. Precisely because of the multiple and changeable systems of power and domination, the term "culture" loses any stable referent and, thus, becomes obsolete to use in referring to the root of people's social practices, let alone people's oppression. For Inderpal Grewal and Caren Kaplan (1994: 17–18), "transnational feminist practices require this kind of comparative work rather than the

relativist linking of ‘differences’ undertaken by proponents of ‘global feminism’; that is, to compare multiple, overlapping, and discrete oppressions rather than to construct a theory of hegemonic oppression under a unified category of gender”. Consequently, feminist international practice should be against any essentializing of non-western cultures and peoples, against the imaginary of the *Other* – the patriarchal savage – and against any use of women as markers of this Eurocentric representation of difference.

The historical and political context in which the internationalization of asylum and refugee protection took place reflects the political conditions in which contemporary definitions and interpretations have been shaped and, consequently, the difficulties of introducing both gendered and Third World cultural experiences of asylum claimants into the law and national court practices. Concentrating on “detecting silence” (of women’s and other oppressed groups’ voices), and “world traveling” (as a self-reflective response to differences among women and a critique of the use of monolithic categories, such as “Western women” and the “Third World women”), Hilary Charlesworth (2003) sets up a possible methodology that should uncover international law’s claims to generalizations and universalism and the ways that structural hierarchies and inequalities both between men and women, and between different groups of women are played out. More precisely, the protection of women from gender-based violence in international and U.S. asylum law can be seen as male oriented, i.e. silencing the gender related claims – but also reflecting the unequal power relations between women themselves, i.e. between women refugees and their American advocates and attorneys. Anne Orford (2003) outlines the pitfalls and implications of unreflexive claims by feminist scholars and activists in the international arena. A different scholarly approach for feminists and other reformist international politics is needed – one that is strongly aware of the consequences of any claim in the context of international law and power relations. Feminist scholarship and politics should not enter without taking into account the colonial-rooted and Western-oriented structure and foundations of these institutions. Anthony Anghie (2002) similarly proposes that international law and organizations cannot be detached from the colonial past. The new “science of development” led by Western interests blossomed in organizations such as the League of Nations and the UN (“science” that now includes human rights and women’s rights as crucial in their development goals), which were encouraged by the historical potential of internationalism, i.e. “the spirit” of the 20th century. Some of these international approaches, he argues, have been seriously disadvantageous

for Third World countries (starting from the League's mandate to internationalize colonialism) (Anghie, 2002). Therefore, feminist scholarship and politics in the sphere of international law have to be open-ended, communicative, and communicated among different parties in this system of multiple global inequalities. If we see international law and organizations as such, it would be easier to avoid the implications of unreflexive claims, such as the appropriation of a feminist reformist agenda by the neocolonial and nationalistic projects (which are frequent in the contemporary era of "humanitarian" interventions that legitimize themselves with reference to women's rights, among other things, while still reproducing unequal international power relations).³

GENDER-ASYLUM IN A HISTORICAL PERSPECTIVE

Many of the issues concerning complex and multifold power relations inscribed in the asylum-seekers protection system stem from the historical development of certain concepts and definitions, such as the definition of the refugee, of what constitutes persecution and on which grounds. Additionally, asylum as a concept is intrinsically an international issue that was legally and politically "born" from complex and often conflicted relations between states as well as between the international and national level of decision making. The first internationalization of the refugee system appeared in the period of the demise of Western European colonialism and of the beginning of Western anti-communist politics, with the Leagues of Nations' (LN) regulations of refugee status in the period between 1920 and 1935.⁴ Until then, only states were seen as significant agents in the international arena, while the concept of a refugee was seen as an international anomaly, i.e. stateless persons in a world of nation-states.⁵ The refugee explosion in the interwar period made refugees become visible actors in international relations and law as the flow and resettlement of people could not be coordinated by any single state alone. In the 1920s, the Russian Revolution refugee

³ This refers to a feminist critique on contemporary American nationalist endeavours to appropriate feminist claims for humanitarian and neocolonial interventions in the world (see, for example, Abu-Lughod, 2002).

⁴ The 1951 UN Convention Relating to the Status of Refugees mentions the following agreements and conventions inherited from the League of Nations: the Arrangements of 12 May 1926 and 30 June 1928, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939, and the Constitution of the International Refugee Organization (UNHCR, 2010: 14).

⁵ The existing international law did not recognize individuals as holders of rights in the international arena (see Hathaway, 2000: 10).

flows made Western countries realize how highly political and sensitive the refugee issue was becoming in international relations. As a consequence, in 1921 the High Commissioner for Refugees for dealing with Russian refugees was established by the League of Nations, which was later replaced by the Nansen International Office for Refugees in 1930 as an autonomous and non-political organization recognized by the LN (Jaeger, 2001: 728). It can be said that the asylum and refugee system grew out of the East/West divide, which grew stronger and stronger with the Cold War. Furthermore, the financial insecurity and the decline of League's reputation contributed to the demise of the power of the League's international protection of refugees (Jaeger, 2001: 727–732) and additionally weakened its international and neutral position. The Nansen Office experienced yet another crisis with the refugee avalanche from Germany, Italy, and Spain, consisting of mostly Jewish and other politically persecuted refugees. The Refugee Convention that was organized in October 1933 and was adopted by 14 states did not pass without difficulties, but today it presents the first international refugee law document. The difficulties related to the implementation of the protection for Europe's own citizens, Jews.⁶ Finally, the horrors of WWII influenced the transformation of the international protection of refugees, with the newly formed UNHCR as a structural and ideological heir of the Nansen Office.

The extent to which we can see the UNHCR endeavours to assist refugees and displaced people in truly internationally coordinated and supported projects as successful depends on the larger political context of the time, on the consequences and implications of the legal framework it has established, as well as on its impact on the member states. When the UN initiated the UNHCR in 1950/51, its independence and non-political nature were emphasized in the context of the beginning of tensions between the two blocks in the Cold War. Refugees became a highly risky and political issue.⁷ In this context of political fights, a "nonpolitical" intervention by the neutral body was needed both for the states and for the UN. What seems to be different from recent trends in refugee protection is the fact that refugees in the founding period of the UNHCR came mostly from communist countries, admitted for permanent resettlement, and were also generously

⁶ Robert Beck (1999) describes how Britain was reluctant to ratify the convention seen as intervening in national sovereignty. The refugee question was a part of the debate about British reluctance to accept a large number of Jewish refugees from the National Socialist regime in Germany.

⁷ Guy Goodwin-Gill (2001) and Charles Keely (2001) write about the beginning of the Cold War and its influence on the early UN refugee system.

admitted in large numbers by Western European and Northern American governments. For example, during Castro's rise to power in Cuba, the U.S. publicly supported asylum seeking migrations. In this case, the aim of U.S. Cold War politics was not to introduce stability but to destabilize the communist regimes and influence their collapse by supporting the internal groups and the emigrants that were opposing them (Keely, 2001: 306–308). This argument goes even further to claim that asylum politics has long been a tool for the U.S. foreign policy towards communist countries (Gibney, 2004: 132). The UNHCR had to take into consideration these political events and its implications for the international protection of refugees, i.e. the instrumentalization of asylum for international power struggles, for which it emphasized its neutrality and the nonpolitical nature of its work in its Statute.⁸ Such proclamations reflect the UNHCR's intention to be truly international, non-biased, and reformist in protecting the *universal right* of the individual to asylum.⁹

Although this presented a step forward for the international protection of refugees towards more decentralized power relations, the Cold War power relations were inscribed in the work and policies of the UNHCR. In the formative period of the UNHCR, the U.S. and Western European countries saw refugee regulation as part of the ongoing Cold War politics and a matter of home security. By pushing the interest of their own countries and dealing with refugees independently of the UNHCR, Western countries consequently minimized the authority of the power appointed to the Commissioner. Additionally, the financial structure of the UNHCR depended mostly on rich countries, and these donors did push their political interests.¹⁰ Consequently, the UNHCR's regulation offered an outline for the protection of refugees which was dependent on a principle of state sovereignty and the primary states' role in the protection of refugees, which consequently allowed for ambiguous and unclear or minimalistic responsibilities for the host states. Finally, even though the Statute declared the

⁸ The Statute of the UNHCR states in its second article: "The work of High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social, and shall relate, as a rule, to groups and categories of refugees" (UNHCR, 1996: 8).

⁹ The UNHCR was given a mandate by the General Assembly in order for the office to be neutral, legitimate, and democratically governed (UNHCR, 1996: 8–9).

¹⁰ For example, in the beginning of the UNHCR's work at the beginning of the Cold War, refugees were handled by the U.S. in an alternative way. The UNHCR had severe financial problems and the Ford Foundation's donations played a crucial role in "saving" the institution. These donations have to be seen in the context of highly political events during the period, such as Hungarian refugees from 1956 within the Soviet/American power competition (Gallagher, 1989: 582).

UNHCR as neutral and universal, the agency dealt primarily with European refugees, with its first non-European office opening as late as 1962 in Burundi.¹¹

The consequences of the Cold War on the refugee system, therefore, affected mostly Third World refugees; but by the end of the Cold War, in the 1970s and 1980s, restrictive asylum policies were introduced indiscriminately. After the fall of the Iron Curtain, asylum was no longer offered so generously to ex-communist nationals. Charles Keely (2001: 306) argues that the contemporary crisis of the asylum system derives precisely from the formative period of the UNHCR and manipulation and instrumentalization of the asylum system by the U.S. and other Western countries pushing their interests to destabilize the communist bloc. He further argues that since the LN, but definitely since the 1951 UN Convention on the status of refugees, there have been two policies in the international arena: one for the refugees of the Soviet bloc, and another for the rest of the world (meaning Third World countries). As a result, the UNHCR's agenda was primarily focused on Third World refugees while leaving the asylum policies in the West to the arbitrary power of the states. For Anthony Richmond (1994), the previous generous asylum protection granted to the communist bloc refugees, but guaranteed to all universally through the 1967 Protocol, now seems clearer than ever as a "cold luxury", and one that was mainly reserved for Europeans, making the contemporary Western policies of asylum a form of *global apartheid*.

These historical events and conditions had their impact on the legal formulations of the status of refugees, especially in as much as they shaped to some extent gendered and racialized definitions of a refugee. The definition in the Convention Relating to the Status of Refugees in 1951 defines the experience of European (male) refugees in the period of the Second World War.¹² The Convention even stated so in its Chapter 1 ("As a result of events occurring before 1 January 1951 ...") (UNHCR, 2010: 14). The definition

¹¹ Difficulties in reaching full international membership and representation can be seen in the fact that, for example, the UNHCR's controlling body (Executive Committee) was composed of only 24 member states' appointees and reached membership of 70 different countries as late as 2006. Secondly, the list of High Commissioners shows that most (all except one) of the commissioners came from Western countries. And thirdly, the UNHCR office was not opened outside Europe until 1962 in Burundi (UNHCR, 1996, 2011).

¹² A refugee is a person who due "to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (UNHCR, 2010: 14).

recognized primarily political dissidents and then national, “racial”, and religious minorities as eligible for asylum. The concept of “membership in a social group”, where varieties of otherwise ignored reasons for claiming asylum could be placed, was not elaborated in detail but practically takes into account adult, male, and European experiences of refugees. Finally, by placing persecution in the sphere of the public and political and, therefore, privileging primarily male-types of political persecutions, the Convention limits the recognition of many different kinds of persecution experienced by women.

Although the Protocol Relating to the Status of Refugees in 1967 removed to some extent geographical limitations to the Eurocentric refugee law, the definition regulating what could be considered as persecution, and therefore, a legitimate claim for refugee status, did not change.¹³ Despite the fact that geographical limitations were nominally removed, the definition of the refugee and the scope of recognized persecutions were not expanded in such a way that they would include refugee experiences around the globe. James Hathaway (2000) argues, it is the Euro-centered definitions in the refugee law that prevent full recognition of the needs of Third World asylum seekers, as most of the Third World refugees flee for reasons such as war, ethnic conflicts, and persecution, natural disasters, and others, and as such are excluded from the right to asylum. He argues that it is difficult to claim that this (Eurocentric definition) was done on purpose, in order to exclude the underdeveloped countries’ refugees, but it was more likely an effect of the UNHCR’s “universalistic” ambitions and, accordingly, its universalistic definition for refugees that took precedent in the Protocol 1967 (Hathaway, 2000: 61).

As the definition of the refugee was in many ways a result of the historical conditions stated above, gender, sexuality, and many other possible grounds for persecution specific to women were not included neither in the 1951 Convention, nor in the later documents. The groundbreaking point was the 1985 *Acosta* case, when the U.S. court recognized that sex/gender can be accepted as grounds for persecution within the criteria of “member-

¹³ The Convention states: “Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention”, and “[c]onsidering that it is desirable that equal status should be enjoyed by *all refugees* covered by the definition in the Convention irrespective of the dateline 1st January 1951, (...) the term ‘refugee’ shall (...) mean *any person* within the definition of article 1 of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and...’ and the words ‘...as a result of such events’, in article 1 A (2) were omitted. [...] The present Protocol shall be applied by the States Parties hereto without any geographic limitation [...]” (UNHCR, 2010: 46, the author’s emphasis).

ship in a particular social group". The U.S. appeals court elaborated what the definition of the persecution on account of membership in a particular social group could mean in order to include gender/sex:

[...] persecution on account of membership in a particular social group encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic [...] such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. (Matter of Acosta, 1985)

Until such interpretation did not exist at the national court level, the Convention was deemed to proscribe membership in a particular social group only as class and political group membership, or as the refugee's "past experience such as former military leadership or ownership". Such definition of "a social group" clearly pinpointed refugees fleeing communist persecution of bourgeoisie and landowners or fleeing anti-colonial uprisings against western and local elites. Many feminist scholars and activists have persistently pointed out the gender bias in the legal definition, arguing that "gender" could form a sixth category for grounds of claiming asylum (e.g. Kim, 1993; Schenk, 1994). The male-centered standard in the refugee law excluded a whole range of individual approaches to the protection of refugees that experienced different kinds of persecutions characterized by age, gender, sexuality, cultural, religious, political, physical, mental, and other factors. Consequently, the gender and age inclusive reforms were pushed forward most visibly in the last few decades by women's movements. Women's movements and women's rights conventions influenced slowly but successfully the international human rights law by pointing to the different, gender-specific kinds of torture, persecution, and violence, which makes women's asylum claims sometimes different from their family members.¹⁴ Finally, the UNHCR's Executive Committee issued a conclusion in 1985 that encourages states to take into consideration: "(W)omen asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group'" (UNHCR, 2009: 50). The UNHCR repeatedly called on states to recognize the gender specific persecution that women refugees experience and recommended the special treatment of women, special training for officers, and development of national guidelines for these matters.¹⁵ In 1995, the first national guidelines for the specific

¹⁴ See footnote 2.

¹⁵ In 1990, ExCom recommended that states should provide women asylum officers. In 1991,

needs of women asylum seekers were issued in the U.S., and followed by Australia, Canada, and the Netherlands.¹⁶ The case law in these states has contributed to the recognition of a wide range of persecutory acts that are gender-related, such as sexual violence, domestic violence, punishments, and discrimination for the transgression of social mores, sexual orientation (rarely), FGM (female genital mutilation), and trafficking. International recommendations and guidelines opened up a space for the protection of women who suffer multiple and complex kinds of persecution, which earlier could not have been incorporated in the male-centered definitions.

Although the UNHCR's policies can be seen as a step forward towards acknowledgment of gender differences in refugee protection, the application of these policies at a national level seemed to be more complex. As a consequence, keeping the limited definitions in recognition of Third World refugee claims as a product of historical events and global political dichotomies in which international and U.S. refugee protection was developed, women's claims for asylum in the hands of women's groups advocates seemed to emphasize only gender, while excluding their political opinions, their religious interpretations, material oppression, and in that sense failing to see gender as a part of broader context.

GENDER-BASED ASYLUM CLAIMS: FROM INTERNATIONAL TO NATIONAL PROTECTION

The U.S. court decisions over the past decade, as well as the advocacy around particular cases usually involving women's rights NGOs, have been crucial for the recognition of the claims of women asylum seekers as well as the development of the asylum law towards acknowledging "cultural" violence against women in non-Western countries as a basis for granting

the UNHCR issued Guidelines on the Protection of Refugee Women in which it was recommended that the special needs of women in refugee camps should be recognized. In 1993, ExCom encouraged the development of national guidelines. In 1995, 1996, 1997, and 1999, ExCom again called for the recognition of women's refugee status within the criteria of "a social group" (within the 1951 Convention definition of refugee) and consideration for different gender-related persecutions that they experience (ExCom Conclusion No. 64 (XLI) – 1990; <http://www.unhcr.org/3ae68c441f.html>).

¹⁶ The United States Bureau of Citizenship and Immigration Services (1995); the Department of Immigration and Humanitarian Affairs of Australia, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*, July, 1996; the Immigration and Refugee Board of Canada, *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update*, 13 Nov. 1996; and the Dutch Immigration and Naturalization Service, *Working Instruction No. 148: Women in Asylum Procedures*, subsequently superseded by guidelines in the Aliens Circular 2000.

asylum. The advocates, along with the judges, had to answer some crucial questions: Are women persecuted by their culture, state, or local social groups? To what kind of a “culture” do these cases refer – geographically and discursively? Are all women members of the potentially persecuted group or only the women opposing the dominant treatment imposed upon them? Are these gendered persecutions contextualized with regard to class, place of living, age, ethnicity, and individual political, religious, and other beliefs? In many of these questions, culture and women’s position in it seemed to be central. Some scholars have pointed out that asylum law contains culturalist prejudices that can instrumentalize and even alter the asylum claims, especially in case law (Akram, 2000; Sinha, 2001). Susan Akram (2000) argues this is particularly so if we look into the approach of refugee advocates towards claims of women refugees from Muslim cultures. Muslim refugee persecution stories are often altered to fit the misconceptions of Islam as monolithic, oppressive towards women, and cruel and inhumane in all of its practices. Namely, the asylum claims, rearticulated by judges or refugee advocates in the U.S. and Canadian courts, especially those of Muslim women claimants, have continuously referred to Islamic laws or cultures as the oppressor, instead of, for example, state laws that fail to protect citizens from persecution, or family practices (Akram, 2000: 20).¹⁷ These claims, she argues, formulated by the refugee advocates, silence the real oppression that women undergo by naming the oppressor simply as “Muslim customs” or religion. In the case of *Nada* in 1991 in Canada, a Saudi woman claiming to be persecuted for refusing to wear a veil, the advocates claimed that she was a member of “a particular social group”, a group that according to UNHCR’s gender sensitive recommendations included all Saudi women opposing “Muslim customs” (Akram, 2000: 18). From there, *Nada* was represented by the advocates as somebody denouncing her religion, although that was not the case, since she made a statement herself explaining that she was fleeing from the political oppression of women which, for her, had no religious or cultural roots (Akram, 2000: 26). Although her application could have been formulated as a persecution due to difference in views on state-supported religious law, the choice of her attorneys to formulate her claim in such a way resulted in the representation of her as a group of Saudi women denouncing Islam and Saudi culture. Encouraging the claims for asylum solely on gendered persecution as self-evidently caused by the

¹⁷ The author explains the case of *Bostanipour*, where the court referred to the applicant’s persecution as performed by the Islamic law that forbids the change of religious belief, and not the Iranian state law which actually failed to protect the religious minority.

Islamic, Islamist, or “Muslim culture”, refugee advocates persist on presenting women as denouncing and opposing their culture and religion.

The U.S. courts ruled in favour of an asylum claim based on gender as reason of persecution for the first time in 1996, in the case of *Kassindja*. Kassindja’s case for asylum was based on her opposing to FGM as a form of violence and therefore persecution that took place in her home country of Togo. The U.S. asylum officers and appealing courts based their rulings on the UN 1951/1967 definition of a refugee, the UNHCR guidelines and recommendations, and, finally, on the 1995 U.S. *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*. The recognition of gender as a category in the U.S. courts was also influenced by the advocates lobbying within different spheres of refugee law. The *Kassindja* case was based on a previous court’s recognition of persecution conducted in the private sphere in the *Fatin v. INS* case in 1999 which allowed for the change in the, until then, exclusive public definition of persecution enforced by the state or non-state individuals and groups in the public sphere. In the *Fatin v. INS* case, the U.S. appeals court ruled that Fatin could be considered a member of the “social group of the upper class Iranian women who supported the Shah of Iran, a group of *educated westernized free-thinking* individuals” (*Fatin v. INS*, 1999, the author’s emphasis). It was clear from this ruling that not all women in Iran are eligible for asylum, but nevertheless that gender/sex makes a social group whose members are targeted for persecution. Fatin based her claim on a combination of criteria: political and gender persecution. She was a member of a subgroup – women who *oppose* dominant restrictive gender regulations. The court refused her claim because she did not prove that her political (gendered) beliefs were strong enough to be at risk of persecution, although the court was very sympathetic to women in Iran due to Iran’s harsh and inhumane treatment of females (“the Court is very much sympathetic to the respondent’s desire not to return to Iran, [because] she would be subject to the same discriminatory treatment as all other women in Iran [...]” (*Fatin v. INS*, 1999)). The court refused her political asylum, but declared women could form a social group and with it established a precedent, i.e. expanded the definition of persecution in a way that gender-based violence was included as a persecutory act. The *Kassindja* case was the first case in which asylum was granted to a person fleeing from gender-based violence, namely opposing FGM, which presented a well-founded fear of persecution on the grounds of membership in a social group. With the *Kassindja* case, sex/gender was accepted for the first time as legitimate grounds for granting the host-country’s protection. Kassindja

was found to be a member of the social group of “Togolese young women opposing the practice” (*Matter of Kassindja*, 1996).

At the same time, a variety of other claims of women have been refused.¹⁸ *Fatin’s* case, for instance, was an example of the court’s failure to recognize women’s specific, complex political claims within the asylum law. Women asylum seekers often claimed various and multiple oppressions involving religion (different religious interpretations of gender roles), political opinions (different political opinions on gender roles), and membership in a family (opposing the family gender roles). While during the Cold War, political opposition to communist ideology was considered legitimate grounds for attaining asylum in the U.S., already in the 1990s and 2000s women’s persecution based on different political beliefs (opposing certain patriarchal practices often supported by their states) was not seen as credible. Finally, the successful implementation of international women’s rights policies in some countries finally enabled the gendered aspects of persecution to be recognized, but was this done at the expense of leveling down the complexity of different kinds of gendered and political persecutions that women asylum seekers undergo, binding them to re-formulate their claims in a specific way?

ARE ALL WOMEN VICTIMS OF THEIR CULTURE?

Successful implementation of international and national gender-sensitive guidelines such as the UNHCR guidelines, U.S. guidelines, and a number of cases that established legal tradition put into focus concepts such as “culture” and opened up the question whether culture can be a factor of persecution of (all) women. In that respect, the *Mohammed v. Gonzales* case in 2005, in which an asylum seeker was a young woman claiming protection for returning to Somalia where she would be persecuted based on her gender, is extremely interesting for several reasons: it is the first case in which asylum was granted to a woman on the grounds of culturally-based persecutory practices, namely FGM, although the genital modification/mutilation had already been performed; secondly, in this case, the court ruled that Mohammed may be considered a member of a particular social group, “a group of all women in Somalia”; and thirdly, the court did not address Mohammed as an individual opposing the persecution. Past persecution was found as an eligible claim for asylum as long as the claimant could prove that “an incident [...] rise(s) to the level of persecution; that an incident was

¹⁸ For example, *Gichema v. Gonzales* or *S-A* case (Knief, 2006: 5–6).

on account of one of the statutory-protected grounds; and was committed by the government or the forces that government is either unable or unwilling to control" (*Mohammed v. Gonzales*, 2005). In the decision, the judge expressed a strong conviction that "the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law" (*Mohammed v. Gonzales*, 2005). The decision further notes that the mutilation of women and girls is "a horrifically brutal procedure" often performed without anesthesia that results in long-term physical and psychological consequences (*Mohammed v. Gonzales*, 2005). Since persecution can be physiological and emotional as well as physical, it constitutes a basis for asylum protection even if the persecution act already happened. Additionally, the court referred to a number of country reports by the Immigration and Naturalization Service (RIC reports) and WHO, stating that this practice causes long-term harm, concluding that further or future mutilations are likely to happen (*Mohammed v. Gonzales*, 2005). The court decision further states that FGM is "not an isolated act of violence, but rather a form of gender-based persecution, practiced to overcome sexual characteristics of young women, [...] and to control women's sexuality" (*Mohammed v. Gonzales*, 2005).

[FGM] permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life. (Mohammed v. Gonzales, 2005)

[...] government would have some difficulties in establishing that Mohamed would not be subjected to further violence that is related to her past persecution, given the conditions in Somalia. (Mohammed v. Gonzales, 2005)

The court found that the claimant might be further tortured, e.g. she could be raped, further mutilated, etc. (*Mohammed v. Gonzales*, 2005). The informative reports provided by the RIC and cited in the decision made clear that the subordination and persecution of women in Somalia are not limited to FGM:

Women are subordinated systematically in the country's overwhelming patriarchal culture, and rape is commonly practiced in inter-clan conflicts.¹⁹

In the *Mohammed* case, the court clearly recognized the long-term harm of persecutory acts against women and further concluded that the persecution is embodied in the culture. Somalia's "overwhelming patriarchal culture" was taken as the grounds for the court to conclude that Somali women suffer horrific oppression and persecution. Conditions in Somalia,

¹⁹ The State Department's Country Reports cited in the court's ruling.

a country torn apart by long-lasting local and internationally influenced conflicts, are far from providing individuals or groups with a persecution-free environment, but the particularities of these conditions were not addressed in the text. On the contrary, only the country's "patriarchal culture" was strongly emphasized. Furthermore, Mohammed testified on a series of persecutory acts towards her family and herself. She was denied asylum on those grounds as she was not found credible earlier in the process (*Mohammed v. Gonzales*, 2005). Ignoring other forms of persecution about which Mohammed testified, the Ninth Circuit's judge opened the court's ruling with an extensive description of FGM that was taken from previous court rulings such as the *Kassindja* case. Strong conviction of FGM and its "barbaric nature" was needed so that the judges could explain why Mohammed's application for asylum was now accepted, although FGM was presented as evidence later in the trial:

We note that many courts and the BIA [Board of Immigration Appeals] refer to the practice at issue here as FGM. We see no need for using the initials rather than the full three word phrase. We are short neither of paper nor of ink. The use of initials, if it has any effect, serves only to dull the senses and minimize the barbaric nature of the practice. The further bureaucratization of the language would serve no useful purpose here. (Mohammed v. Gonzales, 2005)

Unlike to the UNHCR and U.S. state guidelines that address the cultures of asylum seekers very scarcely and bureaucratically, the text of the court decision repeatedly refers to monolithic cultural categories addressing with an authoritarian "we" the American public on what is considered to be legally acceptable cultural practice. Further on, in contrast with the *Kassindja* case in which the applicant was found to be a member of the social group of women opposing certain social or cultural practice, the court found Mohammed to be a member of a social group of all the (young) women in Somalia:

In this case, there are at least two ways in which the agency could define the social group to which Mohammed belongs. First, it could determine that she was persecuted because of her membership in the social group of young girls in the Benadiri clan. (Mohammed v. Gonzales, 2005)

Although referring to the *Kassindja* case, the court found it was not necessary that Mohammed be a member in a group that opposed FGM as:

[t]he persecution in this case – the forcible, painful cutting of a female's body parts – is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality. That is, the shared char-

acteristic that motivates the persecution is not opposition, but that the victims are female in a culture that mutilates the genitalia of its females. (Mohammed v. Gonzales, 2005)

Finally, unlike in the Fatin case in which the court ruled opposition is necessary to establish a social group, the court concluded that the asylum could be granted based on membership in a group of all Somali females, since 98% of them have been genitally “mutilated”, establishing precedence in the gender-based asylum case law:

Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law. (Mohammed v. Gonzales, 2005)

Such monolithic definition of a homogeneous social group formed on a “biological” and “inherent” trait without any political stand or agency, against which persecution is conducted systematically, defers significantly from the discourse of the international and U.S. guidelines. The U.S. guidelines themselves recommend that women could be found constituting a social group, as they can experience gender-specific types of persecution or their experiences are often shadowed by male members of the family, but their persecution has never been perceived as persecution based on gender/sex solely. In that sense, the guidelines address issues of recognition of gender specific claims within a variety of types of persecutions, consequently appropriate types of treatment in dealing with victims.

Finally, another particularity that can be traced in this case was the addressing of the persecutor. The court in the *Mohammed* case stated that the persecution was proved to be enforced by the “culture” itself, as the government does not allow nor engages in practicing FGM, and there is no identifiable militia or group of people that are the persecutors. Moreover, in the case of FGM, the same women who are found to be victims of this cultural persecution, i.e. members of the particular social group constituted by all women in Somalia, appear to be the agents of the “persecution” (as FGM is conducted usually by a mother or female member of the family). In such a way, the court disregarded numerous other factors influencing the persecution, among which is the important role of the state and the fact that the state in this instance could be found responsible for allowing for such persecution of young girls or failing to protect its citizens.

THE ROLE OF THE WOMEN'S ORGANIZATIONS AND ADVOCATES

In many of the groundbreaking cases, the advocates and the media play a crucial role. For instance, the court reopened Mohammed's request after ruling that her previous attorney had failed to present evidence that she suffered from FGM in the past (*Mohammed v. Gonzales*, 2005). When she applied for asylum, Mohammed claimed that she had a well-founded fear of persecution on account of her membership in a Benadiri clan. In the civil war, Mohammed said, her family fled Somalia when her brother and father disappeared, when her sister was raped, and when the militia attempted to arrest the rest of her family and clan (*Mohammed v. Gonzales*, 2005). Upon arrival to the U.S. via Ethiopia, she filled a request for asylum that was denied on the grounds of a lack of credibility. After the denial, she hired a new attorney that pleaded for reconsidering the deportation because the claimant feared genital mutilation upon her return. This was the first time FGM was mentioned, and it was obviously done on the advice of the new attorney. The new claim stated that 98% of Somali women are "mutilated", that Mohammed had not yet been genitally mutilated, and that Mohammed's previous attorney failed to raise this evidence due to negligence. Although Mohammed's physician report stated differently, i.e. that Mohammed had been genitally operated on, and although the state attorney argued that the new motion did not prove negligence due to the fact that FGM had not been proved in court practice as a sort of future threat (but only torture in the past), the court ruled in favour of reopening the application, because, as mentioned, FGM obviously presented a past persecution with long lasting consequences. Mohammed stated in her application:

I then hired a new attorney [...] where I learned that my subjection to female genital mutilation constituted past persecution and torture. (Mohammed v. Gonzales, 2005)

In the second motion, Mohammed stated that she had been mutilated in her childhood and submitted the evidence for the previous attorney's negligence, together with the medical report and WHO's reports on women's life conditions in Somalia. Her request was denied again by the asylum officers because of the failure to prove negligence. Finally, the Ninth Circuit judges, at the high court of appeals for asylum claims, accepted her request and eventually her claim. The advocates in this case used both the international and the national legal framework, i. e. UNHCR and U.S. guidelines, in order to find a way for their claimants to gain asylum status, but in doing

so they did not contribute to the overall expansion of the legal recognition for the complex context of women's persecution.

The media coverage of cases like *Kassindja* and *Mohammed v. Gonzales* additionally contributed to this goal. The National Public Radio broadcasted a report (Lewis, 2005) on the *Mohammed* case under the title: "All women in Somalia could be found eligible for asylum in the U.S.". After the *Kassindja* case was celebrated as the milestone of Third World women's asylum claims, together with the advocate Karen Mussalo and the Center for Women and Refugees Studies, the *Mohammed v. Gonzales* case was seen as a sort of a victory in the struggle of women's and asylum seekers' rights NGOs. Local women's human rights activists and legal experts, especially those working with immigrant women and against FGM, contributed to the media campaign, a campaign that was not solely oriented towards the courtrooms, but also towards American immigrant groups. Many local activists fighting against FGM such as Catharine Hogan from the "Washington Metropolitan Alliance against Ritual FGM" commented on the asylum cases, stating that they should:

[...] warn [immigrants] families that we consider this child abuse [...]. It is a form of reverse racism not to protect these girls from barbarous practice that rob them of a lifetime of their God-given right to an intact body (Gruenbaum, 2001: 218).

The discourse in which the authoritarian "we" should warn the new immigrants what "the American culture" considers to be "barbarous" or what is a "God given right" seems to be unfortunately similar to the language of the court decision in the *Mohammed v. Gonzales* case. Finally, as Grewal (1998: 513) points out, quoting the Canadian advocate and activist for women refugees Sherene Razack, women's movement groups clearly embraced a successful strategy of rearticulating asylum claims so that women are "able to present themselves as victims of dysfunctional, unusually patriarchal cultures and states".

This "humanist" and "philanthropist" approach, linguistically voiced in authoritarian "we", opens up several difficulties for the protection of women in asylum law and for the integrity of some women's rights groups that seem to be juggling with local nationalism. Such approach does not critically address the restrictive, classist, male-centered, and culturalist U.S. asylum law in which women who are accepted on basis of their "unusually patriarchal" cultures are waved as a flag of American freedom ideology. Grewal (1998: 517) sees such asylum policy best represented by the imposed meta-

phor of transition from “unfreedom to freedom”, in which the American nation is imagined as the “peak” of human rights development. Secondly, it does not address the complex and disadvantageous position that women asylum seekers are actually living, and the *Mohammed v. Gonzales* case is the best example. Mohammed testified in court on a whole range of disastrous and torturous events that she and her family had gone through, but until her advocates revealed her case as the circumcised Hottentot Venus exhibited to the audience, she was not found “credible”. Her case, although in the end fortunately successful for her, unmasks the conservative U.S. asylum law and implies that there was no real interest to address complex material (as well as discursive) oppression of women in the Third World.

CONCLUSION

In dealing with recent developments in refugee law towards gender-inclusive asylum-seekers’ protection, the author found that the international and global struggle for gender equality and women’s rights had a great influence of the national legal systems, as shown in U.S. case-law. In the court cases that the author analyzed, it was found that the implementation of the international standards for the protection of women asylum seekers was often embedded in different national and hegemonic discourses in which women seeking asylum were presented as symbolic markers of human rights violations in Third World countries. The protection of (women) asylum seekers in these cases was framed primarily by courts but also by the legal and activist representatives of asylum seekers in such a way that reproduced global inequalities by representing the “Third World” women as victims of their culture, instrumentalizing women’s claims for broader political purposes while covering up in many ways the still restrictive and Eurocentric asylum politics towards asylum seekers. By pushing the gender asylum claims to the forefront in the analyzed cases, women’s advocates and activists silenced the actual and often complex political claims women were making, often aimed at the weak and dysfunctional states unable or unwilling to protect its (female) citizens, reformulating multifold oppressions and persecutions to fit legally successful and publically intriguing metrics of gender-asylum claims in which the non-Western and “barbaric” cultures were marked as sole oppressors of (all) of its victimized women.

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Politika rodnog azila u SAD-u: zaštita tražiteljica azila u kontekstu globalnih nejednakosti

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SAŽETAK

U radu se propituju promjene u rodno osjetljivijim interpretacijama izbjegličkog statusa u međunarodnim i nacionalnim zakonima o azilu i politikama u kontekstu suvremenih te povijesnih globalnih odnosa moći. Analiziraju se i jezične promjene u međunarodnim UNHCR-ovim uputama za zaštitu tražiteljica azila, nacionalnim smjernicama SAD-a za procjenu rodno povezanih zahtjeva za azil i u nedavnim sudskim presudama SAD-a koje se tiču rodno povezanih zahtjeva žena. U fokusu analiziranih sudskih slučajeva nalazi se slučaj Mohammed iz 2005. zbog dvojbene sudske odluke i pravnih interpretacija. Smatrajući da je za razumijevanje suvremenog sustava azila i tražiteljica azila presudno to što su zapadne zemlje instrumentalizirale međunarodni sustav zaštite izbjeglica, u argumentaciji se povezuje povijesne uvjete s načinom na koji je zaštita žena izbjeglica iz »kulturno« rodno nasilja artikulirana u politici azila u SAD-u. Autoričin je općeniti zaključak da su međunarodni zakon, vladine organizacije i liberalne nevladine organizacije za ženska ljudska prava oblikovali međunarodnu i nacionalnu pravnu zaštitu (žena) tražitelja azila na način koji u svojem prikazu žena »Trećeg svijeta« i njihovih kultura reproducira globalne nejednakosti, iskorištava tražiteljice azila koje bježe od nasilja za ostvarivanje kulturne superiornosti Zapada te prikriva restriktivnu i rasističku zapadnu politiku azila prema imigrantima i tražiteljima azila.

KLJUČNE RIJEČI: rodno utemeljeni azil, zaštita tražitelja azila, orijentalizam, međunarodni zakon, ženska ljudska prava