

SOME OTHER(ED) ‘REFUGEES’?: WOMEN SEEKING ASYLUM UNDER REFUGEE AND HUMAN RIGHTS LAW*

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Introduction

This chapter explores three issues that arise from a consideration of women’s claims for recognition as refugees under international refugee law (IRL), subsidiary protection and/or protection from *refoulement* under international human rights law (IHRL).

The first issue I consider is women’s access to protection. Whilst it remains the case that men are more likely than women to leave their country of origin and seek protection in Europe, I draw attention to the increasing numbers of women seeking protection, and the gendered impacts that Europe’s ‘re-bordering’² has on those women who are forced to undertake ‘illegalised’³ and, therefore, ever-more dangerous journeys. Having examined

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² Term developed with Professor Costello and Stephanie Motz in discussion.

³ I use this term to draw attention to and problematise the legal processes that render different migration routes either legal/safe or illegal/unsafe, see Harald Bauder, ‘Why We Should Use the Term ‘Illegalized’ Refugee or Immigrant: A Commentary’ (2014) 26(3) *International Journal of Refugee Law* 327.

the ability of both IRL and IHRL to challenge Europe's re-bordering, I argue that jurisprudence on violence against women and sex discrimination should be relied upon to challenge specific instances of re-bordering that impact disproportionately on women.

The second issue I consider is the scope of protection offered to women seeking protection from gender-based violence under IRL and IHRL. Whilst much attention has been (rightly) paid to the positive impact that IHRL has had on IRL, I argue that broad assertions of IHRL's primacy when it comes to affording women protection from violence are overly simplistic. Instead I highlight the value of recourse to a multiplicity of legal sources, particularly the specialist regimes developed to respond to violence and discrimination against women.

I conclude this chapter with a consideration of a recent success: developments in IHRL that seek to improve the way that women's claims for protection are determined. In examining these developments, I ask whether advocacy that focuses (again, rightly) on securing procedural protections for women, when coupled with the attack on women's ability to access asylum, risks contributing to the denuding of the substantive right, the right to seek and enjoy asylum from persecution, by equating it, in effect, to compliance with a set of procedures that comparatively few women are able to benefit from.

Access to Protection

Access to protection depends on being able to access a jurisdiction in which a protection-seeker may be recognised as a refugee, be granted subsidiary protection and/or be protected from *refoulement*. Asylum's 'proximity bias', that it is only available to those who are able to leave their own State and enter one that does provide protection, has meant that women

have found it significantly harder than men to seek, never mind obtain, international protection.⁴ Less than one third of protection-seekers in Europe, for example, are women.⁵ Irregular migration is predominantly undertaken by men, women either remaining in their countries of origin or migrating shorter distances, generally only gaining entry to European jurisdictions when and if family reunion, in one form or another, is possible.⁶

Women are, however, increasingly undertaking travel to Europe to seek protection, a development that has particular gendered consequences when those journeys are illegalised. 45% of first-time asylum applicants in Europe are now women.⁷ Women make up a significant proportion of asylum-seekers from Syria as a substantial number of Syrian families are migrating together, potentially as a result of the further deterioration in conditions there and concern about the adoption by a number of European States of more restrictive family reunion policies.⁸ As Syrians are the largest group currently seeking protection in Europe, this gender balance is significant statistically, as well as, as we shall see, practically and legally.⁹

⁴ Matthew E. Price, *Rethinking Asylum: History, Purpose and Limits* (CUP 2009), 164.

⁵ Between 2008-2015 the highest proportion of women claiming asylum was 28% (in 2008), the lowest 21% (in 2015), Eurostat, 'Asylum and new asylum applicants by citizenship, age and sex, annual aggregated data (rounded)' (*Eurostat*, 2015) <<http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>> accessed 19 March 2015.

⁶ Resettlement and humanitarian admission programmes often privilege women/female-headed households; however, these benefit only very small numbers. For a critique which highlights the instrumentalisation of women's protection needs in this context see Lewis Turner, 'On Encampment and Gendered Vulnerabilities: A Critical Analysis of the UK's Vulnerable Persons Relocation Scheme for Syrian refugees' [2015] 5(2) *Oxford Monitor of Forced Migration* 21.

⁷ Eurostat, *Asylum Statistics* (11 May 2016).

⁸ European Asylum Support Office (EASO), *Quarterly Asylum Report: Quarter 3, 2015* (2015).

⁹ In 2015 the number of first-time asylum applicants in Europe from Syria rose to 363,000, 29% of the total. 14% of applicants are Afghani, 10% Iraqi, 5% Kosovan and Albanian and 4% Pakistani, *ibid*.

Europe has responded to increased migration flows with a ‘re-bordering’ that is both legal and physical. I am using the term ‘re-bordering’ to denote the response adopted by the EU and some, but not all, European states from 2015 to those seeking protection here.¹⁰ Of course, border control (rather than simply management) and the use by States of deterrence policies (with varying degrees of ‘success’) are not recent phenomena and the re-borderings described here need to be considered within this broader context.¹¹ What is apparent is the extension and intensification of these policies, with deadly effect, from 2015.¹²

Legal re-bordering involves the removal of lawful migration opportunities in combination with the strengthening and deepening of the territorial border through enhanced immigration controls. It is not just that legal migration routes are curtailed, but that this curtailment occurs in direct and inverse proportion to the need for them.¹³ Denied lawful entry, those seeking protection face a strengthening of the border outside Europe through the use of carrier sanctions, juxtaposed immigration controls and the increasing

¹⁰ The terms ‘refugee crisis’ or ‘migration crisis’ are avoided here as it is not the arrival of protection-seekers, even in significant numbers, that is productive of ‘crisis’ but the response, or lack thereof, of the EU and some its members to them.

¹¹ Deterrence policies adopted by European States in the 1990s did reduce ‘in-flows’; their effects, however, were relatively small compared with other migration determinants, Mathias Czaika and Hein De Haas, ‘The Effectiveness of Immigration Policies’ (2013) 39(3) *Population and Development Review* 487, 503.

¹² The closure of the Balkan route started on 17th Nov 2015 as Slovenia stopped allowing protection-seekers from countries such as Iran, Eritrea and Somalia to cross its border. The next day similar restrictions were imposed by Macedonia, Serbia and Croatia. Further restrictions followed in these and other countries and by 9th March 2016 the route was completely closed with Macedonia’s border closure.

¹³ The number of Schengen visas given to Syrian nationals before and during the conflict demonstrates this; the total number granted dropping from over 30,000 in 2010 to almost none in 2013, EU Agency for Fundamental Rights (FRA), *Legal Entry Channels to the EU For Persons In Need of International Protection: A Toolbox* (FRA Focus, February 2015). The increasingly restrictive policies adopted by some European states to family reunion is a further example.

use of security arrangements that radiate south into North Africa.¹⁴ Also apparent is the use of an increasing array of criminal penalties against those who assist protection-seekers to gain entry to a particular jurisdiction, as well as the increasing deployment of the criminal law and the coercive power of the State (for example, through detention followed by deportation under the EU-Turkey deal) against those who actually manage to gain entry. The border is also deepened, reaching within States as migration status becomes determinative of an ever increasing array of social rights.¹⁵

Examples of physical re-bordering at Europe's external borders include naval blockades, interception at sea and push-backs as well as the militarisation of land borders (for example at the Moroccan-Spanish borders at Ceuta and Melilla and on the border between Turkey-Bulgaria and Turkey-Greece).¹⁶ Borders between European States have also been militarised, as the British border in Calais and the Hungarian and Slovenian border walls/fences illustrate. Movement within Europe has also been curtailed by the reintroduction of border controls between a number of Schengen states.¹⁷

The effect of this re-bordering on those seeking asylum is considerable, and indeed, lethal. The different facets of legal and physical re-bordering described have been shown to increase the number and proportion of attempts to enter territory unlawfully and in ever

¹⁴ For a detailed examination of the latter see Ruben Andersson, *Illegality, inc.: Clandestine Migration and the Business of Bordering Europe* (Oakland, CA: University of California Press 2014).

¹⁵ Including in the UK, the ability to hold or renew a driving licence or rent private accommodation, Immigration Act 2016.

¹⁶ Repeated allegations of the use of lethal force have accompanied this militarisation, Human Rights Watch, *Bulgaria: Pushbacks, Abuse at Borders* (20 Jan 2016) and <http://bulgaria.bordermonitoring.eu>.

¹⁷ For a detailed discussion of these phenomena and their implications see Cathryn Costello and Minos Mouzourakis, 'The CEAS – Where did it all go wrong?' in Maria Fletcher, Ester Herlin Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017).

more dangerous ways, thus increasing the numbers of those seeking protection dying as a result.¹⁸ Whilst a consideration of gender has been noticeably absent from debates on Europe's re-bordering, the increasing numbers of women seeking protection makes engaging in such an analysis legally and politically necessary. The question that arises, therefore, is how do women experience Europe's re-bordering and the illegalised journeys they are compelled to undertake as a consequence?

A cursory analysis of the available evidence reveals that at every stage of the journey from country of origin to country of destination/protection, women are at particular and heightened risk of experiencing violence, including fatal violence. Externalised border controls have been implicated in the gender-based violence experienced by women in transit.¹⁹ Whilst men face a higher risk of death at internal border sites (such as in detention) a greater proportion of women than men die at frontiers.²⁰ Drowning is the leading cause of border-related death and women are more likely than men to drown/die at sea.²¹ Being pregnant is particularly associated with drowning and with dying at a frontier.²² Women die, Sharon Pickering and Brandy Cochrane conclude, as a result of border control practices, in combination with the gendered practices of both smugglers/traffickers and

¹⁸ Mathias Czaika and Mogens Hobolth, 'Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?' (2016) 17(3) *European Union Politics* 345 (which showed that a 10% increase in short-stay visa rejections leads to a 4% to 7% increase in irregular border entries) and Thomas Spijkerboer, 'Moving Migrants, States, and Rights Human Rights and Border Deaths' (2013) 7(2) *The Law & Ethics of Human Rights* 213. See also www.borderdeaths.org, <http://unitedagainstrefugeedeaths.eu> and <http://fortresseurope.blogspot.co.uk>.

¹⁹ A. Gerard and S. Pickering, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' 27(3) *Journal of Refugee Studies* 338, 348-9.

²⁰ Sharon Pickering and Brandy Cochrane, 'Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders' (2013) 17(1) *Theoretical Criminology* 27, 39 and 44.

²¹ *ibid* 37.

²² *ibid* 33 and 39.

families/communities.²³ Once within Europe, women remain subject to violence and particular gendered forms of it, as re-bordering has been linked with increases in the numbers of women and children being trafficked into and within Europe, primarily for sexual exploitation.²⁴ The increased use of detention in Greece following the EU-Turkey deal, a general lack of appropriate reception facilities and failures in, or the withdrawal of, financial support for protection-seekers have also been identified as increasing women's insecurity and risk of experiencing violence.²⁵

Europe's re-bordering has clear, adverse consequences for all those seeking to access protection. For women, however, these consequences include an increased risk of experiencing gender-based violence, both within and without Europe, and an increased risk of dying at a frontier. To draw on Pickering and Cochrane's research, it matters where, how and why women experience violence or die because the site of violence or death determines the legal response to it, as the Committee that oversees the Convention on the Elimination of Discrimination Against Women (CEDAW)²⁶ has recognised:

... the experiences of women during displacement, from asylum to integration, return or settlement in a third country, in addition to those of stateless women, are shaped by the action or inaction of various actors. States' parties bear the primary responsibility for ensuring that asylum-seeking women, refugee women, women nationality applicants and stateless women within their territory or under their effective control or jurisdiction, even if not situated within their territory, are not exposed to violations of

²³ *ibid*, 28 and 45.

²⁴ European Commission, *Report On The Progress Made in the Fight Against Trafficking in Human Beings* (Brussels, COM(2016) 267 final, 19 May 2016) and Sylvia Walby and others, *Study on the Gender Dimension of Trafficking in Human Beings* (Migration and Home Affairs, European Commission, 2016).

²⁵ Women's Refugee Commission, *EU-Turkey Agreement Failing Refugee Women and Girls* (August 2016) and Jane Freedman, 'Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean 'Crisis'' (2016) [29(4)] *Journal of Refugee Studies* 568.

²⁶ Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) UNTS 1249 13 (CEDAW).

their rights under the Convention, including when such violations are committed by private persons and non-State actors.²⁷

One limitation on both IRL and IHRL's ability to counter Europe's re-bordering is, therefore, that many of the facets of it described here occur as a consequence of State action, but outside the territory or effective control of the relevant State. Such acts also do not always involve the direct exercise of public powers. Consequently, whilst the Committee Against Torture has found migrants in a transit country to be within the jurisdiction of the European State which had intercepted and detained them,²⁸ much of the violence that women experience in transit which can be causally linked with the re-bordering practice of a particular European State (gender-based violence experienced in an Italian funded Libyan detention centre, for example) has not occurred within the jurisdiction of that European State.²⁹ European States *may* be liable for such acts under IHRL where, as Thomas Gammeltoft-Hansen and James Hathaway argue (also using the example of Italian-Libyan cooperation), such acts can be characterised as aiding or assisting in the commission of an internationally wrongful act.³⁰ A violation of the right to life or the failure to act with due diligence to protect women from violence are both

²⁷ General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women CEDAW/C/GC/32) (14 Nov 2014), para 7.

²⁸ *JHA v Spain* UN Committee Against Torture, CAT/C/41/D/323/2007, 21 Nov 2008. In *Xhavara and Fifteen Others v Italy and Albania* App no 39473/98 (ECtHR, 11 Jan 2001) jurisdiction was found in relation to an extra-territorial act which had extra-territorial effects.

²⁹ Example taken from Gerard and Pickering (n19) 348-9. Italian-Libyan collaboration on migration can be traced to a 2008 'Friendship Pact' which involved the payment of \$5 billion to Libya, Andersson (n14) 14.

³⁰ Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(1) *Columbia journal of transnational law* 235, 276-282.

internationally wrongful acts.³¹ However, as Gammeltoft-Hansen and Hathaway conclude, the content of the duty not to aid or abet another State to breach international law is not yet fully developed in IHRL.³² Consequently, whilst the deaths of men in detention centres may be investigated and those responsible held accountable, there are no such responses to the violence, even fatal violence, that women experience in transit countries or, in some cases, at frontiers.

Jurisdiction is not the only factor which limits IRL or IHRL's ability to challenge Europe's re-bordering. The ability of States to deny access to their jurisdiction, even to refugees (refugee status being declaratory, not constitutive) arises because the 1951 Convention on the Status of Refugees (the CSR) does not require States to admit protection-seekers, although it does prevent States from penalising those who do gain entry.³³ Whilst border walls, border closures and the interception and return of migrant vessels at sea have been identified as giving rise to *refoulement*, the modality of IRL (as a system of law which in practice has no international body charged with its enforcement) means that relying on its prohibition of *refoulement*, or provision on non-penalisation, is challenging.³⁴ The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) may be of assistance

³¹ Art 2 ECHR and *Velasquez Rodriguez v Honduras* Series C no 4, (IACtHR, 29 July 1988). See also Rashida Manjoo, 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' (2013) 2(2) *International Human Rights Law Review* 240.

³² Gammeltoft-Hansen and Hathaway (n30) 282.

³³ Convention Relating to the Status of Refugees (Geneva, 22 April 1954) UNTS 189 137 (CSR), Art 31.

³⁴ See, for example, the CJEU's unprincipled decision in C-481/13 *Qurbani* ECLI:EU:C:2014:2101 [2014].

here; it does have a supervisory body and mechanism.³⁵ The Istanbul Convention's protection from *refoulement* (which is based on the CSR and Art 3 of the European Convention on Human Rights (the ECHR)³⁶) includes 'not prohibiting access to the territory of a country to asylum-seekers who have arrived at its borders or who are prevented to access its borders.'³⁷ Protection from *refoulement* under both the CSR and Istanbul Convention may, therefore, be of assistance in challenging some of the instances of physical re-bordering described above.

Whilst domestic human rights protections in some jurisdictions have been relied on to contest particular deterrence policies, the ability of IHRL to do so has, so far, proven limited.³⁸ Although there are international supervisory bodies charged with the monitoring and enforcement of human rights treaties, its exclusionary premise and deference to the 'rights' of States to exercise immigration control makes relying on IHRL to secure the rights of protection-seekers challenging.³⁹ The European Court of Human Rights (the ECtHR) has for example, repeatedly reiterated that:

States have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and

³⁵ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul, 11th Oct 2011) CETS 210 (Istanbul Convention).

³⁶ European Convention on Human Rights and Fundamental Freedoms (4 November 1950) ETS 5 (ECHR).

³⁷ Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against women and Domestic Violence (CETS No. 210)* (2011), commentary to Art 61.

³⁸ *R v Appulonappa* 2015 SCC 59, [2015] 3 SCR 754, a Canadian case, involved a successful challenge to smuggling offences deemed over-broad and unconstitutional because they criminalised 'humanitarian' acts.

³⁹ It is accepted in IHRL that States can deny access to their territory. Whilst Art 13 of the Universal Declaration of Human Rights recognises a right of residence and movement within a State, as well as the right to leave it, no corresponding right of entry into another country exists. In Art 14, the 'right to seek and to enjoy in other countries asylum from persecution' is not met with a corresponding duty to receive such 'right-holders'.

expulsion of aliens, and that the Convention does not guarantee, as such, any right to enter, reside or remain in a State of which one is not a national.⁴⁰

What limited jurisprudence there is on border walls/fences similarly indicates IHRL's acceptance of the premise that these physical manifestations of re-bordering are legitimate; they just cannot be (too) violent or used to annex territory.⁴¹ The ECHR, has of course, been relied on to challenge both *refoulement* and collective expulsions as occurred in the notable case of *Hirsi Jamaa and Others* [2012]; women applicants are, however, conspicuously absent or underrepresented in these cases.⁴²

Whilst this brief analysis has not considered who might have the standing to bring legal challenges or issues relating to shared responsibility (whether between States or where the re-bordering practice stems from the EU) it has shown that IRL and IHRL may be relied on to challenge some of the re-bordering practices described above, specifically those that constitute *refoulement* or which involve the exercise of jurisdiction.⁴³ However, some instances of re-bordering appear to remain immune to challenge (legally and/or practically) even where they contribute to women's deaths or experiences of gender-based violence. In the final part of this section, I consider two cases which may be relied upon to

⁴⁰ *Bonger v The Netherlands*, App no 10154/04 (ECtHR, 15 Sept 2005), first set out in *Abdulaziz, Cabales and Balkandali v UK* App nos 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985), paras 66-9.

⁴¹ *Streletz, Kessler and Krenz v Germany and K.H.W. v Germany* App nos 34044/96, 35532/97 and 44801/98 (ECtHR GC, 22 March 2001) and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (ICJ, 9 July 2004).

⁴² *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR GC, 23 Feb 2012).

⁴³ Per Gammeltoft-Hansen and Hathaway (n30) understood as arising extra-territorially where a State has effective control or is, under certain circumstances, exercising public powers.

challenge particular re-borderings that adversely impact on women: *Opuz v Turkey* (2009) and *Rantsev v Cyprus and Russia* (2010).⁴⁴.

The applicant in *Opuz* brought a case complaining that her rights had been breached by Turkey's repeated failure to protect her and her mother from domestic violence perpetrated by her husband/ex-husband; violence that in the applicant's mother's case proved fatal. In a landmark ruling the ECtHR made a number of conclusions about domestic violence and discrimination against women. Drawing on its own jurisprudence and CEDAW the Court found that domestic violence, as a form of violence against women, constituted discrimination against women. The failure to investigate and adequately protect women from such discriminatory violence breached their right to the equal protection of the law, even though the relevant laws appeared to be gender-neutral. It was irrelevant whether or not that failure was intentional.⁴⁵ Significantly, the failure to protect women from domestic violence and accord them equal protection under the law was attributed to the criminal justice system in Turkey as a whole.⁴⁶ The Court consequently found breaches of Arts 2 and 3 ECHR, in conjunction with Art 14.

The second case I draw on concerned Oxana Rantseva, a 21-year-old woman from Russia who died within two weeks of arriving in Cyprus. Ms Rantseva was in Cyprus on an 'artiste' visa, a visa that existed to facilitate the movement of women into Cyprus for the purposes of sexual exploitation. Holders of artiste visas were subject to a number of rights-restrictions and placed in a relationship of forced dependency on their employer.⁴⁷

⁴⁴ *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 Jan 2010).

⁴⁵ *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009), paras 184-191 and 200.

⁴⁶ *ibid*, 192-202.

⁴⁷ *Rantsev v Cyprus and Russia* (n44) 291-3.

In Ms Rantseva's case these restrictions resulted in her being returned by the police, just hours before she died, to an 'employer' she had sought to leave. The ECtHR held that the artiste visa regime violated the positive obligations of Art 4 ECHR by not affording their holders sufficient protection against trafficking.⁴⁸ Whilst the Court stopped well short of requiring States to enable or facilitate migration that is safe and lawful, the judgement affirms that those routes that States do choose to provide must afford migrants practical and effective protection from trafficking, or, one may surmise, other conduct that violates an individual's Convention rights, such as the right to be free from inhuman and degrading treatment and the right to life.

The steps the Court has taken in *Opuz* and *Rantsev* to expound upon the obligations on States not to discriminate against women (directly or indirectly, intentionally or otherwise) and to protect women from violence that results from both State action and inaction can be drawn upon to challenge legal re-bordering practices which impact disproportionately on women, even where these impacts are experienced outside of the relevant State's territory.⁴⁹ The adoption of a more restrictive family reunion policy could, for example, be argued to discriminate against women because women continue to make up the majority of family reunion beneficiaries. Other legal re-borderings, such as a reduction in the number of Schengen visas granted or the imposition of carrier sanctions, may impact on women and men, but women may be more likely than men to be trafficked or experience other forms of violence as a consequence. The question that arises in relation to a particular re-bordering practice is, therefore, whether or not it breaches the positive

⁴⁸ *ibid*, 292-3.

⁴⁹ States can be held responsible for the effects of immigration controls which are experienced outside of their territory, *X and Y v Switzerland* (1977) 9 DR 57.

obligations in the right to life and the prohibitions on inhuman and degrading treatment, slavery and servitude, in conjunction with the negative obligation not to unlawfully discriminate. A full consideration of the nature and scope of the legal obligations owed by States to women outside their territory is beyond the scope of this chapter.⁵⁰ However, following *Opuz* and *Rantsev* such obligations include ensuring that the migration routes States do provide do not discriminate against women or expose women to the risk of harm, including trafficking, violence or death. States also have an obligation to investigate and respond to violence, including that which is fatal and gender-based.⁵¹ Women have the right to be protected from gender-based violence. Particular immigration rules or practices, as well as, potentially, immigration law as whole, may be impugned if it is unable to offer women protection from such violence.

Of course, in engaging in such hypothesising, I am presuming, with foundation, that the connections drawn above between, for example, a decrease in legal migration routes and an increase in women undertaking dangerous journeys could be made sufficiently to satisfy a court.⁵² Being able to draw on the Court's jurisprudence on discrimination is crucial here: the ECtHR does not have procedural rules which limit the admissibility of evidence that may demonstrate the differential impact of a particular rule or practice on women and men; nor is there any restrictive formula which states how such evidence should be assessed.⁵³ Applicants can draw on a range of different sources to show

⁵⁰ See *Spijkerboer* (n18) for a general account in relation to the right to life.

⁵¹ In *Xhavara and Fifteen Others v Italy and Albania* (n28) the duty to investigate was found to apply extra-territorially.

⁵² *Spijkerboer* (n18) establishes a link between re-bordering practices and the increasing numbers of deaths of protection-seekers.

⁵³ *DH and others v Czech Republic* App no 57325/00 (ECtHR GC, 13 November 2007).

disparate treatment and, when they have done so, the onus is on the State to justify that treatment.⁵⁴ Justifications for differential treatment are evaluated by reference to relevant international standards.⁵⁵ CEDAW General Recommendations, as well as other specialist sources, can be drawn upon to demonstrate that particular forms of violence, such as domestic violence or trafficking, are indeed gender-related and that particular rules/practices, such as apparently gender-neutral immigration rules, are discriminatory.⁵⁶

This section has argued that Europe is re-bordering and this has particular and under-examined consequences for women seeking to access protection. Whilst some instances of physical re-bordering can and have been successfully challenged, I have demonstrated that legal measures, which restrict lawful migration, are as implicated in re-bordering as a phenomenon as those which constitute *refoulement*, and have argued that the ECtHR's jurisprudence on violence and discrimination against women can be drawn on to challenge these. The use of IHRL to vindicate the rights of protection-seekers should not be limited to challenging those re-borderings which are physical. If law can be used to create and sustain conditions which result in women undertaking unsafe journeys, it should also be capable of challenging them.

Scope of Protection

As the previous section has shown, IHRL and IRL interact with each other in a number of different ways and at a number of different levels. Human rights instruments are used to

⁵⁴ *Opuz v Turkey* (n45).

⁵⁵ *Biao v Denmark* App no 38590/10 (ECtHR GC, 24 May 2016).

⁵⁶ General Recommendation 19 Violence Against Women (11th session, 1992) and CEDAW's GR 32.

define ‘persecution’ in the CSR, elaborate on the CSR grounds and inform a consideration of whether or not a State is able to offer a ‘sufficiency of protection’ to its citizens. This section considers the relationship between IHRL and IRL in relation to women’s claims for protection from gender-based violence.

Whilst refugee law has been interpreted ‘properly’ to enable women fleeing domestic violence to obtain refugee status, the way in which such cases have been decided has been, in some instances, troubling.⁵⁷ In *Shah and Islam* (1999)⁵⁸ and *Khawar* (2002),⁵⁹ for example, domestic violence is essentially seen as a private matter, the nexus between such violence and a CSR ground not lying in the violence itself, but the failure of the relevant States to offer protection from it. This is problematic because, as discussed in the preceding section, domestic violence is discrimination against women. The nexus between domestic violence and a convention ground lies, therefore, in both the discriminatory/persecutory nature of the violence itself and the failure of the State to offer women protection from it. Similarly, in *Kasinga* it is *resistance* to FGM that is held to create the relevant particular social group (PSG), not fearing or undergoing FGM itself, FGM being another form of violence and discrimination against women.⁶⁰

IHRL has, therefore, been looked to to both improve IRL’s response to violence against women and to offer subsidiary protection to women at risk of it. Debora Anker, for

⁵⁷ UNHCR, *Guidelines on International Protection No 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (HCR/GIP/02/01, 7 May 2002).

⁵⁸ *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex parte Shah* [1999] UKHL 20.

⁵⁹ *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14.

⁶⁰ *In re Fauziya Kasinga* 3278, US Board of Immigration Appeals, 13 June 1996.

example, has argued that the interpretation of refugee law should be grounded within a human rights paradigm for women's benefit.⁶¹ Catherine Dauvergne and Jenni Millbank have similarly argued that one of the problems with refugee law is its persistent failure to 'fully embrace human rights norms, especially as they relate to gender and sexuality'.⁶²

There are a number of shortcomings to this analysis that I want to highlight. The first is that whilst some refugee cases have treated violence against women that occurs in the private sphere as not in and of itself giving rise to a claim for protection, this is not uniformly the case. In *Olimpia Lazo-Majano v INS* (1987) (a US case on domestic violence) and *Refugee Appeal No 76044* (2008) (a New Zealand case on domestic violence and so-called 'honour' killings) the private sphere harms experienced/risked were found to be persecution on the grounds of political opinion.⁶³ In *Fornah* (2006) (a UK case on FGM) and *Refugee Appeal No 71427* (2000) (another New Zealand case on domestic violence) the persecution the applicant experienced/risked was found to be because she was a woman from Sierra Leone, or in the latter case, simply a woman.⁶⁴

IHRL is also not immune to the criticisms that Dauvergne and Millbank level at IRL, as a consideration of the ECtHR's jurisprudence on forced marriage, Dauvergne and Millbank's concern, illustrates. *AA and Others v Sweden* [2012] concerned a Yemeni

⁶¹ Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133.

⁶² Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73(1) *Modern Law Review* 57, 85.

⁶³ *Olimpia Lazo-Majano v INS* No 85-7384, USCA 9th Circuit, 2 April 1987 and *Refugee Appeal No 76044* (RSAA, 11 Sep 2008).

⁶⁴ *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 All ER 671 and *Refugee Appeal No 71427* (RSAA, 16 Aug 2000). See also Michelle Foster, 'Why We Are Not There Yet: The Particular Challenge of "Particular Social Group"' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law, From the Margins to the Centre* (Routledge 2014).

woman and her six children who had fled violence perpetrated by AA's husband.⁶⁵ AA had been forced into the marriage. AA's husband had subjected his eldest daughter to a forced marriage and planned the same for his younger daughters. AA had tried and failed to obtain a divorce; she and her family subsequently fled to Sweden where they claimed and were refused asylum. The ECtHR held that the applicants' deportation to Yemen would not breach Art 3. This decision was based on a combination of disbelief of the applicants themselves and belief in the availability of alternative protection via male family members.⁶⁶ Surprisingly the Court also found that the risk of forced marriage to a child did not reach the required threshold to breach Art 3.⁶⁷ The Court's judgement is, as Thomas Spijkerboer observes, shameful:

The Court takes as given, and thereby reproduces the assumption that seems to be dominant in Yemenite family relations that women need a male relative (father, husband, brother, son) in order to be protected against violence of other men. The judgement assumes and thereby reproduces the social system of female dependency on male relatives, of which forced marriage forms a part. Article 3 ECHR apparently does not protect women against patriarchy even in its most violent form. It requires women to play by its rules – try to pay back the dowry, try to identify nicer men to protect you and hope that alternative dependency will not turn violent as well.⁶⁸

This approach is similar to that adopted by the ECtHR in two other cases: *F v UK* (2004)⁶⁹ and *Z and T v UK* (2006).⁷⁰ *F v UK* concerned the criminalisation of consensual same-sex sexual activity; in that case the Court found that such laws breached the applicant's Art 8

⁶⁵ *AA and others v Sweden* App no 14499/09 (ECtHR, 28 June 2012).

⁶⁶ *ibid*, paras 77-94.

⁶⁷ *ibid*, 93.

⁶⁸ Thomas Spijkerboer, 'European Sexual Nationalism: Refugee Law After the Gender & Sexuality Critiques' (Nordic Asylum Seminar, University of Uppsala, 8 May 2015), 4.

⁶⁹ *F v UK* App no 17341/03 (ECtHR, 22 June 2004).

⁷⁰ *Z and T v UK* App no 27034/05 (ECtHR, 28 Feb 2006).

right to a private and family life but that the gravity of this breach was not sufficient to prevent removal. Similarly, in *Z and T v UK*, which concerned the ability of Christians in Pakistan to manifest their religious beliefs, the Court held that Art 9 was engaged but could not be relied on to prevent removal. *AA* was based on Art 3;⁷¹ *F v UK* and *Z and T v UK* concerned ‘flagrant breaches’ of Arts 8 and 9 ECHR. Whilst deportation is prohibited if there are substantial grounds for believing that, if returned, an applicant would face a real risk of experiencing any treatment contrary to Arts 2 or 3 ECHR, deportation is only precluded if an applicant faces a ‘flagrant breach’ of the other rights protected by the Convention. What is similar about these cases is, however, the Spikerboer ‘play the game’ point. The applicants are all held to be able to avoid discriminatory/persecutory treatment by conforming with the very structures that oppress them: to go to their male relatives for protection from other men; to hide their sexual orientation or religious beliefs.⁷² In contrast, in *HJ Iran* (2011)⁷³ and *Y and Z* (2012)⁷⁴, IRL has clearly and comprehensively vindicated the rights of those who do not want to collude with a persecutory system in order to avoid persecution.⁷⁵

Discussion about the role that IHRL has in relation to defining persecution often rests on a prior assumption: that persecution can only be determined by reference to

⁷¹ Potentially because in *N v Sweden* App no 23505/09 (ECtHR, 20 Oct 2010) an inability to divorce was held to breach Art 3.

⁷² This may also explain *EM (Lebanon) v Secretary of State For The Home Department* [2008] UKHL 64, [2009] 1 All ER 559 which concerned a ‘flagrant breach’ of Art 8 ECHR. Here there was simply no way in which the successful applicant, a woman who was to be separated from her child by Lebanese family law, could ‘play the game’.

⁷³ *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

⁷⁴ *Joined Cases C 71/11 and C 99/11 Bundesrepublik Deutschland v Y and Z* ECLI:EU:C:2012:518 [2012].

⁷⁵ *HJ (Iran) v Secretary of State for the Home Department* (n74).

(certain, often limited) human rights standards. Cases like *Refugee Appeal No 76044* and *HJ Iran* demonstrate that this is not the case and that there is enormous potential for women's different experiences of violence, patriarchy and subordination to be recognised as persecution in and of themselves. Breaches of human rights norms may be *illustrative* of that conduct which is persecutory, but they are not and should not be thought to be determinative of it. The question that arises is, therefore, how this illustration might be improved. As the preceding section's discussion of *Opuz* indicates, both human rights and IRL would benefit from an engagement with the instruments developed to respond to violence against women and discrimination. Articles 60 and 61 of the Istanbul Convention are specifically concerned with women's protection claims. States are required to

take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.⁷⁶

Art 60(2) turns to the CSR grounds themselves and requires States to ensure that they are interpreted gender-sensitively, something that may assist in 'shifting' women's claims from PSG to the other CSR grounds, where relevant. What is significant about these provisions is that while they do not purport to develop IRL, they require States to be actively involved in ensuring that women's claims for asylum are treated 'properly', rather than simply leaving these issues to decision-makers to determine. CEDAW's General Recommendation 32 also speaks to both IHRL and IRL on issues pertaining to asylum and non-refoulement.⁷⁷ The recommendation is useful in a number of respects, including

⁷⁶ Istanbul Convention (n**Error! Bookmark not defined.**), Art 60(1).

⁷⁷ CEDAW's GR 32 (n27).

acknowledging that women's persecution may arise through the accumulation of different forms of discrimination, recognising the continuum of violence against women.⁷⁸ The recommendation rejects the lens of 'male experience' through which women's claims for protection are often viewed. It encourages States to add sex/gender as a 'ground' in their national law (for the benefit of women and LGBTI applicants) in addition to requiring States to take proactive measures to ensure a gender-sensitive interpretation of the all the CSR grounds.

In this section I have explored IRL and IHRL's response to women's claims for protection from violence. In doing so I have argued that assertions of IHRL's primacy, when it comes to affording women protection from violence, fail to capture both the complexity of the relationship between it and IRL and the weaknesses of the former in relation to such violence.⁷⁹ Rather than positing a hierarchical relationship between these bodies of law, I have highlighted the value of reference to a multiplicity of sources and particularly the importance to both IRL and IHRL of recourse to the specialist regimes developed to respond to violence and discrimination against women.

The proceduralisation of a substantive right?

IHRL has been used to speak to the CSR's silence on status determination, providing important procedural safeguards and guarantees.⁸⁰ Both the Istanbul Convention and to a

⁷⁸ *ibid* para 7; see also Ulrike Krause, 'A Continuum of Violence? Linking Sexual and Gender-based Violence during Conflict, Flight, and Encampment' (2015) 34(4) *Refugee Survey Quarterly* 1.

⁷⁹ See Heaven Crawley, '[En]gendering International Refugee Protection: Are We There Yet?' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refuge Definition* (Boston: Brill Nijhoff 2016) on these points.

⁸⁰ David James Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' 34(1) *Refugee Survey Quarterly* 79

greater extent, CEDAW's General Recommendation 32 continue in this vein, the latter detailing circumstances in which States should provide legal information and advice, childcare for interviews, access to female interviewers and interpreters and a host of other important protections.⁸¹

It is, of course, vital that procedures designed to ascertain who does, and does not, require protection are gender-sensitive. A woman will not disclose an experience of sexual violence, for example, if she is not given the proper opportunity to do so (without her children being present, following the receipt of legal advice/information, in an appropriate environment and to a female interviewer through a female interpreter).⁸² Whilst developments that improve status determination are, therefore, to be welcomed, I want to end this chapter by sounding a note of caution and asking whether or not a focus on such procedures risks reducing the substantive right to seek and enjoy asylum to a set of procedures that, given the re-bordering described earlier, fewer and fewer women are able to avail themselves of. The question of whether or not a State is upholding their protection obligations cannot be equated with, or ascertained by reference to, whether or not it has a particular set of procedures in place. This question can only be answered through a consideration of whether or not protection-seekers can access the jurisdiction in question, are accorded procedural protections during status determination and, where required, are recognised as refugees, granted subsidiary protection and/or protected from *refoulement*. Process is not the same as outcome. Positive developments in status determination

⁸¹ CEDAW's GR 32 (n27) paras 42-50.

⁸² H Baillot, S Cowan and V. E Munro, 'Hearing the Right Gaps': Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21(3) *Social & Legal Studies* 269.

processes need to be secured alongside the ability of women to actually access and benefit from them.

Conclusion

The relationship between refugee and human rights law is highly contested.⁸³ In this chapter I have engaged with these debates through a consideration of three issues that arise in relation to women's claims for protection under IRL and IHRL. In doing so I have sought to highlight two recent additions to the panoply of IHRL which have the potential to improve both systems: the Istanbul Convention and CEDAW's General Recommendation 32. Overall, I have argued that whilst the process of 'adding in gender' to both IRL and IHRL has indeed been 'transformative'⁸⁴, a consideration of each system's response to the three elements of women's claims considered here - access, scope and status determination - reveals that this transformation remains far from complete.

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⁸³ Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford: OUP 2014) and, in response Cathryn Costello, 'The Search for the Outer Edges of Non-refoulement in Europe: Exceptionality and Flagrant Breaches' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition* (Boston: Brill Nijoff 2016).

⁸⁴ Siobhán Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 175.

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