CHAPTER THREE

Captive subjects

Gender, intimate violence and the crises of international human rights interventions

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The growth of the international women's rights movement and its emergence as a field of research and advocacy has led to a valuable but increasingly self-contained discourse, often cut off from developments in postcolonial conditionalities ('postcoloniality'), on the one hand, and conceptions of the different legal contexts in which international human rights operate, on the other. Such a trajectory of 'development' in human rights standards for women have no doubt had an enormous impact on women's lives worldwide, but simultaneously it is also culpable of creating the 'woman-as-victim' subject, 'geographically captive' in the 'barbaric' cultures of the 'third world'.

The nation-building projects of countries like India have an agenda of claiming ownership of this postcolonial subject to establish its 'authenticity'. And, the authentic, globally, then gets constructed as the 'other', sometimes the 'native'. The authentic subject has come to exist with a singular identity of the nation. And, the other multiple identities, especially of caste and class, have been appropriated to further authenticate the national identity, that remaining primary. Unfortunately, the creation of this hegemony of authentic national identities has also led to the creation of authentic postcolonial victims and peripheral

subjects: the good woman as the culture bearer of the nation's identity and the 'sexual subaltern' threatening the very foundations of that same identity (Sircar, 2006a).

To keep the authenticity alive, postcolonial nations resist outside (read: Western) interventions to civilize the native. But, the very creation of the postcolonial identity allows the Western (now read: Imperialist) to further valorize the postcolonial native authentic identity through an essentializing project that targets identities as well as cultures. Gender, for one, gets a raw deal. The image that is produced is that of a truncated third world woman who is sexually constrained, tradition-bound, incarcerated in the home, illiterate, and poor, an image that is strikingly reminiscent of the colonial construction of the 'Eastern woman' (Kapur, 2005).

This image, however, is not contested through the postcolonial nation-building discourse. It only provides the victim subject a shared location from which women repudiate claims of being part of a Western culture, yet furnishing the creation of a unitary subject that enable them to make claims based on a commonality of experience (ibid.). The responsibility of the postcolonial nation then becomes to protect women and what they stand for, rather than protecting their rights.

Can this subjectivity of the Eastern woman be challenged through the language and practice of international human rights law, or is the discourse been oblivious, even responsible for its creation and continues to be so?

In this paper I will map the developments that led to the integration of gender into the international human rights law discourse and examine how the language of 'violence' and 'respectable victimhood' (from Vienna 1993 to Beijing 1995) has been privileged leading to the dislocation of 'discrimination' as envisaged by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as the primary index for measuring women's human rights violations. What has been the consequence of this dislocation? With specific reference to the historic proceedings at the Vienna Tribunal and illustrations from the works of international organizations like Amnesty International and Human Rights Watch, the paper will attempt to identify the hyper-visibility of 'sexual violence' caused due to

cultural/traditional sanctions in the 'third world', constructed by the international women's right movement to invisibilize the 'resistance potential' of women from the Global South.

After the formal integration of gender and sexuality in the international human rights discourse, these constituencies are increasingly being treated as subjects for human rights norm-setting. However, as the paper will argue, this 'achievement' has been resulting in regressive consequences for women's human rights in the 'third world'. To establish this contention, the paper will closely study the concept of 'worse the better' in international asylum jurisprudence, where the establishment of conditions of 'radical evil' (Baxi, 2006) are imperative to the guarantee of 'saving' the fleeing, 'disempowered' and 'vulnerable' Eastern woman from the clutches of barbaric postcolonial states.

A critique of the international asylum adjudication system is necessary to do a reality check with regard to what it can exactly offer when it comes to drawing the fundamentals of refugee rights guarantees from the basic principles of international human rights law. While human rights guarantees are understood to be universal and inherent across the world, when it comes to the determination of an asylum seeker as a refugee, to establish 'fell-founded fear' in an objective fashion, asylum adjudicating officers tend to generate simplistic, even derogatory, characteristics of asylum seekers' countries of origin, as areas of barbarism or lack of civility in order to present a clear-cut picture of persecution (Bhaba, 2002). The central guiding principle of this kind a construction of the asylum seeker as the 'native', who needs to be 'civilized' and rescued out of the clutches of a 'barbaric' state might be best described as "the worse the better" – the more oppressive the home state, the greater the chances of gaining asylum.

In the main, I will deal with the emerging debates and crises that the international human rights regime faces with regard to the postcolonial accusations of it being a 'civilizing-the-native' project and its creation of the third world 'woman-as-victim' subject, to establish how such an approach essentializes both gender and culture. In conclusion, the paper will suggest means through which a 'lens of marginalization' can be employed to

bring the peripheral subjectivity of the 'woman-as-victim' to the centre – a move that will have the potential of busting the rhetoric of 'respectable victimhood' – to claim, through the apparatuses of the state, the rights to politico-cultural autonomy and 'plural' citizenship.

Among others, I specifically refer to the works of Alice Miller, Ratna Kapur and Jacqueline Bhaba. These feminist legal scholars and activists employ a discursive mix of human rights theory, postcolonial and subaltern studies and international relations theory to understand the politics behind the articulation of "women's rights as human rights" and decisively observe how such an articulation operates with regard to geo-political, social and cultural locations of women facing intimate and other forms of violence.

Locating captive subjects

Intimate violence, private-public divide and state accountability

The 'woman' within the international human rights law discourse is essentially constructed as a captive subject. She is 'stuck' at the precarious juncture of 'cultural captivity' – as the loyal, chaste wife – and political non-agency – as second class citizens, devoid of autonomy and bodily integrity. She is a subject who is perpetually vulnerable, due to the essentialized understanding of her 'weaknesses'. She is both hyper-visible in 'private' spaces as primary culture bearers of community and nation and invisible, because the enormity of her presence remains un-acknowledged if we see the nature of 'humanitarian' responses it attracts. Her vulnerability compounded with in/hyper-visibility further disenfranchises her of all agency to decide whether she wishes to claim humanitarian responses and what kind of responses is she willing to claim to break out of the situation where she is 'stuck'.

Making private violence public

Traditionally, in human rights law, violation is understood as an act of the state or those acting in their capacity as state agents. This view only recognizes violations perpetrated by public

authorities and fails to recognize the rights of women to be free from gender-based violence perpetrated in the so-called 'private' sphere. Notwithstanding the fact that women throughout the world are most often subjected to gender-related harms perpetrated in the 'private' sphere of intimate relationships, the state's refrain from intruding into that domain has allowed such violations of women's human rights to continue with impunity (Randall, 2002: 305, 306).

The feminist critique of international human rights law has primarily been an analysis of this public-private divide. The fact that the domestic arena is itself created by the political realm where the state reserves the right to intervention is a result of an imagined division between the public and private spheres (Romany, 1994: 94). Since what occurs in 'private' shapes their ability to participate in the public arena, when women are denied their human rights in private, their human rights in the public sphere also suffer (Bunch, 1995: 14).

As Johnstone points out:

> At the domestic level, the dichotomy of public and private may justify the state's failure to intervene in private relationships, a smokescreen behind which systematic violations of women's human rights have been rendered invisible. Law finds itself in the public realm, but if one cannot enter the public sphere, law and legal rights have nothing to offer. On one level, the classification of particular activities as public or private has been erroneous, because the classification depends on the gender of the actor, rather than the nature of the activity. On another level, the dichotomy itself is questionable, because all activities have both public and private natures. At both levels, political decisions to allocate certain activities to the private sphere have been used to justify the states' abdication of responsibility for that activity. (2006: 152)

As a consequence of the public-private dichotomy, intimate violence remains on the fringe: it is considered less severe and less deserving of international condemnation and sanction than officially/politically inflicted violence. But, when stripped of privatization, sexism and sentimentalism, gender-based violence is no less grave than other forms of inhumane and subordinating official/political violence, which have been prohibited by treaty

and customary law and recognized by the international community as *jus cogens*, or pre-emptory norms that bind universally and can never be derogated from (Copelon, 1994: 117, in Lyth, 2001: 9).

Feminist scholars have stressed that the very jurisdiction of international human rights law is divided along these same public-private fault lines (Knop, 1993: 330). As international law evolved as a set of rules intended to regulate relations among states and as it remains centred on the state, women's experiences tend to get lost from the agenda (Lyth, 2001: 9). For instance:

- Many abuses against women have not been acknowledged as human rights violations because they are committed by private actors rather than by agents of the state.
- Civil and political rights hold a privileged position in human rights law despite formal recognition by the international community or their interdependence and indivisibility with economic, social and cultural rights.
- International norms concerning the life of the family call on states to protect the institution of the family and enshrine the right to privacy in the family (Sullivan, 1995: 126, 127, in ibid.: 9).

While the human rights doctrine in itself has led to greater scrutiny of state action, the engagements of women's rights activists and scholars at the international level have pushed the frontiers of state action to include even the failure of the state to prevent violence in the marital home. The process started with CEDAW, which places affirmative duties on the state to prevent discrimination, even by private actors. It is in this area of preventing violence against women that states become responsible for conduct of private actors even in what was considered the most sacred and distinct private space – the home/family (Coomaraswamy, 1996: 16).

In understanding the relation between the woman being violated and the state, it is important to point out that women suffer due to lack of infrastructure that protects them or enforcement of the existing laws providing them with effective

redress (Bahl, 1997: 41). In other words, the state is responsible to the extent that it fails to provide or utilize the apparatus that could prevent or redress the wrongs. As already mentioned, the state has an affirmative obligation – understood as the concept of 'due diligence' in international law – to protect and prevent violence and its inability to do so amounts to persecution from non-feasance, that is, liability is conferred on the state for commission of those persecutory acts. The state would definitely be in breach of its obligations under international law, which requires it to punish those individuals – government agents or private actors – who commit human rights violations. The breach of such obligations and the inability or unwillingness in protecting a woman's human rights tantamount the state's connivance in the act of persecution (Sircar, 2006b: 264).

In spite of the recognition of 'due diligence' as a *jus cogens* norm in CEDAW and many other international human rights instruments, the family remains the valorized space for the woman – captive and incarcerated – in what even the UN believes to be the "natural and fundamental group unit of society" which is "entitled to protection by society and the state" (Article 16, UDHR). What this implies is that 'due diligence' will actually extend to making the state responsible for protecting the institution of the family, in turn insulating it from state intervention. Interestingly, this human right standard names the society and state as participants who are urged to take an active role in maintaining a social practice or institution and where the power of the state is invoked as a protective device (Rao, 1993: 74).

This raises concerns about the potential of international human rights law to deliver its promise of protecting women's human rights in the private sphere, especially when it is cloaked almost completely in the language of 'violence' and 'victimhood'. While the feminist critiques of the public-private divide allows for a critical re-look at the workings of statist human rights standards and agendas, by ensuring the application of 'due diligence', yet the same language of women's human rights as it is worded by the UN results in reifying women's subjectivities as agency-less and victims. What kind of a more critical lens can one

use to then understand the underlying problematics and politics of "women's rights as human rights"?

It is at this juncture that it will be useful to quickly map the developments that led to the articulation of "women's rights as human rights" within the international human rights discourse to understand how self-contained this development has been, and more importantly, how this development has been effected relying on the construction of the 'woman-as-victim' subject, and bodily-harm as marker of violations.

Protecting women and not their rights?

The recognition of violence against women as a human rights issue emerged almost four decades after the UDHR was adopted in 1948. This enormous lapse in time, in spite of the 'real space' within which gender-based violence operated, is in itself a glaring example of how much importance was given to women's issues in the UN. Issues of violence and gender were solely part of the bodies of International Humanitarian Law[1] (the 'Law of War') and Criminal Law[2] where it was only about political/state-effected forms of violence like rape in times of armed conflict, forced prostitution etc.

The first articulation that could have connections with issues of violence was the CEDAW, adopted in 1979. There was minimal recognition of violence against women in either the Mexico (1975) or Copenhagen (1980) World Conferences on Women. It was in 1985 at the Nairobi Conference that named violence as a concern and began a process of elaborating strategies to address the problem. With the 1986 UN expert group meeting on violence against women and a 1989 study on violence in the family, there began a shift from seeing women's experience of violence as simply a family/private problem to perceiving it as a larger problem and understanding such abuse as human rights concern (Sen, 2006: 55).

The articulation of violence against women, thus, came after the drawing up and adoption of CEDAW, which meant that violence was missing from this instrument. It is remarkable to note how for the framers of CEDAW, a causal connection between discrimination and violence was not evident. However,

in 1992, the Convention's monitoring committee (which periodically adds explanatory, interpretive statements to the document) added General Recommendation 19 which states that violence against women is understood to be a form of gender-based discrimination and that states are to be held accountable for violence against women, including by private persons.

Many other developments followed in the 1990s, most importantly a Declaration on the Elimination of Violence against Women (DEVAW) in 1993 and the creation of the post of the special rapporteur on violence against women, its causes and consequences, who was appointed by the UN in 1994. The governmental Platform for Action, arising from the Beijing World Conference on Women in 1995, had a section on violence against women as one of twelve critical areas of concern (ibid.: 56).

The developments noted above have been very significant within the UN human rights system, where women's rights have been traditionally under-funded and under-valued, to finally elevate it to the status of 'mainstream' human rights. However, what began with the CEDAW in 1979 as a process of ending/challenging gender-based *discrimination,* claiming women's right to substantive equality, through the developments lost out to gender-based *violence* as the issue of primary and fundamental concern to the UN and the international women's movement (Miller, 2004: 20). Violence against women, or VAW, emerged as the 'only' issue that concerns women's human rights as is reflected through the developments stated above. What marked this shift from *discrimination* to *violence*? And, what effect did dislocating *discrimination* have on the larger question of women's rights in the global arena?

It was at the 1985 Nairobi World Conference on Women that violence received an unprecedented articulation. However, such articulation confined it to being understood only as a "women's issue" (ibid.). Starting with the 1990s, especially the global attention on rape as a war crime (with special regard to Rwanda and former Yugoslavia), VAW took centrestage in the theatre of women's human rights advocacy, and sexual violence was constructed as the most important element of VAW. The rallying call to states to end VAW received a resounding amplification at

the 1993 Vienna World Conference on Human Rights (Vienna Conference). It was here that the adage "women's rights are human rights" was coined entirely in the language of 'violence'.

Here I refer to a seminal essay by Alice M. Miller, wherein she comments:

> The [...] move to make 'women's rights human rights' [...] succeeded primarily by following the form of the mainstream human rights paradigm of the time: a *focus on the body suffering from acts committed by the state* [...] VAW [...] was addressed either as a problem for development or as an issue of discriminatory denial of protection against crime [...] [The] attempt was to 'human rights-ify' violence against women (2004: 19) (author's emphasis).

This implies an understanding where bodily-harm becomes a marker of human rights violations and redress can be sought only when we take the state as the primary signifier of rights and the law as its primary legitimizing discourse. This is where we also understand how bodily-harm, which is sexual in nature, and has the potential to threaten/challenge/rupture the essentialized relationship between women and community/nation, creates a hyper-visibility of sexual violence that tends to invisibilize other forms of violations of women's human rights.

Within this discourse then, as soon as questions of violation of the 'body' arise, the law jumps in with forms of incarceration to protect the 'good body' from the 'bad body/ies'. These 'bad bodies' violate the 'good body' in very many ways: from rape to sexual assault. The important question to ask here is, when does the law consider a 'body' to be rapeable or assaultable? The law's responsibility springs to force on the basis of the creation of a construct of the 'good body', which can be raped and/or assaulted. Though 'rational' or 'reasonable' thought would make us assume that the law in its protective role applies impartially to all 'bodies', in reality, the law responds only when the act of 'violation' meets its own qualifying tests. Only when the legal construct of the 'good body' is 'under threat of violation', or has been 'violated', will the law be of any use. If the 'body' does not meet the legal standards of a 'violable body', there is no recourse. The 'good body' also remains violable forever and is in need of

perpetual protection. The law further locates the 'good body' in constructed spaces. If 'violation' happens on a 'good body' in a space, which does not meet the notions of the legal construct, it is not considered a violation at all.

The operation of human rights law on women's bodies thus creates the protection vs. freedom quandary. What were the primary objectives of this entire body of law that was made to end VAW – was it to protect 'violable' bodies, or create enabling conditions for 'freedom from violence' for all bodies? The singular focus on sexual harm as the gravest form of VAW has resulted in the state exercising its responsibility – to protect women's bodies, but not their rights (ibid.: 17). And, what kind of 'body' qualifies for protection is constructed through the law, under influence from socio-political forces that are in a position to make it.

VAW and specifically sexual violence has been effective in forwarding the cause of women's rights advocates because it seemed to provide a means to make the gender-specific content of this violence visible to the key human rights bodies and actors. The result was where "women [made] demands and ladies [got] protection" (Miller, 2004).

It is important to understand how historic developments on women's human rights in the UN have worked both in progressive and regressive ways for women. Where on the one hand it embodied a horror that could no longer be ignored and had to be responded to by states, it also represented the woman purely as a victim subject and reaffirmed her image (especially of women from the South) as without power and in need of protection. If one recollects the victim testimonies presented at the "Women's Rights are Human Rights Tribunal" (Vienna Tribunal) at the 1993 Vienna Conference, we will realize how clearly they were focused on sexual violence. In a filmed documentation of the proceedings at the Tribunal, of the 15 or so testimonies shown, at least 10 deal with sexual assault in detention, incest, marital rape, forced prostitution or rape in armed conflict. This narrow frame of sexual harm has reduced women to suffering bodies in need of protection by the law and

the state, than as bodies and minds in need not only of protection, but participation and equality (ibid.).

While the hapless suffering bodies of sexually victimized women gained visibility internationally as markers of the only kinds of violence women experienced, this push was also propelled through an understanding where the voices of victimized women had to be made respectable, to lend credibility to the work of women's and human rights advocates.

As Miller notes:

> A [singular] focus on harm makes the discussion on sexuality safe – which is to say, respectable. Some forms of anti-sexual violence advocacy dovetail with the interests of states and thereby gain 'respectability' as an element of 'credibility' to participate in making policy with a state [...] Focusing on the harm in sex rather than what good sex might be [puts advocates] beyond self interest and salaciousness, especially if her focus is on a powerless victim, someone who cannot conceivably be held responsible for [exercising any agency] [...]. (2004: 37)

Through the discussion so far I have attempted to both celebrate the strides made in international human rights law in articulating the need for responses to stop VAW, and at the same time, have cautioned about what those responses might entail for women's human rights in the long run. In spite of the historic developments on women's rights and state accountability in human rights law, we can still identify the location of the 'woman-as-victim' in the trajectory of rights-claims: she still remains captive within the constructs of family, home, community and nation. Her captivity is further valorized by human rights standards that invoke culture to create an imaginary geographical hierarchy of locations where the 'woman-as-victim' should and ought to be. In the next section I take ahead the discussion to understand what still continues to fuel the VAW approach to women's human rights, and how women victims from the postcolonial worlds are further victimized for their 'cultural captivity', invisibilizing all forms of resistance potential that they have.

The 'postcoloniality' conundrum

Gender, culture and the crises of international human rights interventions

My concern in this section is to deal with two issues: first, to develop an overview of what 'postcoloniality' means, and second, to establish a connection between postcolonial conditionalities and its interactions with international human rights law and how such interactions impact on gender and culture in the Global South.

The international human rights discourse has been fraught with the accusation of being 'Eurocentric' – meaning, that it has emerged out of the experiences of World War II, and was in essence a response to addressing conditions of rights-violations in the Euro-Americas. Though over time states have been able to reach a semblance of consensus, through the UN, on the 'universality' of 'inherent' and 'indivisible' human rights norms and standards. But, as many scholars have pointed out, the 'universality' thesis has its roots in the understanding of 'Enlightenment', and thus is deployed in a cruelly liberal fashion, where peoples in the Southern world are subjected to an 'othering' treatment if they refuse to conform with the Western 'universal' standards and their attempt of resistance is constructed as 'fundamentalist' (Kapur, 2005; Baxi, 2006; Bhaba, 2005; Mamdani, 2004). This is evident from the kind of 'invasions' that have taken place in recent times in the name of 'humanitarian intervention' in Afghanistan and Iraq, and continue in several African and South Asian countries – through governmental, non-governmental and evangelist missions.

Such an experience is not new for postcolonial nation-states who have had to face the accusation of being 'backward' and 'barbaric' since the time of their colonial occupation. Here, I will use the term 'postcoloniality', "not simply meaning as *after* colonialism but as the discourse of oppositionality that the encounter with colonialism brings into being – postcoloniality thus begins from the very first moment of colonial contact" (Menon, 2006: 207). Postcolonial conditionalities are thus the strategies used to create subjectivities – of the 'native' and the

'civilizer' – and the systems through which these identities are perpetuated much after the colonial withdrawal – the law being one such major system (Singha, 1998; Nair, 1996; Kapur and Cossman, 1996).

In the situation of being a 'post-colony', the 'cultural connection' is primarily invoked by Western 'interventionists' who continue to act upon the understanding that the 'natives' still need to be 'civilized' and women need to be 'rescued' from their 'geographic captivity' and 'barbaric' cultural practices.

The 'woman question' remains central to the colonial (simultaneously Imperial/Western) enterprise as gender continues to be an overdetermined subject at the heart of ideological and political struggles over the meaning of culture and nation. "This forms the rationale for colonial legal interventions in the interests of 'civilization' as well as the grounds of ['native'] resistance to colonial interference and impetus for reform [from] within [postcolonial] communities" (Basu, 2002: 111).

Postcoloniality continues to recreate, as Partha Chatterjee points out, the 'inner' and 'outer' zones that determine the mechanics of culture and its impact on women. 'Western' material resources and practices are seen as beneficial for the new nation undergoing 'modernization', but 'Eastern' spirituality and culture are understood as superior, and thus demand responses to protect its 'authenticity' from getting tarnished and contaminated by Western influences. The 'outer' forms of the colonizer's world are to be embraced but the 'inner' world of authentic culture and tradition is considered sacrosanct from external intervention. Reform for women, associated with the inner world, is, thus, supposed to come from within the community and not from outside (Basu, 2002: 111, 112; Chatterjee, 1997; Bannerji, 2001).

The fixed notions of 'Western' and 'Eastern' marked through imagined authentic symbols of women – as chaste, loyal wives and dutiful mothers – as ones that solely bear the burden of cultural authenticity – have resulted in essentialisms that conflate gender and culture along with the many subjectivities that might inform socio-politico-cultural identities of women, to invisibilize the plural identity that an intersectional experience of gender, class, caste, religion, nationality etc. can produce.

The distinction is then made clear – the 'Western' woman is independent, liberated and can exercise agency and thus does not require 'protection, whereas her 'Eastern' counterpart still remains a victim of degenerated orthodox cultures and must be rescued. The contested question is: who will rescue her? Her essentialized vulnerabilities and weaknesses are not issues under consideration between the dichotomies of east-west, first world-third world, west-'the rest', but who shall have the heroic claim of being the 'knight in shining amour' (apologies for the 'Victorian' adage), becomes the reason for all deliberation – will it be the 'civilized' white man or the 'barbaric' brown/black man?

Not surprisingly, most of the responses of international human rights law to protect women from violence have been directed towards the truncated 'third world' woman, who according to the 'Western' law-makers, is sexually constrained, tradition-bound, incarcerated in the home, illiterate and poor – an image that is strikingly reminiscent of the colonial construction of the 'Eastern woman' (Kapur, 2005). Expectedly, such a response has attracted the many self-proclaimed guardians of 'Eastern' culture to reject the entire body of international human rights law as 'Eurocentric', in turn using the argument of 'Relativism' to create a culture of impunity for themselves where violence against women can continue through state sanction.

It is this continuum that I will briefly explore by examining some human rights law interventions that allow the Enlightenment-induced liberal discourse of human rights law to cement both the assumed "moral superiority of the West over the rest and the existence of an intense eye upon the 'other' cultures that [are] deemed to be in need of changing their gender relations to become modern and enlightened" (Sen, 2005: 43).

Of crises, interventions and imagined victims

It is an understood fact that only situations of crises invite interventions. Sometimes, the crises are real, sometimes constructed and imagined. If we look at the developments in international human rights law to accommodate the issue of VAW (as discussed earlier), we can deduce that the crises were indeed an

outcome of the combination all the three factors. VAW was a *real* problem that necessitated a concerted response from the international community; the hyper-visibility of sexual harm as the gravest form of VAW was *constructed* through the language of 'respectable victimhood' and a singular focus on harm done too the gendered-body; and the women of the third world are *imagined* to be the victim subject, without any agency and in need for human rights protection from the violence inflicted upon them by their own cultures. How is this imagined cultural subjectivity of a third world woman's experience represented through human rights work and reporting? And, what kind of interventions does such representation attract?

In her influential essay, 'The Tragedy of Victimization Rhetoric', Ratna Kapur observes:

> [...] [R]eliance on the victim subject [...] in the context of [VAW] presents a position [...] [where] women in the postcolonial world are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West. In the end, the focus on the victim subject reinforces the depiction of women in the postcolonial world as perpetually marginalized and underprivileged, and has serious implications for the strategies subsequently adopted to remedy the harms that women experience. It encourages some feminists [and women's human rights advocates] to propose strategies which are reminiscent of the imperial interventions in the in the lives of the native subject and which represent the 'Eastern' woman as a victim of a 'backward' and 'uncivilized culture. (2005: 99)

Kapur goes on to further point out the nature of state response a singular focus on the victim subject attracts:

> [The] victim subject and the focus on violence invite remedies and responses from states that have little to do with promoting women's rights. Thus, a related concern is that the victim subject position has invited protectionist, even conservative responses from states. The construction of women exclusively through the lens of violence has triggered a spate of domestic and international reforms focused on the criminal law, which are used to justify state restrictions on women's rights – for the protection of women. (ibid.: 100)

If one were to look at the numerous reports that international ('Western') organizations like Amnesty International (AI) and Human Rights Watch (HRW) have put together on VAW and have used them as campaign material, we would understand the trope that they follow. Consider some of the AI titles: *Women in Afghanistan: the Violations Continue; Bangladesh: Institutional Failures Protect Alleged Rapists; India: Amnesty International Campaigns against Rape and Sexual Abuse by Members of the Security Forces in Assam and Manipur; Pakistan: Honor Killings of Girls and Women* (cited in Visweswaran 2004: 484).

Using the crises-induced-intervention theory that I briefly talked about above, there is no denying the fact that the events of VAW being documented and reported are indeed real. But, the plight has been singularly focused on women from the South.

One of HRW's most well-known publications and one that is very popularly cited by researchers and advocates is the *HRW Global Report on Women's Human Rights*, published in 1995. The timing of its publication was indeed planned to coincide with the 1995 Beijing World Conference on Women and also immediately follows the historic developments of the 1990s on women's human rights: the 1992 CEDAW General Recommendation 19 on VAW, the 1993 Vienna Conference, and the 1994 DEVAW and appointment of the Special Rapporteur. At a time when VAW was receiving unprecedented global attention and demanded state responses to end VAW, the publication of the report of timed strategically. But if one looks through the 6-page contents section it will be hard to find reports on VAW in countries of the North. Barring two reports, one on 'Sexual Abuse of Women Prisoners in the U.S.' and another on 'Abortion and Women's Rights in Ireland and Poland', all the other reports are about the most egregious forms of VAW faced by women from Africa, South Asia and the Middle East. Even, the cover of the report shows the face of a woman who definitely looks distraught and South Asian!

Though the report does not specifically invoke culture and religion as variables for analyses, the overwhelming majority of cases from Southern countries automatically works as a process of constructing the imagination of barbaric and backward cultures and implicitly draws a stark distinction between the

conditions of women in the East and West, and completely fails to arrest the phenomenon of VAW that cuts across cultures and nations. For instance, the report on 'Sexual Abuse of Women Prisoners in the U.S.' locates VAW in the US only inside police custody, invisibilizing all other structural forms of violence that women face both inside their homes and at work, and also comes across as naïve, ignoring racial issues that escalate VAW within custody – Black women being at the receiving end of such violence not only because of their gender, but also for their colour.

In 2003 AI started a 6-year-long Stop Violence against Women Campaign and published a report titled *"It's in Our Hands: Stop Violence against Women"*. Even if one cursorily flips through the publication, the images that stare at you from the pages, almost all of them are of women from the South. It is easier to make that out because all the photographs are in colour. This report, however, does provide some statistics that bust the myth of VAW, especially domestic/intimate violence being an exclusively Southern preserve. Chapter 1 of the study reports, among others:

- The Council of Europe has stated that domestic violence is the major cause of death and disability for women aged 16 to 44 and accounts for more death and ill-health than cancer or traffic accidents.
- In the USA, women accounted for 85 per cent of the victims of domestic violence in 1999 (6,71,110 compared to 1,20,000 men) according to the UN Special Rapporteur on VAW.

The question of representation of gendered-harm and its connection with culture was also evident through the testimonies presented at the 1993 Vienna Tribunal. In the run-up to the Tribunal hundreds of testimonies were gathered by the organizers, the Centre for Women's Global Leadership, but only a few were presented at the Tribunal. The testimonies were also considerably edited to highlight the goriest of details regarding the kind of violence the victim had faced.

One such testimony was by a Pakistani woman called Perveen Martha whose story focused on how she was set on fire

by her husband in February 1984. In her analysis of this testimonial, Kapur notes:

> The listener was left with the impression that the 'burning of brides' is a feature of 'Asian' culture. The framing of Perveen's life through the lens of violence and the mechanism of personal testimonial did not disrupt the gender and cultural assumptions present in the audience's *imagination*. What was marginalized in the telling of the story was the fact that Perveen was a Christian who had been married for several years and had several children, who were not in her custody. Even in the transcript of her testimony, Perveen's broader story as a divorced Christian woman and parent is not in the foreground. The script focuses on the burning incident [...] though she had been subjected to physical abuse prior to [...] [that]. Constructing the story around the incident of burning is an exoticism move that plays into cultural essentialism and provides little insight into the *reality* of Perveen's life. Her husband had divorced her and she was struggling in court to secure maintenance and custody of her children [...]. It is important to understand her multiple subject positions and location as a divorced Christian woman, at a time when the military dictatorship of General Zia-ul-Haq in Pakistan was clamping down on women's rights generally (2005: 128) (author's emphasis).

Kapur refers to another testimonial in her essay:

> [...] Alpana Chandola [...] [was] described as a 'survivor of dowry violence'. However, her testimony revealed that she was also a survivor of domestic violence, beaten and abused from the first day of her marriage. Focusing on the dowry demand deflected attention from other reasons for the violence she experienced. Describing Chandola's experience of violence through the lens of dowry closed off a more complex socio-economic analysis of her experience and reinforced cultural stereotypes about how women in India experience domestic violence. (ibid.: 129, fn25)

The constant use of culture as a cause for VAW and the singular focus on bodily-harm has three regressive side-effects for women's human rights. First, it essentializes both gender and culture, invisibilizing plural practices that a culture might have and homogenizing the category of woman – completely

disregarding intersectional experiences of existence and potential for resistance. Second, since VAW is constructed as visible bodily-harm, state responses are focused at only countering the visible violence and not the systems that fuel it. When the violence is not visible any longer, but continues in other insidious forms, the state can absolve itself of all responsibility, in turn subverting the principle of 'due diligence'. Third, focus on bodily violence is also a process of privileging civil and political rights over economic, social and cultural rights – denying women guarantees to enabling conditions and decision-making authority.

When it comes to talking about VAW in the third world, there is an almost purposeful attempt at establishing a connection between culture and violence, however, that never happens when VAW in the Western context is referred to. For instance, Uma Narayan has discussed how dowry murders are cast in the first world scholarship as an age-old Indian/Hindu practice, and she contrasts it with research on domestic violence murders in the US, which are not similarly cast as practices of 'American culture' through references to Christianity (Narayan, 1997: 82, in Kapur, 2005: 109).

Like the conflation of dowry murders with Indian/Hindu culture or practice the international activist and academic discourse on VAW is replete with works on female genital mutilation (FGM), honour killings, the imposition of the veil, and all such forms of VAW also have a captive location – the third world, especially Islamic countries that are touted to be on the other side of 'civilization', so much more after September 11. A political climate where the 'clash of civilizations' are primarily being fought on the grounds of cultural supremacy, it is evident why for the Bush Administration, the plight of women in Afghanistan was the justification for the illegal invasion. Even Western media propaganda represented unveiled women after the Taliban were defeated, as the marker of 'liberation' that the 'West' has finally achieved to effect.

In a film titled *"Women's Rights are Human Rights"*, made by AI, the cover states that "it is a well-focused and sometimes shocking denunciation of the violence that afflicts women in

many countries of the world". The 'many countries' featured in the film are Egypt, Indonesia, Bosnia and Herzegovina, Kosovo, Gambia, Pakistan, Somalia and Turkey. And, the forms of VAW that the film documents are FGM, honour killings and as a slight digression rape as a war crime. Interestingly, the part on Honour killings (filmed in Pakistan) starts with images of veiled women on the street, with the sound of the *azaan* in the background and the voice-over saying that in Islamic law men are supposed to be protectors of women. Here again, culture is not explicitly invoked to draw a connection with honour crimes, but both the visualization and narrative clearly point towards that direction.

Such interventions and representations construct cultural practices to "occupy our imaginations in ways that are totalizing of a culture and its treatment of women, and are nearly always overly simplistic or a misrepresentation of the practice" (Kapur, 2005: 107). Be it veiling, honour crimes or FGM – none are universally practised in the Islamic world or in Africa and thus cannot be used as markers to put Islam into a homogenized bundle.

As Purna Sen succinctly remarks:

> Making culture the divisor [...] renders those who inhabit the culture under scrutiny problematic per se, and suggests that their salvation lies in abandoning this culture, and, by implication, adopting another. Almost invariably this Salvation is Western, Judeo-Christian culture. Is this really the answer? If the problem were [...] [Eastern or post-colonial cultures and religions], it might be – but then only if Western culture and religion had eliminated violence against women. And, as we know, this is far from the case. If violence against women exists in the cultures that criticize the 'other', as it clearly does, then existing cultural practices do not determine the safety of women, as in no culture are women assured freedom from violence. (2006: 62)

From here I take the discussion into the domain of international refugee and asylum law as another system of intervention. This body operates on the basis of establishing 'barbarity' as the qualification for gaining asylum – meaning, a guarantee for protection 'outside' of one's country when states fail to exercise 'due diligence' completely.

"Worse the better?"

Gender-based persecution and the politics of asylum jurisprudence

Although postcolonial feminist critiques of the liberal discourse of human rights law (Kapur, 2005; Visweswaran, 2004) have exposed the dangers of applying it unproblematicaly to questions of culture in the third world, international refugee and asylum law, which is a supplemental part of the body of human rights, has been playing a nobly truant role in continuing the imagined North-South divide of civility-barbarity. The situation gets complicated because of the fact that none of the South Asian countries are party to the 1951 UN Convention on the Status of Refugees (Refugees Convention) and its 1967 Protocol, thus being outside of any international obligation to protect the rights of those fleeing persecution in their own countries. Moreover, the 1951 Convention does not recognize 'gender' as a valid ground for being persecuted, expanding manifold the possibility of women's asylum applications being rejected.

One major way to escape gender-based violence, especially of the private nature, when the state is unable or unwilling to provide protection, is to flee – as a refugee seeking surrogate protection from the jurisdiction of another state. Such situations are regulated through the discourse of international refugee law, its standards premised primarily on the Refugees Convention. But, even within the refugee law discourse, protection of rights of women fleeing gender-based violence/persecution is measured only through their 'victim' status. Responses from states as well as agencies like the United Nations High Commissioner on Refugees (UNHCR) does not consider their special needs and requirements, nor are the responses framed in ways that privilege their 'voices'.

Though women's issues have become increasingly central to UNHCR's policies for close to two decades now, their conditions are always perceived as vulnerable victims of war or culturally sanctioned intimate violence. Evoking the picture of suffering and helplessness of refugee women, the UNHCR appeals to our humanitarian sympathy. Women are construed as more 'true' refugees, being the victims rather than perpetrators of violence.

This picture reduces a refugee woman to the level of an infant and leaves her without agency and responsibility (Malkki, 1995, quoted in Turner, 2000: 8).

It is well documented that the majority of the world's refugees are women (UNHCR, 2002), who bear the brunt of the most extreme forms of human rights abuse. In any civilian exodus, women and children normally make up an estimated 75 per cent of a refugee population. Yet, the Refugees Convention does not recognize 'gender' as a separate and independent ground for persecution. After all, the 1951 Convention – the Magna Carta of international refugee law – was crafted by an all-male panel and defined a refugee as someone with a well-founded fear of persecution based on *race, religion, nationality, membership of a particular social group* and *political opinion.* Not a single woman was present amongst the *plenipotentiaries* when the drafters of the Convention had met in Geneva. The founding 'fathers' did not deliberately omit persecution based on gender – it was not even considered (ibid.).

It was the dominant image of a political refugee – someone who is fleeing persecution resulting from his direct involvement in political activity – which informed the minds of the drafters. This understanding does not often correspond with the reality of women's experiences and the "law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women" (Romany, 1994: 88).

Even, the existing bank of jurisprudence on the meaning of persecution is primarily based on experiences of male claimants where "[persecution] is [understood] by the criterion of what men fear will happen to them" (Charlesworth, 1994: 71). Female-specific experiences such as genital mutilation, bride burning, forced marriages, domestic violence, forced abortion or compulsory sterilization, have not been widely understood to qualify as persecution. Rape is the only exception (Macklin, 1995: 225).

In South Asia, where violence against women is endemic and human rights obligations of states are seldom met, they are indeed defenseless in their ability to seek protection from violence through the implementation of international law. State

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adjudication practices as well as the non-existence of a regional 'gender asylum law' regime do not afford them an opportunity to seek surrogate protection[3] under international refugee law. The result is a growing number of internally displaced women who are at greater risk because the government that should have protected them often commits the abuses they seek to escape. Moreover, because they have not crossed any international border to seek refuge or asylum, displaced persons can claim only minimal protection from international law (HRW, 1995: 101).

Gendered dimensions of persecution

Article 1A(2) of the Refugees Convention, as amended by the 1967 Protocol relating to the Status of Refugees, defines a 'refugee' as:

> ...any person who... owing to a fell-founded fear of being persecuted for reasons of *race, religion, nationality, membership of a particular social group* or *political opinion,* is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country; or who, not having a nationality and being outside the country of his/her formal residence, is unable or owing to such fear, is unwilling to return to it. (author's emphasis)

However, there exists no comprehensive definition of concepts of 'persecution' and 'well-founded fear of persecution' in international law. The drafters of the Refugees Convention framed an open-ended and flexible approach to the concept of persecution in the form of a universal framework. The UNHCR's Handbook gives direction in this regard:

> ...it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution. (UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979: para 51)

The Handbook further states:

> The phrase 'well-founded fear of being persecuted' is the key phrase of the definition. It reflects the views of its authors to the

> main element of refugee character [...] Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in [her] country of origin. (UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979: para 37)

Women face special difficulties in obtaining refugee status. Two issues arise here: the ground upon which someone is granted refugee status, and the process of establishing these grounds. To identify the 'ground' one has to go with the understanding of 'persecution' and to 'establish the process' of arriving at the ground; one will have to understand 'well-founded fear'.

Thus, to gain recognition as a refugee, the asylum applicants must demonstrate that (1) the level of harm they have experience rises to persecution, (2) their own government cannot or will not protect them from the harm, and (3) the persecution is based on one of the protected grounds included in the definition (Martin, 2004: 28).

Why is the definition of persecution is necessarily linked to the five specified grounds only? In an attempt to redefine 'persecution', Alexander Aleinikoff points out:

> My sense is that this gets at something other than simply the level of harm; call it a 'qualitative' or 'normative' aspect of the definition of persecution. That is, persecution connotes unacceptable, unjustified, abhorrent infliction of harm, not just simply a particular degree of harm. (1991: 298)

One can draw from this understanding to state that the non-inclusion of 'gender' as a ground does carry a notion that calibrates pain and suffering on a scale where 'gender' cannot match up to the kind of *unacceptable, unjustified* and *abhorrent* infliction of harm that the existing grounds of *race, religion, nationality, political opinion* or *particular social group* attract.

The claim to refugee status by women facing gender-based persecution also presents special difficulties. There are cases which involve women who are victims of domestic violence or who fear harsh or inhuman treatment because of having

transgressed social mores that confine them specific spaces, tasks and responsibilities. Even, when they are able to demonstrate that the harm is so great that it constitutes persecution and they have exhausted all efforts to receive protection from their governments, they are still faced with showing that the persecution is based on one of the protected grounds. As is known to us, gender is not one of the bases for persecution in the Refugees Convention definition (Martin, 2004: 31).

As already discussed, the definition of persecution in refugee law contains two elements: first, persecution not only requires that a claimant be at risk of sustaining serious harm, and second, that she cannot expect meaningful protection from that harm in her home country. Thus, recognizing that gender-related harm which threatens basic human rights of women constitutes serious harm alone is not sufficient to warrant the label of 'persecution', the harm feared must be directly or indirectly attributable to the state and that the individual cannot expect meaningful protection from these state authorities in the country of origin (Adjin-Tettey, 1997: 54).

According to Susan Forbes Martin, "Even more [problematic] are situations in which women flee their country because of severe sexual discrimination [...] While the universal right to freedom from discrimination on the ground of sex is recognized [...] the dividing line between discrimination and persecution is not a clean one" (2004: 31). Thus, eventually the criterion that is particularly significant in cases dealing with gender-persecution and that differ from other asylum application, is which acts amount to persecution.

The term 'gender-based persecution' refers to asylum applications of women premised on issues pertaining specifically to their gender. These claims can be separated into two general categories. The first focuses on persecution commonly faced by women such as – rape, genital mutilation, domestic violence and bride burning, among others. The second category includes claims that constitute persecution because of the applicants' gender, that is, persecution for disobeying repressive gender discriminatory laws or for not conforming with social mores that are offensive to women. This category also includes situations

that discriminate against women and strictly prohibit them from engaging in certain activities (Bahl, 1997: 34).

In other words, gender-based persecution would include:

- When a woman is persecuted *because* of her gender, it addresses the causal relation between gender and persecution, her gender is the reason for why she is persecuted.
- When a woman is being persecuted *as* a woman, it is the *form* of persecution that is sex/gender-specific. Understanding the ways a woman is persecuted *as* a woman is critical to naming as persecution things that are done to women and not to men.
- When gender can be considered to be a risk factor that makes a woman's fear of persecution more well-founded than that of a man in similar circumstances (Lyth, 2001: 16).

The definition of refugee in the Refugees Convention is one that is not simply silent on the category of 'gender', but behind it lies narrow interpretations and assumptions of the conventional refugee that rarely fit the experiences of women. In practice, women have greater difficulty in satisfying the legal requirements for refugee status because of certain inherent male biases in the law. Women are less likely to meet the eligibility criteria for refugee status because of non-recognition of gender-based persecution, as well as the social and political context in which their claims are adjudicated. According to Nancy Kelly (1993: 265) the problem is two-fold: first, the Refugees Convention definition of 'refugee' does not specifically identify gender as a base for protection; and second, in applying the refugee definition, adjudicators have traditionally neglected to incorporate gender in their interpretation of the grounds of persecution enumerated in the Refugees Convention. This is especially true of male adjudicators who tend to regard gender-based persecution as a private and personal matter rather than as a socially significant phenomenon. Applications are continuously considered as falling outside the requirements of the Refugees Convention and rejected on the basis that the perpetrator is a private actor for whom the state cannot be made accountable. At times, fear of treading on state sovereignty has led advocates for cultural

relativism to warn against interpreting traditional and historically sanctioned practices as persecution.

This is also due to the general failure of the international refugee and asylum law regime in not recognizing systemic denial of social and economic rights while emphasizing individual targeting and specific deprivation of civil and political rights. Besides, as already discussed, human rights law and discourse tend to privilege male-dominated public activities over the activities of women, which take placé largely in the private sphere (Crawley, 2000: 17).

The key criteria for being a refugee are drawn from the public realm dominated by men. With regard to women's activities in the private sphere, there is primarily silence, which assigns the critical quality 'political' to mostly public activities. Thus, state oppression of a political minority is likely to be considered political unlike gender oppression at home (Indra, 1987: 3). Moreover, in rejecting gender as a legitimate ground for persecution, state authorities may easily dismiss people, especially women, whose economic, cultural and social rights have been violated as 'economic migrants' (Raj, 2001: 170).

'Gender' as a sixth ground?

This omission of gender as a separate ground for persecution has had severe implications for many female asylum seekers across the world. As a consequence, debates have focussed on whether women's experiences can and should be interpreted so that they may be included into the already existing grounds or whether it is instead necessary to introduce gender as a sixth ground. Another consequence of the Convention's non-recognition of 'gender' is that it becomes difficult to understand which convention 'ground' is the most appropriate for raising claims for gender-based persecution.

The question is whether the addition of gender as a sixth ground can bring about a reconceptualization that would reveal, instead of conceal, the persecution that has its origin in women's distinctive existential and material state of being? (Lyth, 2001: 28).

In an authoritative paper by Roger Haines for the Global Consultations on International protection of the UNHCR, it is pointed out that adding 'gender' as a sixth ground to the Refugees Convention runs the risk of implying that gender need not be treated as intrinsic to all of the five grounds that are named in the convention. Haines writes:

> The failure of decision-makers to recognize and respond appropriately to the experiences of women stems not from the fact that the 1951 Convention does not refer specifically to persecution on the basis of [...] gender, but rather it has often been approached from a partial perspective and interpreted through a framework of male experiences. The main problem facing women as asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women. (2003, quoted in Newland, 2003: 2)

Heaven Crawley seconds Haines' contention by stating: "Simply adding gender or sex to the enumerated grounds of persecution would not solve the problem. The bars to women's eligibility for refugee status lie not in the legal categories per se, but in the incomplete and gendered interpretation of refugee law, the failure of decision-makers to acknowledge and respond to the gendering of politics and of women's relationship to the state" (2000: 17). Still how refugee law could be more effective in strengthening other forms of protection is that refugee law, in part, takes an integrative perspective on women's rights. "By interpreting forms of violence against women within mainstream human rights norms and definitions of persecution, refugee law avoids some of the problems of marginalizing women's rights in international law" (Anker, 2002: 133).

However, there is a need for scholars, activists and policy makers working on refugee rights to be skeptic of the kind of repercussions inclusion of 'gender' as a separate ground for persecution might have. Such an inclusion would definitely be a very significant development, but it would also tend to homogenize the 'woman' category by assuming that women's experiences of persecution everywhere follow the same patterns

and trends irrespective of their cultural and geopolitical locations.

To avoid essentializing both gender and culture, the framework for asylum determination needs to be transformed to accommodate the inclusion of women not as a special case, but one as many different categories where women's experiences are contextualized not just with regard to their sex or gender, but one which takes into consideration the linkages and interactions of their gender identity with that of their caste/colour/race/national/political identities. This approach suggests that the problem is not so much the invisibility of women but rather how their experiences have been represented and analytically characterized (Crawley, 2000: 19).

Politics of seeking asylum

In the process of determining asylum claims questions of human rights abuse arise, generally, in three circumstances: persecution in the state of origin (the basis of the claim to asylum); rights violations in the course of migration (which may impinge on the substance of the claim); and abusive host state practices at the point of reception (which may relate to procedural questions about where a claim should be lodged or whether the applicant is credible).

In one of her influential essays titled "Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights", Jacqueline Bhaba (2002: 156–57) points out that refugee movements today are increasingly becoming more torturous and facilitated by commercial intermediaries and false documents. According to her, in a situation like this, the bona fide of the asylum seeker raises some critical questions: What is the nationality of the applicant? Which state should be responsible for providing protection in cases where the applicant's flight itinerary has involved various safe 'third' states en route to the state where asylum is being sought? Why did the applicant not present her asylum claim at the first opportunity?

Bhaba goes on to further point out that in a climate where escalating concerns about terrorism, economic recession, and state security heighten exclusionary and xenophobic impulses in

developed states considering asylum applications, the challenge of establishing a particular host state's obligation to protect is particularly great (ibid.).

A critique of the international asylum adjudication system is therefore necessary to do a reality check with regard to what it can exactly offer when it comes to drawing the fundamentals of refugee rights guarantees from the basic principles of international human rights law. While human rights guarantees are understood to be universal and inherent across the world, when it comes to the determination of an asylum seeker as a refugee, to establish 'fell-founded fear' in an objective fashion, asylum adjudicating officers tend to "generate simplistic, even derogatory characteristics of asylum seekers' countries of origin, as areas of barbarism or lack of civility in order to present a clear cut picture of persecution" (ibid.: 162). The central guiding principle of this kind a construction of the asylum seeker as the 'native', who needs to be 'civilized' and rescued out of the clutches of a 'barbaric' state might be best described as "the worse the better" – the more oppressive the home state, the greater the chances of gaining asylum (ibid.).

With specific reference to violence against women, absence of regional or national laws have also meant that women facing persecution on grounds of gender can only avail of the recourse of applying for asylum to a Northern country. This, beyond being a practical constraint, is culpable of creating the stereotypical image of the third world woman-as-victim subject. An examination of case law in various Northern countries will make it evident that most cases of gender-based persecution concern women from the South who face culturally sanctioned forms of violence. Similar to the problems of addressing 'gender' as a special ground for persecution, the present politics of asylum jurisprudence considers the third world 'native' woman to be tradition-bound, incarcerated in the home, illiterate and poor and most importantly in need of Western intervention for 'protecting' and 'saving' her from violence (Kapur, 2002: 18). Moreover, her attempt to flee persecution is constructed as her desire to live in a 'liberal' and 'equal' society – epitomized by cultures in the West – and renouncing her 'own' barbaric culture. The need for a 'gender asylum regime' in South Asia is thus necessary for not

only advancing asylum jurisprudence in the region, but also challenging and countering the existing constructs of the Eastern-native-disempowered-woman, which at best victimizes and at worst infantilizes them.

Not a conclusion: towards a more rigorous interrogation

Having raised more questions than providing answers, requires that I propose directions in which we can take ahead this debate, not to 'liberate' the 'captive subjects', but to employ lenses that will enable us to look at them differently, not only gaze at them, but also create conditions for us to welcome their gaze back. What I suggest here are not original or ingenious ideas, but ones that have been informed by the works of the scholars I have been referring to. They are not meant to sound prescriptive, merely suggestive. They remain open to challenge as more consistent interrogation of imagined ideas must remain the *leit motif* of all human rights work in times where hegemonic appropriation of knowledge and practice threatens subaltern existence at every step.

There is a need to bust the mechanics of 'binary logic' on the basis of which most of our human rights work is premised: East-West, Civility-Barbarity, Right-Wrong, Agency-Victimhood, War-Peace, State-Non-State, Private-Public etc. Breaking out of the binaries can allow possibilities that can better capture the existential complexities of the violated subject and create spaces for their participation in determining justice-seeking responses.

Our work should not outright reject essentialism, but recognize its deployment as a strategy and understand the limitations and dangers of using it as a campaign tool for claiming rights. Essentialism is helpful, but an over-reliance on it can subvert the very objective with which it was deployed.

We have to move beyond identifying women merely as victims, and recognize the resistance potential that she as a peripheral subject possesses. For instance, a woman in Iran might wear the veil to offer resistance in more than one way: she wears it to access public spaces which would otherwise be inaccessible to her, and at the same time she wears the veil as a Muslim

holding up a symbol to resist the 'imperial' gaze that wants to imagine liberation *for* her.

The concept of state accountability must be understood not merely with regard to compensating the violated, constructing her identity as a victim-survivor – but should be extended to 'due diligence' that will recognize her as a citizen, to expand its base to not pit freedom against protection and ensure enabling conditions to exercise civil citizenship and guarantee reparation.

Captivity can be one of the many experiences that mark the existence of women in the South. However, for those of us who deduce that through looking at them from afar, it is simply a perceived experience. Even if we work to establish its reality, it would still never qualify to be the only one. It is this recognition of a multiple and layered existence, one that does not calibrate pain, but looks at disadvantage through the lenses of intersectionality – which will allow us to resurrect a more emancipatory politics for claiming women's human rights.

Notes

1. International Humanitarian Law is governed by the Geneva Conventions of 1948 and its accompanying protocols.
2. International Criminal Law was applied for adjudication at the International Criminal Tribunals in Rwanda and the former Yugoslavia and is presently enshrined on the Rome Statute of the International Criminal Court. The demand for reparation by former Japanese 'Comfort Women' was made on the basis of International Criminal Law principles.
3. Refugee law provides surrogate national protection to individuals when their states have failed to fulfil fundamental obligations, and when that failure has a specified discriminatory impact. Under the Refugees Convention, the responsibility to provide international protection – a surrogate to the ruptured, national protection – is placed in states that are parties to the Convention.

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