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Women in the International Asylum régime- equality guaranteed?

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Dear colleagues, ladies and gentlemen,

I would like to express my thanks to EWLA for the opportunity to address the Conference on a topical and timely issue on the materialisation of equality and mainstreaming women into the contemporary asylum régime. I have been generously provided with the EWLA's Draft Working Paper on European Immigration, Asylum and Refugee Legislation and Gender Mainstreaming, February/March 2003 as a context to my presentation. This has been a pleasant and fruitful standpoint as the issues currently discussed within refugee law vis-a-vis women touches and, indeed, materialises several issues covered by the EWLA's Draft Paper. I would like to highlight the situation of women in the context of refugee law and then bring the discussion into the framework of the Draft paper by discussing what has been achieved within the refugee law in order to implement the guidelines on mainstreaming women into the refugee régime.

Women in the international refugee law

Protecting women effectively has been an issue of lively debate within the refugee law during the past decade. The discussions have been initiated not only by reasons of principle but also by practical need- the vast majority of the world's refugee population are women and children. There has, on one hand, been a need to clarify and sharpen the legal doctrine on women as refugees and the interpretation of the international agreements and, on the other hand, effectively offer protection to the millions of women suffering from persecution and internal conflicts.

The dominant legal doctrine of the refugee law has had a tendency to exclude women's particular needs, interests and life experience as women. The legal definition of a refugee in Article 1(A)2 of the 1951 Geneva Convention on the Status of Refugees is *per se* gender-neutral: a refugee is a person, who has a well-founded fear of being persecuted on grounds of race, nationality, religion, membership of a particular social group or political opinion. However, in practice, the decision makers tend to base their decisions on scenarios that have their roots in male reality. Thus, e.g., political opinion can be understood largely by activities more typical to men excluding the sometimes more subtle forms of female action which, nevertheless, can be considered as a political opinion in the context of the woman's own society. For instance, an Iranian woman can refuse to dress in veil, which, within the Iranian context can very well be an expression of a political opinion.

These subtle forms of activities may, however, be ignored or underestimated in the decision making bodies thus excluding women from refugee protection régime. Law is thus created and applied on the basis of male experiences and behaviour. Refugee law has been recently carefully analysed and reviewed in order to address the existing biases and to mainstream women into the application and creation of modern refugee law.

In armed conflicts and societies known to violate human rights women often face similar difficulties and violations of their rights as men. They may, additionally, also face human rights violations based on their sex, sexual violence, for instance. Women, whose spouse or male relatives are politically active, often are targeted by association in the absence of their male relatives. Nurturing children and the elderly is in many societies entirely women's responsibility. In ethnic conflicts human rights violations subjected to women are executed in order to violate the entire ethnic group: women as birth givers represent the honour, continuity and survival of the group. The object of mass rapes is often to harm the identity and existence of the whole group.

In several countries women's possibilities to develop themselves as individuals, choose their lifestyle and make decisions on the basic issues of their lives can be very limited. Women's role models, code of moral and dress, forced marriages, birth control legislation and social reality can, in practice, limit women's rights to an extent that it amounts to violation of human rights.

Women's vulnerability and special needs have been addressed by various authoritative actors in the refugee field, most notably the UNHCR. However, in the implementation of various recommendations and guidelines and, indeed, in the actual application of the 1951 Geneva Convention, a lot is left to be desired. Not only does application of material law but also the asylum procedure discriminate women. Internal reflections and self-criticism in the refugee law are well-called for in order to put into effect the adequate and just protection of the majority of the world's refugee population- women.

The evolution of the interpretation of the 1951 Geneva Convention

As mentioned earlier, the legal definition of a refugee is gender-neutral. A refugee is a person who has a well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group or political opinion.

Gender as such is not mentioned as a ground for persecution. The refugee definition is, *prima facie*, gender neutral. However, in reality women receive less affective protection than men in many countries due to procedural difficulties, mostly in terms of evidence and credibility, and the interpretation of material law.

The UNHCR has addressed the issue of refugee women in a serious manner during the entire 1980's and 90' and the discussion continues. As early as in 1985 the Executive Committee of the High Commissioner's Programme adopted the Conclusion No. 39 on the inclusion of women into the notion of "a particular social group":

”(w)omen asylum seekers who face harsh or inhuman treatment due to their having transgressed

The European Court of Human Rights has in the year 2000 given a decision (*Jabari v. Turkey, 11.07.2000*) where it has examined the application of an Iranian woman vis- a- vis Article 3 of the European Convention on Human Rights. The decision also quotes the above mentioned UNHCR's Conclusion No. 39. The UNHCR had prior to the application recognised the applicant, Ms. Jabari, as a refugee on grounds of her well-founded fear of inhuman punishment (stoning to death, lashing) for adultery. UNHCR had based its decision on the membership of a particular social group:

” 34. The applicant stated that she committed adultery in Iran and had to leave before criminal refers to caes of women in Iran having been stoned to death for having committed adultery. She stressed that she was granted refugee status by the UNHCR on the ground that she had a well-founded fear of persecution as she belonged to a particular social group, namely women who have transgressed social mores according to the UNHCR guidelines on gender-based persecution.” (Jabari

The UNHCR has adopted in 1991 *Guidelines on the Protection of Refugee Women* together with the document *Sexual Violence Against Refugees: Guidelines on Prevention and Response* in 1995. These guidelines have been reviewed in 2002 by an independent evaluation. During the UNHCR's Global Consultations on the 1951 Geneva Convention the issue of women refugees was addressed in a meeting on 25 April 2002 (EC/GC/02/8). Apart from these documents the UNHCR has adopted in October 2002 in its Executive Committee an *Agenda for Protection* which aims at strengthening implementation of the 1951 Convention and its 1967 Protocol. The Agenda sets out different goals and

a *Programme of Action*, the operational guidelines. The goal No. 6 is to meet the protection needs of refugee women and refugee children. Suggested follow-up activities relating to refugee women are incorporated throughout the entire *Programme of Action*.

The women and children as refugees are to be mainstreamed into the refugee protection régime through improving the framework for the protection of refugee women. ” States, UNHCR and partners

are to set in place measures to ensure that refugee women participate equitably in decision-making in all areas of refugee life, as well as in the implementation of such decisions and that the protection- and gender-sensitive approaches are applied at every stage of programme development, implementation, monitoring and evaluation.” (*Agenda for Protection, the fifty-third session of the Executive Committee of the UNHCR, October 2002*).

Within the legal framework States are encouraged to consider acceding to the *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)* and its *Optional Protocol*. As regards the already existing UNHCR's documents on women, the organisation is called to review the recommendations of the independent evaluation on the 1991 Guidelines on refugee women made by the Women's Commission for Refugee Women and Children in 2002. UNHCR is, further, to revise its 1991 Guidelines and to ensure the continuous dissemination and monitoring of the implementation of the Guidelines. Finally, it is UNHCR's responsibility to ensure that Country Operational Plans and Annual Protection Reports fully address critical women's rights issues and include detailed reporting on activities carried out and results achieved.

Future Challenges for Refugee Law to protect Women

As can be noted, the amount of already existing documents on protecting women's rights as refugees is abundant. The problem of implementing these documents is still a burning issue. As an illustration I would like to bring up the issue of one particularly harmful form of violation of women's right, domestic violence.

A whole concept of what can be considered a human right's violation serious enough to amount to persecution still needs further elaboration. This is particularly true when it comes to the issue of private agent of persecution and violation of rights traditionally considered to belong to the sphere of private life. Domestic violence which is rampant and serious in many countries of the world has not fully been appreciated as a form of persecution in most countries. The reality, however, has proven that a vast number of women seeking asylum may do so on grounds of domestic life threatening domestic violence against which their respective countries' authorities will not or cannot protect them.

Persecution emanating from non-state agents is included in the scope of application of the 1951 Geneva Convention. The crucial issue here is whether the State can, in fact, protect the individual from such persecution, not who is the persecuting agent. The State has a certain obligation to offer effective protection against serious violations of human rights and to fulfill this obligation with due diligence. In the case *Osman v. United Kingdom (28 October 1998)* the European Court of Human Rights stated on the State Party's positive obligations to ensure protection as follows:

” a positive obligation on the authorities to take preventive operational measures to protect an

individual whose life is at risk from the criminal acts of another individual in a way which does not impose an impossible or disproportionate burden on the authorities.” (Osman v. United Kingdom, para 115.)

In the context of serious domestic violence the following has been stated:

”When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious and economic context in which the claimant finds herself.” (CIRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, Women as Asylum Seekers, 1997, p. 107).

”It should be noted that it is not always reasonable or possible for a woman to alert the authorities to her need for protection. State protection should be effective- with provision of mechanisms for dealing with the complaints and also assurance that such avenues for redress are realistic and accessible to a woman of her culture and position.” (ibid).

”There is a sufficient state connection if violence has been committed by others and theoretically speaking it is conceivable that the authorities could give effective protection, but the woman concerned cannot reasonably be expected to turn to the authorities, because she would run the risk of having to endure further violence or harassment, or because she can have reasonable doubts as to whether she will be given protection.” (ibid.).

Concluding Observations

The international refugee régime as we know it has existed only some 50 years. It is in the state of constant review and evolution. During these past 50 years the 1951 Convention has offered protection to refugees all over the world. However, as all legal documents, it must be able to adapt to the needs of the real world in the real time. A lot has changed since 1951, not only in terms of legal framework but, more importantly, in terms of refugee creating situations. At the same time, general international human rights law has seen a enormous evolution. The scope of rights to be protected against violations has expanded. The beneficiaries of the international refugee protection have also changed.

The UNHCR and, indeed, all State Parties to the 1951 Geneva Convention are facing a situation where over 40 million people have been uprooted from their homes. The vast majority of these people, 75- 80 %, are women and children. In order to alleviate their suffering all feasible measures both legal and operational are needed. Refugee question is a genuinely global issue that calls for the participation of all states in good faith to fulfill their international obligations in order to bring forward solutions to the millions of refugees in our contemporary world.