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The Canadian Guidelines on Gender-Related Persecution: An Evaluation

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The faces of refugees are overwhelmingly female: women and children represent over 80 per cent of the world's 27 million refugees and displaced people. This was the impetus behind much of the discussion of the rights of refugee women at the United Nations Fourth World Conference on Women. In the Beijing Declaration and Platform for Action, States agreed to 'consider recognizing as refugees those women whose claim to refugee status is based upon the well-founded fear of persecution ... including persecution through sexual violence or other gender-related persecution'. Additionally, they pledged to '[s]upport and promote efforts by States toward the development of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on States' initiatives to develop such criteria and guidelines and by monitoring to ensure their fair and consistent application'. The call for countries to adopt consistent standards for admission of women fleeing gender-related persecution was largely based upon the experience of Canada and, more recently, the United States in formulating guidelines for refugee decision-makers. Canada’s Immigration and Refugee Board (IRB) issued ‘Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution’ in 1993, with two goals: to heighten the sensitivity of IRB decision-makers to the unique problems women face seeking international protection, and to provide a method of analysis within which to evaluate a woman’s claim to refugee status. They have provided a model for other countries, but should not be viewed as a finished work; indeed, they were expected to be revised as international and domestic women’s human rights law changed, and a new version is expected in late 1996. This article briefly outlines the background to the adoption of the Guidelines, and the recognition within the IRB that the refugee experience is largely female. It describes the scope of the Guidelines, and the omissions that have become evident as they have been interpreted, such as the lack of discussion of the unique problems faced by women in proving that no ‘internal flight alternative’ exists. The article further discusses how the Guidelines can be strengthened by the incorporation of references to recent gender-related law, the extent to which States have committed themselves in the Platform for Action to the development of guidelines as a response to the plight of refugee women.
Introduction

The faces of refugees are overwhelmingly female: women and children represent 80 per cent of the world’s 27 million refugees and displaced people. This fact inspired much of the discussion of the rights of refugee women at the 1995 United Nations Fourth World Conference on Women. In the resulting document, the Beijing Declaration and Platform for Action, States agreed to ‘consider recognizing as refugees those women whose claim to refugee status is based upon the well-founded fear of persecution . . . including persecution through sexual violence or other gender-related persecution’. Additionally, they pledged to ‘[s]upport and promote efforts by States toward the development of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on States’ initiatives to develop such criteria and guidelines and by monitoring to ensure their fair and consistent application’. The call for countries to adopt consistent standards for admission of women fleeing gender-related persecution was largely based upon the efforts of the United Nations High Commissioner for Refugees (‘UNHCR’), Canada and, more recently, the United States in formulating guidelines for refugee decision-makers.

In March 1993, the Canadian Immigration and Refugee Board (‘IRB’) released its ‘Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution’, the first of their kind in the world. These Guidelines, based, in part, on work done by the UNHCR, have two goals: to heighten the sensitivity of IRB decision-makers to the unique problems women face when seeking international protection, and to provide a method of analysis within which to evaluate a woman’s claim to refugee status. They were the result of much consultation and analysis, and appeared at a time when the Canadian consciousness was captured by intense media attention on how Canada’s refugee determination process had let women

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3 Ibid., para. 147(h).

4 Ibid., para. 149(i).

5 Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 63(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution (Ottawa: Immigration and Refugee Board, 8 March 1993) [hereinafter ‘Guidelines’]. See also Mawani, N., ‘Introduction to the Immigration and Refugee Board of Canada Guidelines on Gender-Related Persecution’/‘Introduction aux Directives de la CISR concernant les revendications du statut du réfugié craignant d’être persécutées en raison de leur sexe’, 5 IJRL 240, 248 (1993); the text of the Guidelines follows at 5 IJRL 278 (English) and 298 (français).
facing severe gender discrimination 'fall through the cracks' of the refugee definition.

Canada's Guidelines provide a model for other countries to consider when crafting their own criteria for women fleeing gender persecution. However, the Guidelines should not be viewed as a 'finished work'. At the time of their writing, they were expected to evolve as international and domestic women's human rights law changed, and are currently being revised for release in late 1996. The upcoming revisions will address many of the deficiencies in the current Guidelines which have come to light since their adoption. However, some perceived weaknesses in the Guidelines identified by refugee advocates are controversial and are not expected to be incorporated. Other refugee-receiving countries might usefully consider and evaluate both the expected revisions and the more controversial suggestions when developing their own criteria on women refugees.

This article briefly outlines Canadian refugee law and process with respect to women refugees, and the formulation of the Guidelines. It details the omissions that have become apparent as the Guidelines have been applied and interpreted, and solutions sought for these omissions. This is not a comprehensive analysis of all of the ways that the Guidelines could be improved. However, by indicating the most obvious and correctable omissions, it may stimulate discussion which will benefit the development of similar guidelines for other refugee-receiving countries.

1. Canadian refugee law and process

The definition of 'refugee' in Canadian law is based on that found in the 1951 United Nations Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. As in the Convention and Protocol, 'gender' is not an enumerated ground of persecution in section 2 of Canada's Immigration Act. However, with the help of the Guidelines, refugee law has developed in Canada such that gender-related persecution may be considered as persecution due to one of the five grounds listed, especially 'particular social group'.

A refugee may submit a claim either 'inland', or from abroad. Applications abroad may be received at Canadian embassies and consulates. A visa officer will make an initial determination as to whether the person applying is in fact a Convention refugee, followed by an evaluation of the applicant's potential for successful establishment in

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A claim may be also submitted in Canada to an immigration officer, for example at a port-of-entry such as an airport. Here, a senior immigration officer determines whether the person is eligible to make a claim to be a Convention refugee to the Convention Refugee Determination Division (CRDD) of the IRB. If the asylum seeker is deemed ineligible, the claimant is removed from Canada. The decisions of these overseas visa officers and senior immigration officials are not subject to the Guidelines, as the Guidelines only cover decisions made by the IRB.

If the internal claimant is deemed eligible, the claim is referred to the CRDD. A Refugee Hearing Officer (RHO) then conducts background research into the claim, as the RHO will present documentary evidence to the IRB about conditions in the claimant's country and will question the claimant on behalf of the tribunal. Claims are usually heard by a two-person panel, which is expected to apply the Guidelines in all relevant situations. Claimants have the right to counsel and to an interpreter. If the panel comes to a split decision, the positive decision rules and the refugee's claim is accepted. All negative decisions of the Refugee Division must be accompanied by written reasons. The Minister or the claimant may request written reasons for a positive decision. If a claim is refused, the claimant may apply for judicial review to the Federal Court Trial Division, with leave of the Court. Although the Guidelines do not apply at this level, the Federal Court has held that it is an error of law to ignore the Guidelines in relevant cases. If leave is granted and the appeal is allowed, then the claimant may return to the IRB for a rehearing. If the appeal is denied, or no leave is granted, a post-determination review is held to determine if deportation would entail significant personal risk to the claimant. The Guidelines do not apply to the post-determination

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8 *Immigration Act*, R.S.C. 1985, c. 1-2 (as amended), s. 44.

9 Ibid., s. 46.01(1). Some ineligible claimants include: those with refugee status in another country, persons convicted of serious crimes, those who are known war criminals and those who constitute security threats.

10 Waldman, above note 7 at para. 9.17.

11 *Immigration Act*, above note 8 at s. 69(1), and *Convention Refugee Determination Division Rules*, SOR/93-45, rule 17 [hereinafter 'CRDD Rules'].

12 Ibid., s. 69.1(10), exception noted at s. 69.1(10.1).

13 Ibid., s. 69.1(11)

14 Ibid., s. 69.1(11)(b).

15 This is restricted to a review based on errors of law or to findings of fact made in a perverse or capricious manner: Waldman, above note 7 at para 9.19.

16 *Mohamed v. Canada (Secretary of State)* (1994), 73 F.T.R. 159. See further below, notes 73-5 and accompanying text.

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Finally, in the last resort, an application may be made to the Minister to allow the claimant to remain in Canada on humanitarian and compassionate grounds. Again, the Guidelines do not apply to this decision.

2. Formulation of the Guidelines on ‘Women Refugee Claimants Fearing Gender-Related Persecution’

Discussion of the needs of refugee women has increased over the past decade, in parallel with the growing awareness of women’s human rights. International conferences on refugee women have been held, some of which produced recommendations for improving the situation of refugee women. Refugee advocates and scholars produced influential articles on the exclusion of gender from the Convention definition. The UNHCR Executive Committee responded in 1985 with a Conclusion acknowledging that States are free to adopt the interpretation that women who face harsh or inhumane treatment for transgressing social mores constitute a ‘particular social group’. The European Parliament and the Dutch Refugee Council had adopted similar resolutions the previous year. More UNHCR Executive Committee Conclusions followed in 1988 and 1989 on refugee women, and in 1990 on refugee women and international protection. In 1991, the UNHCR released its Guidelines on

18 See below section 3.2.3.
19 Nurjehan Mawani, ‘Violations of the Rights of Women in the Refugee Context’ (1994) 5 NJCL 61 at 66 [hereinafter ‘Mawani’]. See also Genevieve Camus-Jacques, ‘Refugee Women: The Forgotten Majority’, in Gil Loescher & Laila Monahan, eds., Refugees and International Relations (Toronto: Oxford University Press, 1989) 141 at 147, discussing the 1983 Conference of International Socialist Women, which called ‘all governments and member parties to amend the Geneva Convention ... to include the victims of oppression and discrimination on the basis of sex as well as race and religion’.
23 Mawani, above note 19 at 65 discusses the resolution in detail.
The Protection of Refugee Women, a comprehensive discussion on how to recognize and address refugee women’s protection concerns at a practical level. These protection guidelines presented a ground-breaking policy statement which signalled that refugee-receiving countries need to treat gender-based persecution as a valid basis for obtaining refugee status. In 1993, the UNHCR Executive Committee adopted a further Conclusion, commenting on refugee protection and sexual violence.

This international activity was joined by the IRB in January 1990, when it formally established a Working Group on Women Refugee Claimants, the goal of which was to analyse, review and deal more sensitively with gender-related refugee claims, from both substantive and procedural perspectives. The Working Group was composed of some IRB decision-makers who found that women refugee claimants were having particular difficulty in presenting their claims. Refugee, human rights and women’s groups, such as the National Action Committee on the Status of Women, which had been lobbying the IRB to correct the exclusion of women from the Convention refugee definition, were asked to play a consultative role. The opportunity for the IRB to take direct action on the concerns of the Working Group and the refugee advocates only emerged in 1992, when the Immigration Act was amended to authorize the IRB Chairperson to issue guidelines to assist Members in carrying out their duties.

Several cases decided by the IRB denying women refugee status were widely reported in late 1992 and early 1993, and set the scene for the introduction of the Guidelines. The case of Nada, one of the most highly publicized, involved a woman born in Saudi Arabia who fled to Canada after being punished and having her life threatened for her feminist beliefs. She refused to wear the veil in public and opposed restrictions which allowed her only to travel with a male relative. She was harassed because of these choices by men who may have been members of the Committee for the Propagation of Virtue and the Prevention of Vice. An IRB panel denied her refugee claim, as the Board Members did not believe that the Saudi Arabian government was ‘an agent of persecution or an accomplice, by inaction, of other agents of persecution’. The panel held that,

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28 Mawani, above note 19 at 66.
29 Ibid.
30 Immigration Act, above note 8 at s. 65(3).
Nada went public with this decision and an immense public outcry followed. Eventually, the Immigration Minister allowed Nada to remain in Canada on humanitarian and compassionate grounds. Stories such as this galvanized the Canadian consciousness, and a receptive public mood was created for the introduction of the Guidelines.

The Guidelines on ‘Women Refugee Claimants Fearing Gender-Related Persecution’ were released on 9 March 1993, amidst much press coverage, as they represented an international first. More expansive than the UNHCR’s Guidelines on the Protection of Refugee Women, the Guidelines set out a systematic method for the evaluation of gender-based persecution claims.

The Guidelines begin by listing four critical issues which are raised in gender-related refugee claims:

1. To what extent can women making a gender-related claim of fear of persecution successfully rely upon any one, or combination, of the five enumerated grounds of the Convention refugee definition?
2. Under what circumstances does sexual violence, or a threat thereof, or other prejudicial treatment towards women constitute persecution as that term is jurisprudentially understood?
3. What are the key evidentiary elements which decision-makers have to look at when considering a gender-related claim?
4. What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about?

The first section of the Guidelines, entitled ‘The Analysis’, begins with a general proposition:

Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection to women who demonstrate a

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32 Ibid., at 6.
35 Goldberg, above note 26 at 4.
36 Guidelines, above note 5 at 1.
well-founded fear of persecution by reason of any one, or a combination of, the enumerated grounds.\textsuperscript{37}

However, before decision-makers determine the appropriate grounds applicable to the claim, they must first identify the nature of the persecution feared by the claimant, which may fall loosely within one or more of four broad categories:

1. Women who fear persecution on the same Convention grounds, and in similar circumstances as men. Their risk factor is not their gender \textit{per se}. The nature of the harm feared may be gendered.
2. Women who fear persecution for reasons solely pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, siblings or relatives. The political views of a woman's relatives may be imputed to her, or women may be pressured to reveal information about their relatives.
3. Women who fear persecution (imposed on account of an enumerated ground) resulting from circumstances of severe gender discrimination or acts of violence either by public authorities or at the hands of private citizens from whose actions the State is unwilling or unable to adequately protect the concerned persons.
4. Women who fear persecution as the consequence for failing to conform to, or for transgressing, certain gender-discriminating, religious or customary laws and practices in their country of origin. Such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions precedent to a gender-defined social group.\textsuperscript{38}

The Guidelines then list the four grounds of race, religion, nationality and political opinion that a woman may fall under, and give examples of gendered persecution within each. A woman may claim a fear of persecution because of the intersection between her race and gender, such as an Asian woman in an African society.\textsuperscript{39} A woman in an Islamic society who chooses not to subscribe to or to follow the precepts of a State religion may be at risk for persecution for reasons of religion.\textsuperscript{40} A woman who opposes institutionalized discrimination of women, or expresses views of independence from male social/cultural dominance in her society, may be found to fear persecution for reasons of imputed political opinion. She may be perceived by the established political or social structure as expressing politically antagonistic views because of her

\textsuperscript{37} Ibid., 2.
\textsuperscript{38} Ibid., 2–3.
\textsuperscript{39} Ibid., 4.
\textsuperscript{40} Ibid.
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actions. The Guidelines note, importantly, that women's political protest and activism may not manifest itself in the same way as that of men.

The Guidelines describe how women's claims may fit within the 'membership in a particular social group' ground of the refugee definition. There are two social groups to consider: family and gender. There is judicial authority for recognizing claims where kinship is the risk factor as coming within the 'membership in a particular social group' category. There is also now judicial support for finding gender to be a particular social group category, although this came only after the Guidelines were published. When the Guidelines were introduced there was increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reasons of their gender. The Guidelines note that most claims in the social group category would also fit within either the religion or political opinion category.

The Guidelines address four concerns which may arise when a woman attempts to establish a well-founded fear of persecution. The first is that a social group defined by gender is too large. The Guidelines respond: 'the fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant — race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people'. Secondly, what is relevant is evidence that the particular social group suffers or fears to suffer severe discrimination, or harsh or inhumane treatment, that is distinguished from the situation of the general population, or from other women. Thirdly, a sub-group of women can be identified by reference to the fact of their exposure or vulnerability for physical, cultural or other reasons, to violence in an environment that denies them protection. These women face violence amounting to persecution because of their particular vulnerability as women in their societies and because they are so unprotected. Finally,

41 Ibid.
42 Ibid. For example, a woman may choose to feed and house people the State may deem to be 'antagonistic', rather than protest in the streets. Women may, as they did in Guatemala, sew wall hangings with political messages. In other words, women's protest and activism may occur within the 'private' sphere, rather than in the 'public' sphere. Decisions on whether a refugee claimant falls within the 'political opinion' ground have mostly been based, in the past, on the male experience of more overt political activity such as campaigning, street protests, distributing political materials in public, etc.
44 Ward v. Canada (Attorney General), [1993] 2 SCR 689 [hereinafter 'Ward']. See discussion in section 3.3.1 below.
45 Guidelines, above note 5 at 5. See articles, above note 20, for the arguments made in support of including gender within the social group category.
46 Guidelines, above note 5 at 6.
47 Ibid.
48 Ibid.
49 Ibid.
a woman will need to show that she has a genuine fear of harm, that her gender is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility that the feared persecution will occur if she is to return to her country of origin, and that she has no reasonable expectation of adequate national protection.\textsuperscript{50}

Section 2 of the Guidelines, entitled ‘Assessing the Feared Harm’, attempts to show how women’s claims may differ from men’s, and that these unique concerns must be assessed when considering the harm feared. Aside from some rape cases, the meaning of persecution has largely been defined by the experiences of male claimants, thereby ignoring female-specific fears such as infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion or compulsory sterilization.\textsuperscript{51} The fact that violence against women, including sexual and domestic violence, is universal is irrelevant when determining whether fear or experience of these constitutes forms of persecution.\textsuperscript{52} The real issues are whether the violence is a serious violation of a fundamental human right on a Convention ground, and in what circumstances the risk of that violence can be said to result from a failure of State protection.\textsuperscript{53} The Guidelines then list various international instruments which may be referred to when determining permissible conduct by a State towards women.\textsuperscript{54} Finally, the Guidelines specify that harm cannot be assessed solely by reference to the fact that a woman is subject to a national policy or law to which she objects. The claimant will need to establish that,

(a) the policy or law is inherently persecutory; or
(b) the policy or law is used as a means of persecution for one of the enumerated reasons; or
(c) the policy or law, although having legitimate goals, is administered through persecutory means; or
(d) the penalty for non-compliance with the policy is disproportionately severe.\textsuperscript{55}

The third section of the Guidelines deals with evidentiary matters. To

\textsuperscript{50} Ibid., at 7.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
\textsuperscript{55} Guidelines, above note 5 at 8.
support a claim of gender-related persecution, the evidence must show that what the claimant genuinely fears is persecution for a Convention reason as distinguished from random violence or random criminal activity perpetrated against her as an individual.\textsuperscript{56} To establish this, her country's general human rights record must be considered, as well as the experiences of other similarly-situated women.\textsuperscript{57} IRB Members are instructed to keep in mind the difficulties for many women of substantiating with 'statistical' evidence a claim to threats of, or actual, sexual violence at the hands of authorities or private citizens not subject to State control.\textsuperscript{58}

The final section of the Guidelines discusses special problems at determination hearings, recognizing the unique difficulties women face in demonstrating that their claims are credible and trustworthy. For example, cross-cultural misunderstandings may occur between the claimant and the IRB Members.\textsuperscript{59} Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence, in order to keep their 'shame' to themselves and not dishonour their family or community.\textsuperscript{60} Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves unable to answer when asked about the experiences of their male relatives.\textsuperscript{61} The Guidelines have recognized that some claimants may suffer from Rape Trauma Syndrome, and therefore require sensitive handling.\textsuperscript{62} Gender persecution may necessitate changes to the traditional manner of presenting testimony, such as providing testimony by affidavit or by videotape, or in front of Members and refugee hearing officers specially trained in dealing with violence against women.\textsuperscript{63} The Guidelines state that Members should be familiar with the UNHCR Executive Committee's \textit{Guidelines on the Protection of Refugee Women}, thereby providing them with another gender-sensitive reference.\textsuperscript{64}

The Guidelines provide a very progressive method of approaching gendered refugee claims. They assist IRB Members in deciding cases with sensitivity to issues such as domestic violence and rape, which may

\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid., at 9. This is also recognized in the UNHCR's \textit{Guidelines on the Protection of Refugee Women}, above note 25 at paras. 58–61 and 75, for example.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} The UNHCR's \textit{Sexual Violence Against Refugees: Guidelines on Prevention and Response} lists in detail the various psychological responses of women to rape, ranging from experiencing fear, helplessness, humiliation, and a loss of self-esteem, to psychic numbing, above note 27 at 45–6.
\textsuperscript{63} Guidelines, above note 5 at 9.
\textsuperscript{64} Above note 25. The Guidelines contain a useful 'framework of analysis' to follow when deciding a case in which gender-based persecution is feared; see Annexe, below.
have previously been ignored or deemed 'private' matters. The Guidelines have allowed Canada to take a leading role internationally in accepting refugee claims based on gender-related persecution, and to press other countries to adopt similar criteria.

3. Weaknesses in the Guidelines

Despite their many strengths, the Guidelines also suffer from certain weaknesses, some of which are slated to be addressed in the IRB's revised Guidelines to be released later in 1996. The following discussion is organized according to problems identified in implementation, scope and evolution of the Guidelines.

3.1 Implementation issues

3.1.1 The Guidelines are not legally binding: Independence versus consistency

One of the main concerns raised by refugee advocates is that the Guidelines are just that: Guidelines. When the Guidelines were introduced, the IRB Chairperson, Nurjehan Mawani, acknowledged that they are not binding on IRB Members, but felt that this was not a weakness. She stated that implementing the Guidelines as non-binding directives was necessary to balance the competing interests of independence of IRB Members and consistency of decision-making by IRB Members:

In developing a consistent approach to gender-related claims, the Board is committed to providing leadership and guidance to Members without infringing upon their effective independence. But that independence must be exercised within a framework of law, precedent, and careful reasoning if it is to serve the claimants coming before us and the community at large.65

This concern to balance independence with consistency was examined by the Parliamentary Standing Committee on Citizenship and Immigration in its evaluation of the Guidelines.66 IRB Members are independent decision-makers, and the value of their independence must be respected, like the independence of judges. A competing value which

66 The Canadian Parliament asked a Standing Committee to undertake a study on Gender-Based Refugee Claims in accordance with Standing Order 108(2). The Committee was to ask the following questions: 'Are we fully recognizing the particular risks women refugees face?'; 'Are we addressing their special needs?'; 'Have our training programmes changed to reflect this priority?'; 'Are we acting in accordance with our new awareness or are older attitudes undermining real change?'; and 'Are we doing all we can to identify and remove the systemic barriers we know women face in gaining access to Canada's protection?', Standing Committee, above note 1 at 3. The Standing Committee heard submissions from various refugee advocates and non-governmental organizations, including Amnesty International, the Canadian Bar Association, the Canadian Council for Refugees, the National Organization of Immigrant and Visible Minority Women of Canada and the United Nations High Commissioner for Refugees.
67 Ibid., 7.
must be respected is consistency of decision-making, as consistency leads
to fairness and to fewer appeals. The IRB's position is that using
Guidelines, rather than some other method of implementation, better
balances these competing interests, as a mode of decision-making is not
being imposed upon the Members:

The Guidelines have been subject to criticism for their non-binding nature.
Because of the nature of the IRB, our Members are independent decision-
makers. Binding Guidelines could potentially offend this principle.

The IRB Chairperson, Nurjehan Mawani, has addressed some of the
main concerns of refugee advocates regarding the non-binding nature of
Guidelines by indicating that she expects Members to follow them unless
there are compelling or exceptional reasons for adopting a different
analysis. If the Guidelines are not followed, Members must give reasons
in their written decision for departing from them. Although IRB
Members must issue a written decision in every negative decision, this
directive widens the Member’s duties, as it applies whether the decision
is positive or negative. The IRB Chairperson has directed that written
reasons be provided on all decisions under the Guidelines. These
imperatives are meant to provide a check-and-balance system to ensure
that the Guidelines are applied in all relevant situations.

The Parliamentary Standing Committee noted another check-and-
balance: ‘for Board [M]embers to ignore the relevant gender aspects of
a case can constitute error reviewable by the courts’. This is supported
by statements made by the Federal Court in Vidhani v. Canada (Minister of
Citizenship and Immigration):

[The Board should have dealt with [the claimant’s] testimony on possible sexual
attack by the police and determined whether this constituted persecution in her
case . . . it is a reversible error for the Board to have failed to ask the proper
question and conduct the proper analysis of the persecution to which she would
be subject for refusal to marry.]

The decision in Mohamed v. Canada (Secretary of State) also supports the
proposition that a decision may be set aside where the IRB fails to deliver
reasons which squarely address the issue of gender-related persecution.

68 Ibid.
69 Nurjehan Mawani, Chairperson of the Immigration and Refugee Board, Presentation for the
Conference on Gender Issues and Refugees: Development Implications (Centre for Refugee Studies,
York University, 10 May 1993) at 7–8 [unpublished, available at IRB Documentation Centre].
70 Standing Committee, above note 1 at 8.
71 Ad Hoc Working Group, above note 17 at 74.
72 Kristin Kandt, United States Asylum Law: Recognizing Persecution Based on Gender Using
73 Standing Committee, above note 1 at 16.
Div.) at paras. 15–16.
75 Mohamed, above note 16.
The Standing Committee concluded that there are no compelling reasons to elevate the Guidelines to binding status, as consistency is more likely to be fostered by other measures such as initial and ongoing training of IRB Members, justifying departures from the Guidelines in written decisions, the provision of information, documentation and research on gender issues by the IRB Documentation Branch, and review by the Courts. In other words, although the Guidelines are not binding, they do act as a tool of persuasive reference.

Notwithstanding the belief of the Standing Committee and the IRB in the existence of adequate safeguards to balance independence and consistency in implementing the Guidelines, other refugee advocates are convinced that consistency has been compromised for independence. The Canadian Bar Association notes that even though the IRB Chairperson has issued clear direction that the Guidelines are to be applied, in practice this has not always been followed. In Re Lata, the claimant was a Fijian woman whose fear of persecution arose from spousal violence both in Fiji and Canada. The Guidelines were not mentioned in the decision and her refugee claim was rejected. The Canadian Bar Association felt that the lack of analysis of the Guidelines by the Panel Members 'shows complete disregard for gender and domestic violence issues'. This case is particularly noteworthy considering that Canadian law authorities saw fit to lay criminal charges against the alleged agent of persecution. The IRB also failed to apply the Guidelines in Re Alcala Radillo. Notwithstanding that the Guidelines were argued by counsel, they were not mentioned by the panel Members in their reasons. Such cases have led to the recommendation that IRB Members should be obliged to consult the Guidelines on their own initiative when the evidence before them raises issues concerning the categories enumerated there.

Those who believe the non-binding nature of the Guidelines presents problems with consistent application recommend that the Immigration Act be amended to incorporate them. They believe that the present incarnation of the Guidelines creates an imbalance between independence and consistency, with independence significantly outweighing consistency. This view is supported by the Canadian Panel on Violence Against Women:

76 Standing Committee, above note 1 at 16.
77 Immigration Law Section of the Canadian Bar Association, Submissions on Gender Based Refugee Claims (May 1995) at 5 [hereinafter 'CBA Submissions'].
78 Re Lata (10 Dec. 1993), Vancouver V93–01762 (IRB Refugee Division), as discussed above note 77.
79 CBA Submissions, above note 77 at 6.
80 Ibid.
81 Re Alcala Radillo (17 Mar. 1994), Vancouver V93–00151, (CRDD), as discussed above note 77.
82 CBA Submissions, above note 77 at 6.
Until guidelines specifically articulating gender as a ground for persecution are legislation, Immigration and Refugee Board officials are free to respond on a case-by-case basis. To leave women’s safety and lives in the hands of individuals who may have little understanding of women’s circumstances in other countries, is an intolerable violation of women’s human rights.84

Finally, it is argued that the vulnerability of the Guidelines further tips the balance in favour of independence, so far as they Guidelines are much more easily ‘repealed’ than if they were law:

... since the Canadian Guidelines only are persuasive, not binding, it is possible that should a government that is less sympathetic on these issues come to power in the future, these guidelines could easily be scrapped without having to go through any formal legislative process. This is a significant danger ...85

The opposite point of flexibility may also be argued: The Guidelines may be easier to revise if they stay under the control of the IRB Chairperson. It is not too hard to imagine the Guidelines becoming entrenched in their present flawed form if they became a part of the Immigration Act and required an amendment to the law to change them. This could then negatively affect the independence side of the independence-consistency equation. However, this problem could be solved by also introducing a regular mandatory review and revision of the Guidelines into the Immigration Act, or by introducing the Guidelines as a Regulation, which can be amended more easily.

Refugee advocates have argued that the only way to bring consistency in line with independence is to make the Guidelines binding on IRB Members. The Standing Committee has stated that adequate safeguards are in place and there are no compelling reasons to amend the Immigration Act to improve the status of the Guidelines.86 The inadequacies in some Members’ decision-making in cases of gendered persecution suggest, however, that further giving the Guidelines the status of law may provide the necessary weight to ensure their application, and that, in any event, continuing education of Members is necessary to ensure they understand why it is necessary to use the Guidelines.

3.1.2 Omission of the internal flight alternative

Once a refugee claimant has established that she falls under one of the Convention groups, and has established her persecution, she must meet one further test: Could she have reasonably fled to another part of her country of origin where there is no serious possibility of persecution? If there is such a place to flee, the claimant is expected to have done so;

85 Kandt, above note 72 at 169.
86 Standing Committee, above note 1 at 16.
this is called ‘internal flight alternative’ or ‘IFA’. The Guidelines only mention the IFA briefly in a reference to determining if persecution exists: ‘Determine whether, under all of the circumstances including the possibility of an internal flight alternative, the claimant’s fear of persecution is well-founded’.\(^{87}\)

Several issues arise from the IFA. The Standing Committee recommended that the Guidelines be revised to instruct Board Members to be sensitive to aspects of certain cultures that could make an IFA much more difficult for women than for men.\(^{88}\) These factors include the unacceptability of women living alone and unprotected by family members, and the inability of women to obtain work given the patterns of economic life in certain countries.\(^{89}\) Even if there is a theoretical IFA, the Guidelines should reflect the fact that women whose persecution involved sexual victimization could be ostracized if they returned to their communities,\(^{90}\) thereby leaving the woman alone and vulnerable to further persecution. The same could be true for other victimization. Even in countries where the claimant’s fear of persecution is limited to a particular region, tribe, culture or religion, it still may not be feasible for her to find safety by relocating within her country.\(^{91}\) Another community may shun her for leaving her community and breaching traditional social mores.\(^{92}\) There may be restrictions on her ability to travel alone or with her children.\(^{93}\) Sometimes, even though oppressive conduct targeting women may be officially discouraged or outlawed, authorities throughout the country may be unwilling or unable to prevent, intervene in, or punish these practices.\(^{94}\)

The IFA is dealt with in the US Considerations, albeit without examining the above issues. The US Considerations describe the concerns that adjudicators must take into account where the applicant alleges private persecution such as domestic violence:

According to the UNHCR Handbook, ‘a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so’. UNHCR Handbook, ¶91. Whether it is ‘reasonable under all the circumstances’ to expect an applicant to have sought refuge from acts of domestic violence or other seemingly ‘private’ acts will of course depend on the facts of the case. Asylum adjudicators should carefully explore the circumstances giving rise to the harm or risk of harm, as well as the extent to which government

\(^{87}\) Guidelines, above note 5 at 10.
\(^{88}\) Standing Committee, above note 1 at 11.
\(^{89}\) Ibid.
\(^{90}\) Ibid., 12.
\(^{91}\) Ibid., 13.
\(^{92}\) Ibid., 12.
\(^{93}\) Ibid.
\(^{94}\) Ibid.
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Protection would have been available in other parts of the country. The adjudicator must consider whether protection was available as a factual matter as well as in the law of the country and whether, under all of the circumstances, it would be reasonable to expect a woman to seek residency elsewhere in her country. This underscores the need to develop the record fully, with respect to both the applicant's particular circumstances and the conditions prevailing in the country of origin.95

Questions which an asylum adjudicator should take into account when examining the IFA are:

- Did the claimant attempt to flee within her own country? Why or why not?
- Could she have received meaningful protection in another part of her country?
- Would internal flight have had a significant impact on the quality of life for herself, her children, or other members of her family? and
- Do any barriers exist to obtaining protection for the type of conduct she is fleeing?96

The Canadian Guidelines could be improved by incorporating the gender-specific examples of barriers to the IFA, and the list of questions IRB Members can ask when considering whether an IFA existed, into the sections of the Guidelines entitled 'Assessing the Feared Harm' and 'Framework of Analysis'.

3.1.3 Omission of change of circumstances analysis

The Guidelines fail to deal with gender-specific aspects of whether a woman has ceased to be a refugee. Under the Immigration Act, a refugee claim may fail if 'the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist'.97 This issue raises similar concerns as those raised under the IFA, and can arise as a part of the IRB's original refugee determination decision, or subsequent to recognition if the Minister of Citizenship and Immigration brings an application to the IRB for a determination of whether or not a person's refugee status has ceased.98 Whether there has been a change in circumstances must be approached from a gendered perspective. An enactment of a law against sexual violence cannot be considered a change in circumstances if the law is not adequately enforced. In Hathaway's view, the change must be of substantial political

96 Goldberg, above note 26 at 13.
97 Immigration Act, above note 8 at s. 2(2)(e).
98 Ibid., s. 69.2(1).
Secondly, there must be reason to believe that the substantial political change is truly effective. Thirdly, the change in circumstances must be shown to be durable. All of the issues raised above regarding the IFA, such as whether a woman would face ostracism if forced to return to her community, are relevant to a consideration of change of circumstances, as well. Gendered issues arising from a consideration of change of circumstances should be set out and explained in the Guidelines.

3.1.4 Gender issues and testimony

The Guidelines deal with the difficulties women may face in refugee status hearings under the heading ‘Special Problems at Determination Hearings’. The Board announced in March 1995 that it would be developing special procedures for inquiring into the claims of people whose experiences or circumstances may make them less able to present evidence. The Standing Committee recommended that these procedures include separate hearings for husbands and wives. The UNHCR also recognizes this issue: 'If a female refugee is registered in the name of her male partner, and if only the husband’s situation is considered during a family’s request for asylum, then the specific needs, interests and opinions of the women will almost inevitably be ignored.

Currently, the claims of the husband and wife are heard together. A woman may actually have a separate claim for refugee status based on her experience of domestic violence, and it is unlikely that she will reveal this if her husband is in the room. As well, she may have a claim based on sexual persecution, which she will not reveal in front of her husband, brothers or children. As Karola Paul explains:

Persecution as well as the kind of mistreatment a woman suffers generally concerns her honour and thus the honour of her family. A woman coming from such a culture who admits during the hearing that she has been sexually mistreated or even raped during detention would normally have to take her own life in accordance with the traditions of her home country in order to restore the honour of her family. There are examples of women being beaten by

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100 Ibid., 201.
101 Ibid., 203. Cf. Yucay v. Canada (Minister of Employment and Immigration) [1995] F.C.J. No. 35, in which the Federal Court of Appeal noted that ‘the issue of so-called “changed circumstances” seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact’. The fundamental issue is the possibility or risk of persecution: ‘there is no separate legal “test” by which any alleged change in circumstances must be measured. The use of words such as “meaningful”, “effective” or “durable” is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is . . . does the claimant now have a well founded fear of persecution?’
102 Guidelines, above note 5 at 9.
103 Standing Committee, above note 1 at 14
104 State of the World’s Refugees, above note 1 at 60.
105 Standing Committee, above note 1 at 14.
husbands who suspected they had been sexually mistreated while tortured. Men are ashamed because they feel that they have failed as protectors and their aggressions turn against those they were expected to protect. Therefore, the Board should determine the feasibility of holding joint spousal hearings only with the woman’s consent. Members and refugee claims officers must ensure that this consent is genuine as far as possible and must be given education and information regarding their own citizenship eligibility and rights. This process should be set out in the Guidelines.

Other recommendations have been made to improve the fairness of the hearing process for women. The hearing room procedures may need to be more informal. Even the layout of the hearing room, somewhat like a court, may be intimidating, as may hearing procedures, such as standing when IRB Members enter and exit. These procedures may be especially daunting for women whose culture has prevented them from participating to any degree in public life. As the Standing Committee recommends: 'The Board should assess its hearing room procedures to ensure that the presentation of women’s claims is not hampered by systemic discrimination'. The hearing room procedures should also be described in the Guidelines.

Another issue, only alluded to in the Guidelines, is the composition of hearing panels, and use of female interviewers and interpreters. Panels, interpreters and interviewers should be female where it appears that the presence of a man may prevent the claimant from presenting her case. The Standing Committee noted that ‘merely being female does not ensure sensitivity’, and therefore every IRB Member must be trained in gender issues in the hearing process. On the other hand, some cases may only achieve a fair and just result with an all-female panel, such as where it would otherwise be difficult for a woman to tell her story.


Standing Committee, above note 1 at 15.

Ibid.

Ad Hoc Working Group, above note 17 at 86.

Standing Committee, above note 1 at 15.

Ibid.

In the reference to the UNHCR’s Guidelines on the Protection of Refugee Women, at Guidelines, above note 5 at 9.

Standing Committee, above note 1 at 15. See also the recommendation of the Canadian Council for Refugees: ‘Refugee determination processes should be analyzed in order to identify biases against women and measures taken to address these biases. Women should work as interviewers, decision-makers and interpreters and particular sensitivity should be shown towards women who may have been subjected to sexual violence. All officials, including interpreters, involved in the process should be trained in gender issues’. Canadian Council for Refugees, ‘Refugee Women: Recommendations in Preparation for the Fourth World Conference on Women’, Beijing, 1995.

Standing Committee, above note 1 at 15.
In conclusion, the Guidelines could be strengthened by delineating a detailed standard process by which women’s claims can be treated in a gender-sensitive manner. This description should incorporate the observations already listed under the title ‘Special Problems at Determinations Hearings’.

3.2 Issues of scope

3.2.1 Selection of refugees abroad

Refugees may apply for status in one of two ways: from the inland route after arriving in Canada, or by applying abroad through embassies or consulates. The Guidelines apply to applications made from the inland route and do not apply to decisions made overseas. This is a major problem.

More men than women have the means to travel to Canada to make an inland refugee claim: in 1993 and 1994, 39 per cent of the inland claims were from women and 61 per cent were from men. Similarly, in countries where Canadian officials are not stationed, male refugees often have more resources to travel to nearby countries where there is a Canadian embassy or consulate. This travel may be more onerous for women as they may be responsible for small children, financially dependent, or could face danger or reproach for travelling alone. How can these barriers to women be resolved? Firstly, Canadian officials should travel as much as possible to refugee camps to facilitate the selection of women for resettlement. Secondly, if resources do not permit travel by Canadian officers, then travel by women should be facilitated where possible. Finally, the role of Canadian officials in controlling access to Canadian embassies and High Commissions should be carefully scrutinized to ensure that access is facilitated, not hindered.

Even when women do make it to an embassy or consulate to claim refugee status, further systemic discrimination exists. In the inland process, a woman must prove that she is a refugee within the meaning of the Convention definition. Abroad, she must also prove that she will be able to establish herself successfully in Canada. However, the ‘successful establishment’ policies are based, at least partially, upon a refugee’s employment history and education — criteria which leave women at a severe disadvantage when being considered for resettlement. Women often have less education, language skills and paid employment experience than men. Women also may flee with their children. All of these attributes

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115 Ibid., 19.
116 Ibid.
117 Ibid., 20–1.
118 Ibid., 20.
119 Ibid.
120 Foote, above note 17 at 20–1.
may be considered detrimental when weighing the likelihood of successful establishment. Lori Pope has described why these preconceptions may be misleading:

Because overseas selection also involves an assessment of whether the person will be able to establish themselves in Canada, we have to start looking at what biases there are in establishment criteria. A primary one is the assumption that children are a detriment to establishment in Canada. Our position is that this is not the case. Children should be seen as an advantage rather than as a detriment. Children are going to help women integrate into the community through their contact with schools and other organizations... The people who are making these decisions should look at what's happening in the refugee camps to see whether women who are refugees are going to be in a position to integrate. I think you'll find most of [them] are the ones keeping the families going, making sure they are fed, making sure they have a place to live, and they're going to bring those survival skills to Canada.121

The Beijing Platform for Action recognizes this issue: ‘Refugee... women in most cases display strength, endurance and resourcefulness and can contribute positively to countries of resettlement ...’122 Refugee women should be evaluated not in comparison to men, but in their own right, to determine their eligibility for resettlement. Specifically, the government should review the criteria applied in assessing women’s potential for successful establishment in order to compensate for the systemic discrimination of the traditional criteria, to identify the broader abilities of refugee women and to recognize that these abilities enhance their facility to integrate into and contribute to Canada.123 These new criteria should be described, or at least referred to, in the Guidelines.

3.2.2 Use of the Guidelines abroad

At present, the Guidelines only apply to the IRB, which processes claims made by women from within Canada. They do not apply to those overseas officials receiving claims at Canadian embassies and consulates, or at the Canadian border. However, the Guidelines have been distributed to overseas posts and are being used to assess applications for women seeking resettlement in Canada.124 This makes sense, as both the IRB Members and the overseas officials are applying the Convention refugee definition, ‘a task to which both the spirit and the content of the Guidelines are relevant’.125 Some refugee advocates are concerned that overseas officers are not making consistent use of the Guidelines, and are continuing

121 Lori Pope, Immigrant and Visible Minority Women Against Abuse, Standing Committee Evidence, Issue 36:9, as quoted in Standing Committee, above note 1 at 20–1.
122 Platform for Action, above note 2 at para. 137.
123 Standing Committee, above note 1 at 21.
124 Ibid.
125 Ibid.
to apply an interpretation of the refugee definition that disproportionately disadvantages women.\textsuperscript{126} Several solutions have been proposed. The Ad Hoc Working Group on the Status of Refugee Women in Canada recommends that overseas officials also provide written reasons for not referring to (or departing from) the Guidelines.\textsuperscript{127} Officers could be required to furnish a written record of all decisions to their supervisors,\textsuperscript{128} including reference to the Guidelines in all applicable circumstances. Alternatively, statistics could be kept about the application of the Guidelines.\textsuperscript{129} In any event, administrative measures should be developed to ensure that the Guidelines are being applied.\textsuperscript{130} Stemming from these recommendations, overseas officers should receive gender sensitivity training, as do IRB Members. This training should be broader, in fact, because it must encompass the broader gender issues relating to the application of the requirement that refugees be able to successfully establish themselves in Canada.\textsuperscript{131} The usefulness of the training and the Guidelines can only be sustained if overseas officers also have access to relevant and up-to-date documentation regarding human rights abuses of women,\textsuperscript{132} especially relevant regional information.

3.2.3 Post-determination review

The Guidelines do not currently apply to post-determination review cases, that is, where immigration officials determine if deportation would entail significant personal risk to the claimant. The determination at this stage raises important gender-specific concerns: Will the woman face ostracism in her home country for the persecution suffered? Will she be pressured to commit suicide or will she be killed because of the kind of persecution suffered? Does she have any support networks at home which can provide assistance? The Ad Hoc Working Group on the Status of Refugee Women in Canada recommends that the post-determination review decisions be monitored to ensure that gender-related concerns and reference to the Guidelines are an integral part of this last stage of the refugee determination process.\textsuperscript{133} The Working Group also recommends that, since the post-determination review is based on an assessment of risk rather than whether a person is a Convention Refugee, wider concepts of gender-specific risks, such as those identified in international instruments, be part of every evaluation in a case where gender risk is a factor.\textsuperscript{134}

\begin{thebibliography}{9}
\bibitem{126} Ibid.
\bibitem{127} Foote, above note 17 at 79.
\bibitem{128} Standing Committee, above note 1 at 22.
\bibitem{129} Ibid.
\bibitem{130} Ibid.
\bibitem{131} Ibid.
\bibitem{132} Ibid., 23.
\bibitem{133} Foote, above note 17 at 69.
\bibitem{134} Ibid.
\end{thebibliography}
3.2.4 The final appeal to the Minister on humanitarian and compassionate grounds
Section 6 of the Immigration Act authorises the Minister of Citizenship and Immigration to allow an individual admission to Canada on humanitarian and compassionate grounds. This appeal to the Minister is the final route open to a refugee claimant who has been denied at all other levels. In general, humanitarian and compassionate grounds exist when unusual, undeserved or disproportionate hardship would be caused to the individual if she was forced to leave Canada.\textsuperscript{135}

The power of the Minister to grant a stay is delegated to immigration officers, and these officers consult an Immigration Manual to make their decisions on humanitarian and compassionate applications. The Manual is non-binding and exists to ensure some level of consistency.\textsuperscript{136} Refugee advocates argue that the Manual is not adequately gender-sensitive. This especially hurts women whose sponsorships to be landed within Canada break down because of abuse in the relationship, and women who fear abuse if they are returned to their home country and who seek to remain in Canada in order to be safe.\textsuperscript{137} While the Guidelines may not seem to be directly applicable to this stage of the refugee process, their general principles — that gender-related persecution is a form of persecution, that women face unique forms of persecution and harassment, that domestic and sexual violence may amount to persecution, and that a State may be implicated in the failure to provide protection from domestic and sexual violence — ought to be equally applicable to the immigration officer's decision. As the Ad Hoc Working Group on Refugee Women recommended for the post-determination review process above, wider concepts of gender-specific risks, such as those identified in international instruments, should be part of every evaluation in cases where gender risk is a factor.\textsuperscript{138}

3.2.5 Are the Guidelines necessary? Amending the Canadian definition of 'refugee'
The Canadian definition of refugee is based on the Convention definition, and enumerates the same five grounds under which an individual can make a claim. Some refugee advocates recommend that 'gender' be added as a sixth group to race, religion, nationality, political opinion and membership in a particular social group. This would eliminate the need for much of the Guidelines' analysis placing women within one of the existing five groups. Even if the definition were amended, however, the Guidelines would still be necessary (albeit in a revised form) to provide a similar sensitive method of analysis under the 'gender' category.

\textsuperscript{135} Standing Committee, above note 1 at 27.
\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid.
\textsuperscript{138} See above note 134.
Nevertheless, any amendment of the refugee definition to include gender would enhance the position of women in the refugee process and would address many of the concerns about the vulnerability of the Guidelines and their non-binding nature outlined above. As well, the amendment would represent a formal acknowledgement that the refugee experience is more often female than male.\(^{139}\)

The political will to change the Canadian definition of refugee does not appear to exist at the present time, and the Parliamentary Standing Committee was not prepared to recommend amending the Immigration Act:

While the Committee recognizes that the reasons in favour of changing the Immigration Act are strong arguments in principle, we are unable to agree to this. If the existing definition were actually impedying progress in responding to the realities of women refugees' lives, we would, of course, feel differently.\(^{140}\)

The IRB Chairperson has also concluded that the political will to change the Convention refugee definition does not exist, either in Canada or abroad.\(^{141}\) In conclusion, although it would be a progressive and much-needed step forward for women's rights to amend the Immigration Act, and many refugee advocates have recommended this, it is not likely to be taken in the prevailing conservative political climate. Even if the refugee definition were amended, some form of the Guidelines would still be necessary to provide a framework for analysis of the gender ground.

### 3.3 Issues of evolution

#### 3.3.1 The Guidelines should reflect relevant case law

Changes in refugee case law since the introduction of the Guidelines in 1993 should be incorporated. For example, the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Ward* is important not because it was about a gender-related claim, but because it provides a comprehensive analysis of the meaning of 'particular social group' within the Convention refugee definition. The Court classified social groups as, (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.\(^{142}\)

The Court described the first group as including individuals fearing persecution based on gender, sexual orientation and linguistic background.

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\(^{139}\) Standing Committee, above note 1 at 31.

\(^{140}\) Ibid.

\(^{141}\) Mawani, above note 19 at 73.

\(^{142}\) *Ward*, above note 44, at 739.
to name three examples. This clear direction from the highest court that gendered persecution can form the basis of a refugee claim should be described in the Guidelines, and references to earlier cases that reflected a more tentative approach should be removed.

Lower court cases, such as *Cheung v. Canada*, also provide precedent material. In this case, a woman fled from China after having violated the country’s one-child policy by having a second child. She had attempted to hide the child’s existence from the local authorities, but the second child was discovered and she was ordered to be sterilized. She fled her home and found shelter with her in-laws for three years, after which she eventually came to Canada. The Federal Court of Appeal held, in a unanimous decision, that Chinese women who had more than one child and faced forced sterilization were from a particular social group fearing persecution, as they are ‘united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it’.

Cases which have applied the Guidelines may also provide useful examples, especially when a higher court reviews a decision of the IRB Members. For example, the Federal Court noted in *Narvaez v. Minister of Citizenship and Immigration* that certain Members of the IRB had wrongly concluded that women fearing domestic violence do not constitute a particular social group:

The Board, however, seems to be saying that every woman who is subject to personal individualized violence by a domestic partner is not a member of a particular social group, but merely an individual with no commonalities to hers in the same situation. As I have stated above, I cannot agree with this view of the matter. The failure to recognize her as a member of a particular social group results in faulty analysis of whether the State was unable or unwilling to protect her.

A description of higher court cases such as this, which clearly states that a woman fearing private violence may be a member of a particular social

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143 Ibid.
144 Standing Committee, above note 1 at 13.
146 Ibid., 322. The IRB Documentation, Information and Research Branch’s June 1989 issue paper entitled ‘The People’s Republic of China: The One-Child Family Policy’ describes how women who violate the policy may be forced to undergo late-trimester abortions. Other papers have been published on the situation of women in China, Trinidad and Tobago, Bangladesh and Sri Lanka. The Supreme Court of Canada discussed China’s one-child policy in *Chan v. Canada (M.E.I.)* (16 Oct. 1995), S.C.C. 23813. Chan claimed refugee status as a man because of his fear of being forcibly sterilized for violation of China’s one-child birth control laws. The Court held that he did not meet the burden of proof on the objective aspect of the test for a ‘well-founded fear’ of persecution. The documentary evidence submitted to the court strongly suggested that penalties for a breach of the one-child policy only applied to women in the area where he lived.
group, will assist IRB Members in interpreting *Ward* in the context of the Guidelines.

In conclusion, the Guidelines should be updated by reference to the decision of the Supreme Court of Canada in *Ward,* and as future cases of particular relevance to gender issues in refugee determination are decided by the higher courts. Mention of cases in the lower courts do not necessarily need to be incorporated into the Guidelines, as they can be independently circulated to IRB Members.

3.3.2 The Guidelines should be reviewed and revised on a regular basis

The Guidelines were never meant to remain static; they were expected to change as human rights and refugee law developed. It would be useful to establish a regular review and revision process, to institutionalize the evolution of the Guidelines. The Standing Committee recommends that they be revisited every two years, although every three years might prove to be more reasonable. In any event, such a timetable would ensure that the Guidelines remained current and useful.

Conclusion

The Canadian government made discussion of the Guidelines on ‘Women Refugee Claimants Fearing Gender-Related Persecution’ a priority at the United Nations Fourth World Conference on Women. In the final document, the *Beijing Declaration and Platform for Action,* States agreed to apply international norms to ensure equal access and equal treatment of women and men in refugee determination procedures. States also agreed to consider recognizing as refugees those women whose claim is based upon a well-founded fear of persecution for one of the reasons enumerated in the Convention, ‘including persecution through sexual violence or other gender-related persecution.’ The Canadian Guidelines play an important role by providing a model through which this can be achieved. This is implicit in the next clause, in which States agreed to support and promote efforts made toward the development of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on States’ initiatives to develop these criteria and guidelines, and by monitoring to ensure their fair and consistent application. Part of the information that should be shared in this development of criteria and guidelines is where the existing models can be improved.

148 Standing Committee, above note 1 at 13.
149 Mawani, above note 19 at 77.
150 Standing Committee, above note 1 at 14.
151 *Platform for Action,* above note 2 at para. 147(h).
152 Ibid.
153 Ibid., 147(i).
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The IRB refers to the adoption of the Guidelines as a move from gender neutrality to gender inclusiveness in refugee determination. The statistics for 1994 reflect a modest success: 47 per cent of all refugees resettled from abroad in 1994 were female, higher than the 42–43 per cent of previous years. However, there is still room for improvement, as the numbers should reflect the fact that a majority of refugees are women. The Guidelines have proven invaluable for women claiming gendered persecution: 195 women were granted refugee status in Canada in 1994 under the Guidelines. Although this may seem like a large number, in actuality only about 2 per cent of the approximately 40,000 claims made over the past two years have been based on the Guidelines, indicating that grounds other than gender have been argued in most cases. The fact that only a small minority of refugee claims are actually based on gender grounds reflects the better resources of refugee men to access the claims process.

The Guidelines have proven to be extremely useful as a framework of analysis of women’s refugee claims. They also serve as a model for other States, which have committed themselves to developing criteria on women refugees through the Beijing Declaration and Platform for Action. Canada is in the process of revising its Guidelines and many of the weaknesses identified above will be addressed in the revisions. However, not all of the recommendations made by the Standing Committee on Citizenship and Immigration and refugee advocates will be addressed at this time. The more controversial recommendations or those which require increased resources may be left for the future. Other States may usefully take those weaknesses into account, when considering how best to implement criteria for refugee women arriving in their country.

Annexe: Framework of Analysis

1. Assess the particular circumstances which have given rise to the claimant’s fear of persecution.

   Is the form of harm feared by the claimant one that is directed at or experienced predominantly by women:

   i. because of reasons pertaining to kinship?
   ii. as a result of severe discrimination against women?
   iii. on grounds of religious precepts, social mores, legal or cultural norms?

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154 Mawani, above note 19 at 66.
157 Ibid., quoting IRB spokesperson David Austin.
iv. because of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection?

2. Assess the general conditions in the claimant’s country of origin.
   (a) Is the social and political position of women in that country such that it engenders the degree of discrimination likely to amount to persecution?
   (b) Are there oppressive laws and regulations imposed specifically upon women or certain women? How severe are the penalties for non-compliance?
   (c) Do the State authorities inflict, condone or tolerate violence, including sexual or domestic violence? Do non-State groups or individuals use sexual violence against women as a means of punishing or reinforcing their dominance over other groups?

3. Determine the seriousness of the treatment which the claimant fears.
   (a) For the treatment to likely amount to persecution, it must be a serious form of harm which detracts from women’s human rights and fundamental freedoms.
   (b) In passing judgment on what kinds of treatment are considered persecution, an objective standard is provided by international human rights instruments that declare the lowest common denominator of protected interests.

4. Ascertain whether the claimant’s fear of persecution is for any one, or a combination, of the grounds enumerated in the Convention refugee definition.

5. Is adequate State protection available to the claimant?

6. Determine whether, under all the circumstances including the possibility of an internal flight alternative, the claimant’s fear of persecution is well-founded.