Thomas Spijkerboer

Gender and Refugee Status
Gender and Refugee Status

een wetenschappelijke proeve op het gebied van de Rechtsgeleerdheid

Proefschrift
ter verkrijging van de graad van doctor aan de Katholieke Universiteit
Nijmegen, volgens besluit van het College van Decanen in het openbaar te
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om 1.30 uur precies

doors

Thomas Pieter Spijkerboer

geboren op 9 juni 1963
te Schellinkhout
When you begin to examine society concretely, you can't help bumping into the situation of women.

Rainer Werner Fassbinder, 1974
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<td>U.S. Court of Appeals for the Ninth Circuit 23 April 1990, case of Delicia Reyes de Valle v INS, 901 F.2d 787, 1990 U.S. App. LEXIS 6146, CAS/USA/065</td>
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Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>AB</td>
<td>Administratiefrechtelijke Beslissingen</td>
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<td>ACV</td>
<td>Adviescommissie Vreemdelingenzaken</td>
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<td>ALR</td>
<td>Aliens Affairs</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>DLR</td>
<td>European Convention on Human Rights</td>
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<td>ECHR</td>
<td>Female Genital Mutilation</td>
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<td>GV</td>
<td>Gids Vreemdelingenrecht, editie 1994</td>
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<td>GV (oud)</td>
<td>Gids Vreemdelingenrecht, editie 1974</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>IGC</td>
<td>Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia</td>
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<td>International Journal of Refugee Law</td>
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<td>IND</td>
<td>Immigratie en Naturalisatie Dienst</td>
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<td>US Immigration and Naturalization Service</td>
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<td>Imm AR</td>
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Acknowledgements

During my years as a practising lawyer, I talked with many asylum seekers. Although I realise that they had to talk with me because they needed a lawyer, I still feel privileged by the fact that in this way I met many people whom I admired for their dignity, their inventiveness, their strength. It was the incompatibility between the people I met and the poor creatures that occur in much of the literature on refugee women that was at the root of this study. My first words of gratitude go to them, although today I do not remember most of their names and although I would not recognise most of them if I met them.

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I dedicate this book to my parents.

1 Introduction

1.1 The Emergence of Women as an Issue in Refugee Law

Like all legal rules, the refugee definition has been drafted in the male form. According to the 1951 Convention Relating to the Status of Refugees (hereafter: the Refugee Convention), a refugee is any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Article 1A (2) Refugee Convention). The conference at which the Refugee Convention was drafted discussed the relevance of gender once. Article 3 stipulates that the Convention shall be applied “without discrimination as to race, religion or country of origin.” The Yugoslav delegate proposed that the words “or sex” would be added. This suggestion was rejected because, in the words of the British delegate, “the equality of the sexes was a matter for national legislation.” The inclusion of sex as a forbidden discrimination ground might have led to conflicts with national legislation: “To quote an example, during a tobacco shortage in Austria the ration for women had been smaller than that for men. It had been alleged in the constitutional courts that that was a violation of the equality of the sexes, but the finding of the courts had been that women needed less tobacco than men.” In light of this smoky atmosphere, it is remarkable that the possibility of persecution on account of gender was mentioned, be it only in passing. The Chairman of the Conference, the UN High Commissioner for Refugees Van Heuven Goedhart, believed “the original idea underlying article 3 to be that persons who had been persecuted on account of their race or religion, for example, should not be exposed to the same danger in the country of asylum. He doubted strongly whether there would be any cases of persecution on account of sex.” It would last three decades until the next reference to persecution on account of gender was made.

Although refugee women are as old a phenomenon as refugee men, they did not receive much attention until two decades ago. In a mid-19th century monograph on Huguenot refugees in The Netherlands during the 17th century, the author notes that the daughters of exiled families found “a
generous protectress” in the Princess of Orange. Also, foundations were instituted for housing Huguenot women, “be they unmarried or widowed.” In his classical work on refugee law, however, Atle Grøhl-Madsen mentions women only in passing. When he discusses the clause excluding refugee status for a person who “has been guilty of acts contrary to the purposes and principles of the United Nations” (Article 1F (c) Refugee Convention), he writes: “It would, for instance, be preposterous to brand a member of the Federal council (Bundesrat, Conseil Fédéral) of Switzerland in this way on the ground that women are excluded from the franchise in that country.” In a footnote, he adds that “(h)is connexion it is interesting to note that reference to ‘sex’ was specifically omitted from the non-discrimination clause in Art. 3 of the Refugee Convention.” In the first edition of The Refugee in International Law, Goodwin-Gill explicitly acknowledges that women can be refugees, when he begins his analysis of the refugee definition with a sentence on the requirement that an asylum claimant must be outside “his or her” country of origin. Furthermore, he adds in a footnote to the passage on social group as a persecution ground that “it may be the case that the discrimination suffered by women in many countries on account of their sex alone, though severe, is not yet sufficient to justify the conclusion that they, as a group, have a fear of persecution within the meaning of the Convention.”

In the decade after the publication of Goodwin-Gill’s book, things changed. Hathaway’s standard work was published in 1991 and exclusively used pronouns “in the feminine voice in recognition of the fact that refugee women and girls constitute the majority of the world refugee population, and that many of them are exposed to special problems in the international protection field.” Furthermore, the index of his book contains the following headings: “gender,” “rape,” “sex (see gender),” “sexual assault (see rape),” and “women (see gender).” In the general sections of his book, he refers to rape as a form of persecution and to the refusal to wear a chador and attend Islamic functions as the expression of a political opinion. Furthermore, the section on social group as a persecution ground contains subsections on gender and family. The second edition of Goodwin-Gill’s book follows suit in 1996 and, although written in the male form, regularly refers to women in addition to containing two specific sections on women. In this changed atmosphere, it was also possible for the UN High Commissioner for Refugee’s full colour 1995 calendar to have “UNHCR and refugee women” as its theme.

The appearance of women as an issue in general refugee law handbooks was largely the result of work since the early 1980s by non-governmental organisations (NGOs) and academics, who began to criticise the gender blindness of refugee law which, they argued, manifests itself in legal practice and doctrine. The critique held that although nothing in the wording of the refugee definition implied that women could not be refugees, the definition was nevertheless being applied in a biased manner. While some flight motives were specific to women – such as problems with social rules relating to dress (e.g., in Iran), specific forms of political activism (e.g., cooking for resistance fighters) or sexual violence – the critics held that these flight motives were marginalised in legal practice. Dress code problems were dismissed as relating to a (non-discriminatory) law of general application; cooking was seen as too marginal to have possibly attracted the attention of the authorities in the country of origin; and sexual violence was seen as the act of a private person. The posited marginalisation of women in refugee law was held to be wrong and needed to be remedied. The remedy might consist of a reinterpretation or, rather: a correct gender-sensitive interpretation of the terms used in the refugee definition. As will be shown in Chapter 5, there are several variants of this criticism and lively debates on the different variants.

In keeping with the NGOs and academics, the Office of the United Nations High Commissioner for Refugees (UNHCR) (co)organised several conferences on refugee women; its Executive Committee adopted several Conclusions on refugee women, and UNHCR issued explicit guidelines. The critique was strong enough to elicit reactions of Western governments. Guidelines regarding refugee women were issued by decision making authorities in Canada (1993), the USA (1995), Australia (1996) and, although far less comprehensive, The Netherlands (1997). The Swedish legislature inserted a specific provision in its Aliens Act in 1997 and held that people persecuted on account of their gender are entitled to a humanitarian residence permit. A 1998 amendment to the Swiss Asylum Act stipulates that gender-specific flight motives must be taken into account. The agreement constituting the basis for the new German government in 1998 also contains specific rules with regard to gender persecution. A major aim of the present book is to provide an analytic (as opposed to historical) overview of the legal debate on refugee women. Another major aim is to evaluate the factual claims made within the debate on the basis of three sources, namely statistical data on decisions regarding the asylum applications of women and men; the asylum files of some 250 female applicants; and published case law on refugee women.
1.2 Equality as a Variable in Refugee Law

Most critics apply the concept of equal treatment of women and men. Although few explicitly say that women are recognised less often than men (which would be a clear indication of unequal treatment), many say that justice is simply not done with women, that a gender-sensitive approach is necessary in light of human rights law and the like. The emphasis on gender-sensitivity implies that the critics see the asylum cases of women and men as different, and criticise the fact that they are dealt with without due sensitivity to this difference. In terms of the classical definition of the equality principle: the different cases of women and men are not differentially treated to the extent of their difference; hence the equality principle is violated. The implicit presumption of discrimination (which I also made when embarking on this study) is nevertheless problematic for two reasons. The first is that the presumption appears to be incorrect; the second is that the concept of equal treatment of women and men causes more problems than it solves in our context.

A 1994 survey study of Dutch asylum practice suggested that women actually have a higher recognition rate than men. The analysis of the Dutch population data presented in the present study (Chapter 2), and an analysis of the Canadian data published since 1989 confirm this suggestion. As will be seen, these data do not entirely rule out the possibility of numerical discrimination although my conclusion is that discrimination is not the most plausible interpretation for the present data.

The application and evaluation of the equality principle is notoriously problematic in refugee law; witness the difficulty of assessing the relevance of the decision in one case for other cases. In the context of gender, this is exacerbated by the fact that, even if all other factors can be considered equal, the gender of the applicant may always be a relevant factor. This would make the cases of men and women inherently different, as illustrated by the following two examples.

Imagine the case of a person being raped to bring a – in the eyes of the authorities – dissident family back into line. Our case concerns a young person targeted only as a corollary. Pressume there is also no indication that further persecution will follow. Imagine that the applicant is from a country where extramarital sex, whether voluntary or not, will indelibly taint the honour of a female victim and her entire family but not a male victim. If the applicant is a woman, one may argue that being raped will lead to total social exclusion and thus amounts to continuing persecution although no overt threat of further retaliation on the part of the authorities exists. If the applicant is a man, one may argue that being raped will be ignored by his surroundings and there is therefore no threat of future persecution. In this fictitious case, identical individual facts may lead to quite different outcomes for the woman and the man due to different social positions in the country of origin. It can also plausibly be argued that the social positions of women and men are different in every country and thus the asylum cases of women and men are always different.

The next example also involves the comparison of two otherwise very similar cases. The first case concerns a woman who has transgressed a dress code (by wearing a scarf where that is prohibited, by not wearing a scarf where that is obligatory, or by wearing a political sign such as a hammer and sickle or a dollar sign where that is forbidden). The authorities in her country torture her for subversion of the State. The second case concerns the Chinese man who sculpted the Statue of Liberty erected in Tian Men Square in 1989. He is also tortured for subversion of the State. One may argue that these two cases are virtually identical when it comes to the determination of refugee status: they both concern persecution for expression of a political opinion by acting in a particular way in a particular context. The similarity of these cases is not in terms of identical facts but in terms of identical relevance to refugee law.

With the preceding two examples, I hope to have shown that determination of whether the refugee definition has been applied in conformity with the equality principle or not always requires evaluation in light of the refugee definition. The question is whether the refugee definition has been applied correctly or not and hence the equality principle is not an independent criterion. For this methodological reason, I have not attempted to explicitly compare the cases of women and men. In the concluding chapter moreover, I will return to the equality principle.

When I came to the conclusion that there is no numerical discrimination of women, my initial research agenda regarding how bad the discrimination is, and how it is done became more or less irrelevant. In collecting the empirical material however, I encountered many instances of decisions and considerations based on clear assumptions about femininity, gender and sexuality. The effects of these assumptions are arguably negative for women moreover. For example, sexual violence during an interrogation is regularly construed as a private act and not as torture; non-compliance with dress codes is regularly viewed as falling outside the scope of the refugee definition because it is only about dress. This tension between the quantitative data indicating no discrimination of women and the qualitative data
indicating clearly negative treatment as a result of gendered assumptions will be seen to underlie my entire study.

1.3 Gender, Ethnicity, Discourse

In order to get a better grasp on the qualitative differences encountered in my examinations, I will consider the concepts of gender and ethnicity in greater detail here. Gender and ethnicity are often used to distinguish socially constructed difference from biological difference. Sex and race refer to biological (and implicitly “objective” and “real”) difference, while gender and ethnicity refer to social constructions on the basis of biological difference. I basically reject these “foundationalist fictions”, as Butler has called them, because I found them to be more confusing than enlightening. Instead, I assume the “real” differences (sex, race) to be just as socially constructed as the so-called “social” differences (gender, ethnicity). This is not meant to deny the differences between women and men or an “ethnic Dutchman” such as myself and an “ethnic Farsi” whose case I will study. Differences are always perceived; the notions of sex and race are constructed as “real” and as prior to the social constructions gender and ethnicity. In other words: the difference between the discursive (social construction) and the pre-discursive (biology) is itself discursive.

This seemingly trivial issue stands central to this book, because it explains the amount of attention I pay to the construction of the female applicant – not only by decision makers but also by others engaged in refugee law discourse. Asylum seekers have little or no power to influence the manner in which decisions are made about them. They have no institutional power, they usually have no money, they have little access to information on the system in which their claims are processed, they have virtually no access to the media and other public sectors, and they have no say in what their representatives (lawyers, lobbyists) may say on their behalf. This means that people active in the field of refugee law (from local volunteer workers to Supreme Court judges and academics) can represent asylum seekers however they wish and go virtually unchecked by those they represent. I will argue that their representations, often made on the behalf of the truth about the applicants, are part of broader political concepts serving particular goals. In such a manner, for example, the image of defenceless women at the clutches of brutal Oriental males (often invoked by both those helping refugee women and decision makers) is a standard part of colonial discourse and legitimates Western domination of the Third World. The representation of female asylum seekers is particularly complex. For example, presenting them as defenceless women may help them gain a residence permit; it may also perpetuate a racist myth and thereby work against a female refugee once she has a residence right. What I want to emphasise here is that the representation of female asylum applicants involves a number of choices: recourse to their “true” identity or “real” plight may actually obscure this. Those of us who construct female applicants, who create the identity they must live with in at least the asylum context, have a tremendous responsibility. We must be very conscious of the potential effects of our constructions and therefore ask whether the identities we create are actually inhabitable by the people we create them for.

An important (and common) notion which I will rely on in examining discourse on gender and ethnicity is the notion of a more powerful and thus unmarked side to a dichotomy and a less powerful and thus marked side. Men and whites are seen as universal, as the norm and not characterised by sexuality or race. Women and non-whites, in contrast, are marked; they are not universal, are deviations from the norm, and stereotyped in relation to gender and ethnicity. Although in feminist theory (and in the work of Frigay in particular) something close to the opposite has been proposed, I will rely on the more common concept because it – as will be seen in Chapters 3 and 4 – clearly applies to the research material.

The kinds of characteristics considered male and female or white and non-white will be familiar. In dominant discourse, masculinity is associated with rationality, activity and control, while femininity is associated with emotionality, passivity and submission. Whiteness is associated with universality, rationality, control, progress and modernity while non-whiteness is associated with particularity, nature, impulsiveness, stagnation and backwardness. It should be noted that racialisation is highly specific: Japanese, Arabs and Blacks are all non-whites, but the racial stereotypes which they are subjected to are very different. It should also be noted that the concepts of masculinity, femininity, whiteness and non-whiteness may change over time (compare the stereotypes of the Japanese in 1945 and now or the stereotypes of women in 1890 and now).

Of course, gender and ethnicity intersect. The effect of this is more complex than the “double oppression” of non-white women. For example, according to ideas in the West the position of women “in Islam” is taken to characterise Islam in general. “Islamic” treatment of women is considered as traditional and thus “the Islamic world” is treated as a sort of Volkstum where things are as they were decades ago for us. Another example is the representation of the Orient as feminine. The idea that men are not
marked by their gender appears to be valid for only white men and not for non-white men, who are defined in relation to their gender. I only became aware of the inseparability of gender and ethnicity in the course of my research; the issue stands central to Chapter 3.

I have called upon the Foucauldian concept of discourse in the preceding paragraphs because it is fruitful to construe knowledge (in our case: knowledge of the applicant and her “culture”) as inseparable from power. As will be illustrated in Chapter 3, the asylum procedure heavily relies on the concepts of gender and ethnicity. Applicants must conform to the assumptions related to these concepts; if they do not, they are basically incomprehensible as refugees and may be deemed incredible, undeserving or even abusive. Asylum applicants actually try to conform to preconceived notions of the Western participants in the asylum procedure. The subject is created by the discourse in which it functions. The fact that applicants must conform to our discourse is a sign of their powerlessness.

A problem with this concept of discourse is a tendency to see discourse as an autonomous social force. This is clear from Foucault’s famous passage in which discourse is construed as an anonymous phenomenon, and in which power tends to be used as the subject of a sentence (as in “le pouvoir s’exerce à partir de points innombrables” which can be translated as “power exercises itself from countless points”). The risk, of course, is that all kinds of things can be attributed to discourse because it is unclear what it is. However, the omnipresence of discourse implies the omnipresence of resistance to dominant discourse as well. This is a particularly useful implication of the Foucauldian concept of discourse as it allows us to analyse the possibilities for contestation.

Yet another useful but also problematic aspect of the Foucauldian concept of discourse is the presence of internal contradictions in discourse. Discourse constitutes subjects, regulates them and legitimates their regulation; effective exercise of power, however, is hindered by rigid and binding rules. While discourse gives the impression of being coherent it must also be sufficiently flexible to allow for the effective exercise of power. As we will see, the instability of discourse is a useful notion in the context of the present research but again brings the risk of anything being considered the confirmation of a hypothesis (when the hypothesis is contradicted by the facts, this fits perfectly because instability is a must in discourse analysis).

An obvious last problem with the appreciation of discourse analysis in the present research is that it was necessary to translate those parts of the asylum files quoted here from Dutch into English. Even though I have opted for a precise translation at the expense of readability, translation always requires choices. An advantage of having to translate was that this confronted me with the original text in ways that would otherwise not have occurred.

In the present study, I address a number of different debates. The first concerns the role of gender in law. In both academic and non-academic (refugee) legal discourse, the dominant view is that gender is relevant only to a particular set of cases, if at all. That is, only a limited number of “gender specific” applications for asylum are assumed to raise issues of gender and sexuality. I will argue that, quite to the contrary, gender is a pervasive aspect of all asylum cases and of refugee law as such. A second debate involves feminist arguments in the context of international relations. Much (but by no means all) of the feminist critiques of refugee law articulated over the past decade are in my view insufficiently aware of their grounding in Western societies. In their efforts to develop arguments to benefit female asylum claimants, feminist critics regularly rely on wholesale rejection of what is considered “Third World culture” (e.g. Muslim, Hindu culture). This Western chauvinism is directed at not only “Third World culture” but also the people representing it – which includes refugee women. I will argue that the feminist critique of refugee law can actually be strengthened by recognition of the fact that it is grounded in the West. In such a manner, ethnicity becomes an integral part of the feminist critique. Third and last, the field commonly referred to as cultural studies is directed predominantly at artifacts that bear the official label of culture: literature, film, music, the media. Fields that are considered to be more explicitly related to power, such as law and economics, are often only attended to as the sites for enforcement. I will argue that law is also a field for the material production and reproduction of identities and representations. By this I do not mean to deny the specific character of the legal system; I do mean to emphasize that law and culture are not exterior to each other.

1.4 Methodological Remarks

It should be clear that, while I find the concept of discourse to be problematic on a number of fronts, the research material reported on here cannot be understood without it. I have tried to compensate for the self-fulfilling and hence problematic tendencies of discourse analysis in two ways. First, the topic of this book was studied from several angles (so-called triangulation). Second, some clear safeguards were built into the process of qualitative analysis.
Initially, my idea was to conduct only an empirical study of women in the Dutch asylum procedure by analysing their case files. This would have been a pure discourse analysis. In order to avoid the problems associated with this, two more angles were added. First, the statistical analysis of population data presented in Chapter 2 was given an independent role in the study; second, an analysis of published case law was added. As indicated in section 1.2, the quantitative analyses raised some potential problems for the qualitative analyses and hence served their function. The analysis of published case law did not raise particular problems for the analyses of the files but nevertheless provided an extra perspective on the findings. By triangulation, I tried to optimise the chances of being contradicted by my material, surprised by my findings and not confirmed in my preconceived ideas.

The following safeguards were built into the qualitative part of my analyses. First, the countries from which the files were to be selected were chosen with a view to obtaining the greatest degree of diversity possible, as will be detailed in section 2.5. Second, in condensing the material for presentation, I forced myself to attend to cases which did not particularly suit me. I initially produced a 200 page report, organised by country of origin of the applicants, in which (a) I forced myself to describe every case, although the space devoted to the cases differed enormously and (b) the number of pages devoted to each country was proportional to the number of files I examined for that country. Up until the penultimate version of this book, the number of references to cases from a particular country was also proportional to the number of files from that country. Only in the final draft of the book did I allow myself to ignore this requirement as equal representation was not an aim of the study. A third methodological safeguard was that whenever I formulated a conclusion, I tried to find an example of a case contradicting the conclusion. This turned out to be an important tool in analysing the role of ethnicity as especially the Bosnian cases tended to be out of line. Finally, I prohibited myself from explaining a phenomenon by assuming that the decision maker or lawyer was simply a bad or silly person. Bad faith is an overly simple way out of complex situations, although it was sometimes a tempting explanation.

My analysis was largely inductive. I first sorted the cases according to country of origin. I then clustered those cases which I intuitively judged as similar together. The resulting categories of cases are presented in the Tables in Annex 4. The 200 page country by country description of this material, referred to above, followed. Subsequently, I looked for broader themes running through the cases from the six countries involved. This led to the analyses presented in Chapter 3 and section 5.1 and 5.2. In a more deductive analysis, I also categorised the cases according to keywords reflecting the prominent themes in the literature (e.g., sexual violence, social mores). This analysis produced only meagre results when compared to the inductive analysis and was therefore not pursued further.

The presentation of my findings in Chapters 3 and 5 is based on six extensive case descriptions. As I will indicate in § 2.6, most of the six cases are exceptional in one way or another. These particular six cases were selected for extensive description because they enabled an economic presentation of my research findings. I mostly used files with convincing flight motives while the application was nevertheless turned down. Many other cases were less compelling with regard to flight motives, while some were more compelling. The detailed case descriptions give a good impression of the reasoning followed by the Dutch decision makers in the 252 cases analysed here. In the cases described in detail, moreover, the argumentation of the administration must be taken seriously as it is not used to dismiss applications obviously leading to dismissal but applications requiring serious consideration.

When I argue that behaviour is part of a particular discourse, I do not mean that the actor has a subjective motive. Quite to the contrary; the normal case is that people are not conscious of the discourse in which their acts are embedded. This point becomes particularly apparent when it comes to the interpretation of legal reasoning in administrative decisions, briefs, court decisions, and the like. I will make such claims as: “this decision relies on the notion that sexual violence is an expression of lust and unrelated to the political context” or “this decision views women as primarily dependent on their husbands and fathers.” The basis for these claims is interpretative and therefore open to debate. There is never a smoking gun. I only make such claims when a decision (brief, etc.) cannot be understood on its own terms (i.e. on the basis of an internal textual critique). The next step in making such a claim is to argue that the decision makes more sense if we interpret it as part of a particular discourse. If this is so, then the decision can be contested on the grounds that the decision maker has opted for one discourse over another (which is not mandated by law). When a decision cannot be justified in legal-technical terms alone, it typically relies on political or ideological choices which can be disputed. However, I will not be able to prove my claims on this point; I can only argue that my reading is more plausible than a reading that takes the decision in its own terms.
way internal and external analyses are combined; the insufficiency of the internal analysis establishes the plausibility of the external analysis.27

It should be stressed that this book is not aimed at answering the question of what the best or correct legal stance on gender and refugee status may be; it is not a normative study.28 Instead, I want to analyse how normative positions are constructed; the present study is thus about normativity. An important issue will be how opposition to dominant discourse can be most effective. An analysis of how dominant discourse operates will obviously then be crucial.

1.5 Outline of the Book

In the next Chapter, I will describe and analyse the share of women in the world’s refugee population and the population of asylum seekers in Western countries. The first major research question will then be addressed, namely whether statistical indications are found for discrimination against women in the asylum procedure or not. On the basis of the data stemming from Canada and the Netherlands, the provisional answer is negative. I will then provide an overview of the Dutch policy relevant for the asylum seekers from the six countries from which the files were selected for the present study. A very general country by country presentation of the 252 files will also be presented in Chapter 2. In Chapter 3, the main results of my empirical analyses of the 252 files will be presented. First, it will be argued on the basis of this material that the asylum applicant is constructed, and not directly accessible. The next issue was not initially planned to be a part of the research but proved to be inseparable: credibility. The written reports of the interviews with the asylum applicants contain many traces of just how the (in)credibility of the applicants is constructed. The two main sections of Chapter 3 address the ways in which the acts of the applicant in the country of origin are made out to be either political or not and just how the violence which the applicant fears gets construed as normal (insufficient for refugee status) or exceptional (sufficient in principle). The almost exclusive focus in these sections on the political or nonpolitical character of the acts of the applicants and their persecutors reflects the tendency in refugee law practice to consider politics the main issue in the refugee definition. In Chapter 4, the representation of women in Dutch and international published case law is analysed. The decision not to restrict this analysis to “gender-specific” cases of women, as most authors do, was methodologically motivated: what is “gender-specific” is an important question and hence not a criterion for collecting data. This methodologically inspired choice had substantive consequences. The distinction between “normal” and “gender-specific” excludes women from refugee status, which means that an analysis based on this distinction simply reproduces the exclusion. In Chapter 5, I turn my attention to how people have contested the dominant discourse identified in the Chapters 3 and 4. A few specific cases will allow us to examine the resistance of the applicants in greater detail. Then the strategies of lawyers in files from the survey will be examined. I will also provide an overview of the academic literature contesting the dominant refugee law discourse on the grounds of a male bias. The reaction of governments to these counter-strategies will then be examined in terms of the gender guidelines issued by several decision-making bodies in Western countries. The counter-strategies and governmental reactions will then be evaluated in closing, and my general conclusions will be presented in Chapter 6.

I might add that I originally had the idea of including a number of short essays on Fassbinder films. Three of the four texts have already been published. As the book nears completion, however, there seems to be no place. The motto of my book nevertheless testifies to the inspiration I have gained from Fassbinder’s sceptical radicalism.

Notes

3. Thus the Austrian delegate, UN Doc A/CONF.2/5, page 11.
5. Kroeber 1946, 87-89. This, this 16th century author was more “gender-sensitive” than a contemporary author, such as Israel, who ignores women in the section on the Huguenot influx in his standard work on Dutch history, Israel 1995, 627-630.
8. Hathaway 1991, v, footnote 1, internal quotation marks omitted.
10. Conclusion 39 (XXXVI, 1985), Refugee Women and International Protection; Conclusion 54 (XXXIX, 1988), Refugee Women; Conclusion 60 (XL, 1989), Refugee Women; Conclusion 64 (XXLI, 1990), Refugee Women and International Protection; Conclusion 73 (XLIV, 1993), Refugee Protection and Sexual Violence.
2 Female Applicants in Statistics and General Policy

The primary material for the present analyses consists of a select sample of cases on female asylum applicants who arrived in The Netherlands on their own (i.e., without a husband, father, brother) and published case law concerned with women and refugee status. These materials will be the subject of a qualitative analysis in Chapters 3, 4 and 5. Qualitative analysis is a research method that is hard to control or objectify, and it is therefore generally considered desirable for conclusions to be based on more than one source ("triangulation"). In the present chapter, I will present the results of a quantitative analysis at the macro level and a policy analysis at the meso level. In sections 2.1 to 2.4, I will analyse data on the share of women in the refugee populations both world wide and in Western countries. I will also analyse the manner in which Western administrations decide on the asylum applications of men and women respectively. Such data were already available for Canada and specifically collected within the context of the present study for Dutch asylum practice. As there is very little data from other countries, the quantitative analysis will concern these two countries. Sections 2.5 and 2.6 are about the six countries of origin which I selected for this research. In particular, I will analyse the influx of asylum seekers from these countries to The Netherlands; the policy with respect to asylum seekers from these countries of origin; and the results of the policy, measured both by population data and by data from the sample of independently arriving female applicants.

2.1 The Share of Women in Refugee Populations

It is often claimed that women are the (forgotten) majority of the world’s refugee population. Percentages of up to eighty percent are mentioned. However, the same percentages are also mentioned when referring to the share of women and children in the world’s refugee population. In some cases, the categories of “women” and “women and children” are used inter-
changeably: “The faces of refugees are overwhelmingly female: women and children represent 80% of the world’s 27 million refugees and displaced people.” In both cases, references to the “forgotten majority” suggest that there is an imbalance between the attention given to refugee women and the importance of the issue.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of applicants</th>
<th>Percentage female applicants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>350</td>
<td>?</td>
</tr>
<tr>
<td>1975</td>
<td>386</td>
<td>?</td>
</tr>
<tr>
<td>1976</td>
<td>470</td>
<td>?</td>
</tr>
<tr>
<td>1977</td>
<td>575</td>
<td>?</td>
</tr>
<tr>
<td>1978</td>
<td>775</td>
<td>16.8%</td>
</tr>
<tr>
<td>1979</td>
<td>993</td>
<td>23.8%</td>
</tr>
<tr>
<td>1980</td>
<td>1,330</td>
<td>37.0%</td>
</tr>
<tr>
<td>1981</td>
<td>754</td>
<td>24.3%</td>
</tr>
<tr>
<td>1982</td>
<td>1,244</td>
<td>17.0%</td>
</tr>
<tr>
<td>1983</td>
<td>2,015</td>
<td>22.0%</td>
</tr>
<tr>
<td>1984</td>
<td>2,603</td>
<td>23.5%</td>
</tr>
<tr>
<td>1985</td>
<td>5,644</td>
<td>17.0%</td>
</tr>
<tr>
<td>1986</td>
<td>5,865</td>
<td>8.5%</td>
</tr>
<tr>
<td>1987</td>
<td>13,460</td>
<td>17.0%</td>
</tr>
<tr>
<td>1988</td>
<td>7,486</td>
<td>16.0%</td>
</tr>
<tr>
<td>1989</td>
<td>10,355</td>
<td>15.5%</td>
</tr>
<tr>
<td>1990</td>
<td>21,851</td>
<td>32.5%</td>
</tr>
<tr>
<td>1991</td>
<td>21,466</td>
<td>30.5%</td>
</tr>
<tr>
<td>1992</td>
<td>19,962</td>
<td>29.0%</td>
</tr>
<tr>
<td>1993</td>
<td>35,399</td>
<td>34.2%</td>
</tr>
<tr>
<td>1994</td>
<td>52,576</td>
<td>35.1%</td>
</tr>
<tr>
<td>1995</td>
<td>29,258</td>
<td>35.6%</td>
</tr>
<tr>
<td>1996</td>
<td>22,857</td>
<td>34.1%</td>
</tr>
<tr>
<td>1997</td>
<td>34,443</td>
<td>33.1%</td>
</tr>
</tbody>
</table>


Are these numerical claims correct? No complete world-wide data on the demographic characteristics of refugees are available. However, the most comprehensive data – the yearly UNHCR Statistical Overviews – indicate that about half of all refugees are female. Demographer Boyd has shown the world refugee population to more or less mirror the population of refugee-producing regions as a whole. About half is male, about half is female; half is under fifteen years of age, half is older. We may conclude, therefore, that refugee women are “only” half of the world refugee population and that the claim that some 75% of all refugees are women and children is correct.

There is very little data on the gender composition of refugee migration to Western countries. The first data on the gender composition of asylum seekers in a Western country can be found in a 1984 Dutch report commissioned by the Ministry of Social Affairs (including emancipation affairs). Boyd points out that, although women form half of the world refugee population, they are only about one third of the refugee population in such Western countries as Canada. This is corroborated by data from UNHCR.

As Boyd’s analysis shows, moreover, single women are even more under-represented than other women.

As can be seen from Table 2.1, Boyd’s analysis holds for the Dutch situation as well. It should be noted that the percentage of female applicants is steadily rising although it fluctuates from year to year. This trend fits with a more general trend towards a greater percentage of women among migrants or so-called feminisation of migration.

### 2.2 The Treatment of Women in Asylum Procedures

It is regularly claimed that women are discriminated against in the asylum procedures of Western countries. They are putatively recognised as refugees less often than men. Some authors even say that women are “rarely” recognised as refugees, that they are “much less likely than men to meet the eligibility criteria”; or “less often recognized as refugees than men”; or hardly ever recognised as refugees on the basis of sexual or gendered violence.

This widespread assumption, however, is contrary to the (little) available data, which suggest just the opposite. Only Macklin has observed (be it in a footnote) that women claimants in Canada were more successful in their claims than men. Table 2.2 below is based on the data made available by the Canadian decision-making body between 1990 and 1995.
can be seen, the percentage positive decisions is indeed higher for women than for men in Canada.

<table>
<thead>
<tr>
<th>year</th>
<th>total number of decisions on men + women</th>
<th>percentage positive decisions men</th>
<th>percentage positive decisions women</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>5,376</td>
<td>89%</td>
<td>87%</td>
</tr>
<tr>
<td>1990</td>
<td>10,710</td>
<td>75%</td>
<td>79%</td>
</tr>
<tr>
<td>1991</td>
<td>19,425</td>
<td>67%</td>
<td>72%</td>
</tr>
<tr>
<td>1992</td>
<td>17,437</td>
<td>58%</td>
<td>64%</td>
</tr>
<tr>
<td>1993</td>
<td>14,101</td>
<td>44%</td>
<td>50%</td>
</tr>
<tr>
<td>1994</td>
<td>15,224</td>
<td>58%</td>
<td>65%</td>
</tr>
</tbody>
</table>

Source: Immigration and Refugee Board Canada, annual year-end statistics

Similar data are revealed in a survey of Dutch cases from 1983-1992 by the Ministry of Justice. The preliminary results comparing the outcomes of asylum procedures for men and women showed 16% of the female applicants in The Netherlands to attain a refugee status, and only 5% of the male applicants.20 A more comprehensive survey showed that in the years 1983-1998 the percentage of positive decisions (including refugee statuses, humanitarian residence permits and tolerance permits) for women was 8% higher than for men.21

These findings are surprising in light of the widespread and virtually uncontested idea that women are at a disadvantage during the asylum procedures and thus call for an explanation. Only one hypothesis has been put forward to date. Van den Bedem et al. suggest that “men more easily than women will seek their fortune elsewhere, while for the women the decision to burn their bridges and to choose an insecure future in another country is taken more reluctantly. (...) The hypothesis that women will not easily choose an insecure future is further supported by the fact that women coming alone are often over 30 and the fact that these women get an A-status more often than others”.22 The authors suggest that because women are underrepresented in asylum procedures in the West, their applications may carry more weight than those of men. If this is correct, then the relative advantage of women over men from a statistical perspective may be explained. In the following, I will test this hypothesis along with three others using statistical data on the relevant Dutch decision making practice between 1989 and 1995. But first just what the data are and what they are not must be made clear.

2.3 Representativeness of the Statistical Data

There are three aspects of the data on Dutch asylum practice which limit the use of the data to very specific purposes. First, the kind of errors the data contain; second, the nature and purpose of the data; and third, the fact that the registration of temporary protection status changed in 1994. I will outline these three aspects of the data below, and then draw some conclusions about the usefulness of the data for the present study.

Some of the errors encountered in the data may be input errors. For example, there is sufficient reason to believe that some of the ethnic Albanians from Kosovo (with a Yugoslav nationality) were registered as individuals with an Albanian nationality. Errors may also have occurred during the process of entering the data of the Immigration and Naturalisation Service into a computer file. The data I received included 1104 pages and covered some 50 different kinds of decisions on asylum applications, which I reduced to 5 kinds of decisions (granting a refugee status, a humanitarian residence permit, a temporary protection permit, negative decision, and the category “other”, to cover the death of an applicant, for example). Although automatic checks were built into the programmes I used, the computations may have led to additional errors. Nevertheless, there is no reason to think that the errors involve distortions related to the gender of the applicants.

The database from the Immigration and Naturalisation Service was designed for specific purposes. The primary purpose is to facilitate the locating of files and determination of the present status of a case. If you feed a name or a personal number into the computer, you can see when a person applied for asylum, what procedural steps have been taken to this point and what should happen next. The dynamic (as opposed to static) nature of the database has as a consequence, that applicants who have been naturalised are counted as Dutch applicants; this means that an applicant granted a refugee status in 1991 appears to already have the Dutch nationality if the applicant was naturalised afterwards.
An additional purpose of the database is to keep track of the activities of civil servants. Since the late 1980s, continual political upheaval has surrounded the asylum issue in The Netherlands. The State Secretary of Justice, who is the competent authority in immigration cases, has been under pressure to react promptly to the rising number of applications. As a consequence, the number of decisions taken within a given period of time has become a political issue. The database can generate "production asylum" printouts of the number of decisions made in a given period. It should be clear that the database does not underestimate the number of decisions, as the higher the number of decisions, the more active the State Secretary's office. Everything which may count as a decision is also registered separately. An example of a frequent course of events may clarify the effects of this. An applicant who applies for asylum in 1993 may receive a negative decision in 1994. In the later administrative review procedure in 1995, she may nevertheless be granted a humanitarian residence permit on the basis of some general policy. She will then be asked if she wants to pursue her application for refugee status. If she does, her application may again be rejected in 1996. The applicant will have generated three decisions: two negative ones (rejection in 1994 and 1996), and one positive decision (the grant of the humanitarian residence permit in 1995).

In my analysis of the data, I collapsed the first and second decisions. I was not interested in the phase at which a particular application was granted or refused, but in the decision-making practice as a whole and the end result. An important conclusion from this is that the data presented below are not about people but decisions. The number of decisions is considerably higher than the number of people they concern. It is therefore possible that the number of negative decisions may be substantially higher than if the data were about people (compare Annex 6). I nevertheless have no reason to think that this manner of registering the decisions has different effects for men and women. That is, the usefulness of the data for comparing the decision-making practices with regard to men and women remains.

The third aspect to note about the data from the Dutch Immigration and Naturalisation Service is that temporary protection originally had no (explicit) basis in the Aliens Act and was only codified in 1994. Prior to 1994, most applicants who qualified for temporary protection were only notified of this after initial denial of their application, and only the negative decision was registered in the database. For Bosnian applicants prior to 1994, however, temporary protection was granted before the initial decision and no decision was therefore registered in such cases. Since 1994, Bosnian and other applicants who qualify for temporary protection receive a specific permit (referred to here as a temporary protection permit), which is registered as such and I have counted as a positive decision. This implies that the percentage of positive decisions is higher since 1994 in part because of how the decisions to grant temporary protection were registered. This also makes consideration of the data over time problematic. However, I again assume that men and women are not differentially affected by these shortcomings and that the usefulness of the data for comparing the decision-making with regard to men and women remains.

In the context of the present study, these limitations have three consequences. First, it is simply not possible to compare the data to those from other countries of refuge without further analysis. For example, the validity of the claim that the percentage of positive decisions in Canada is higher than that in The Netherlands cannot be evaluated on the basis of the present data. Comparison of Tables 2.2 and 2.3 indicates a higher percentage of positive decisions for Canada, but these percentages involve different things. The Canadian asylum procedure generates fewer negative decisions than the Dutch procedure if only because a single asylum application does not routinely involve two applications (one for refugee status and one for a humanitarian residence permit), as in the Dutch system (see Annex 6).

Second, the data on the years 1989-1993 cannot be compared to the data on 1994 and 1995 due to the changes in the registration of temporary protection. Although relatively few cases are affected by this, it does make consideration over time problematic. Third, when analysing the decision-making practices per country, the data on asylum applicants registered as Dutch must be disregarded. These applicants have either been naturalised since their application or their nationality was registered incorrectly.

The preceding limitations still allow use to compare the decisions on the applications of men and women separately. There are simply no grounds to believe that the data are influenced differentially by the preceding limitations. Comparison the size of the differences for men and women with those for other countries (most notably: Canada) is, however, problematic, because the over-representation of negative decisions in the Dutch statistics affects the size of the difference between men and women (see Annex 6).

2.4 Statistical Data on The Netherlands 1989-1995

We can now turn to the data on Dutch asylum practice. The general picture is clearest when all of the years and all of the countries are considered to-
gether, as in Table 2.3. As in Canada, the women do not receive fewer positive decisions when compared to the men. The women also receive more positive decisions in all three categories. In the following, I will collapse the three categories of positive decisions together and refer to the resulting percentage as the "recognition rates" for applicants to The Netherlands. For example, in Table 2.3 the recognition rate for women can be seen to be 33.7% and that for men 24%.

**Table 2.3 Dutch asylum decisions 1989-1995**

<table>
<thead>
<tr>
<th>Refugee Status</th>
<th>Men</th>
<th>Women</th>
<th>Unknown</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>count</td>
<td>17,539</td>
<td>13,169</td>
<td>258</td>
<td>30,966</td>
</tr>
<tr>
<td>percentage</td>
<td>10.7%</td>
<td>16.4%</td>
<td>8.1%</td>
<td>12.5%</td>
</tr>
<tr>
<td>Humanitarian residence p.</td>
<td>count</td>
<td>16,772</td>
<td>10,330</td>
<td>599</td>
</tr>
<tr>
<td>percentage</td>
<td>10.2%</td>
<td>12.8%</td>
<td>18.8%</td>
<td>11.2%</td>
</tr>
<tr>
<td>Temporary protection</td>
<td>count</td>
<td>5,029</td>
<td>3,633</td>
<td>21</td>
</tr>
<tr>
<td>percentage</td>
<td>3.1%</td>
<td>4.5%</td>
<td>0.7%</td>
<td>3.5%</td>
</tr>
<tr>
<td>Negative</td>
<td>count</td>
<td>87,197</td>
<td>39,213</td>
<td>889</td>
</tr>
<tr>
<td>percentage</td>
<td>53.2%</td>
<td>48.7%</td>
<td>27.9%</td>
<td>51.4%</td>
</tr>
<tr>
<td>Other</td>
<td>count</td>
<td>37,215</td>
<td>14,168</td>
<td>1,417</td>
</tr>
<tr>
<td>percentage</td>
<td>22.7%</td>
<td>17.6%</td>
<td>44.5%</td>
<td>21.3%</td>
</tr>
<tr>
<td>Total</td>
<td>count</td>
<td>163,752</td>
<td>80,513</td>
<td>3,184</td>
</tr>
<tr>
<td>percentage</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Given that the relative advantage of women over men goes against the generally held idea that women are discriminated against in refugee law, the finding calls for further investigation. The first step is to see if the picture differs for the twelve largest countries of origin, which represent 69% of the total number of decisions in the years 1989-1995 (Tables A.1-A.13 in Annex 1). The data for five countries of origin show the women to consistently have a higher recognition rate than men (Bosnia-Herzegovina, Yugoslavia, Romania, Turkey and China). The data on the other countries show men to have a higher recognition rate than women in some of the years.

For example, in 1994, Srilankan men had a recognition rate that was more than 10% higher than that of women. Further analysis of the data for the twelve largest countries of origin yields only the conclusion that, although there is a general trend towards women having a higher percentage of positive decisions than men, considerable variability occurs over time and across countries of origin.

The next step was to search for possible correlations between the differences in the recognition rates for women and men, and other factors. In order to do this, I omitted data on countries from which, in a given year, only a few applicants had arrived. If in a given year only a few decisions were made with regard to applicants from a country, this could lead to considerable male/female differences which are nevertheless of little relevance. I therefore omitted the data pertaining to small nationalities. I have explained this procedure in more detail in Annex 5.

As already mentioned, only one hypothesis has been put forward to explain the higher recognition rates for women relative to men. Given the relative under-representation of women among asylum seekers in the West, their flight motives are hypothesised to carry greater weight than the flight motives of men; this would explain the higher recognition rates for women. If this hypothesis is true, then a correlation should exist between the extent to which women are under-represented and the extent of their advantage over men. In other words: women from countries where only 10% of the applicants are female may be recognised more often than the men from these countries while the recognition rate for women from countries where 50% of the applicants are female should be more or less equal to the recognition rates for men. Such a correlation is not found, however. Not even a weak correlation is found, so the hypothesis must be rejected. There is also a substantive reason for rejecting this hypothesis. A direct relation between the seriousness of an applicant’s flight motives and the fact that they are fleeing to a Western country simply seems improbable. A flight to the West is most likely influenced by access to the necessary resources, which also means that the under-representation of women among asylum seekers in Western countries may well be linked to differential access to resources.

Two other hypotheses concerned with factors possibly related to the different recognition rates for male and female applicants were also examined and rejected. The one additional hypothesis was that women benefit from the higher recognition rates associated with a particular country than men. In other words: if the applicants of a particular origin have a particularly high recognition rate in a particular year, the women will benefit more than the men. In my data, however, a correlation between the recognition
rate for a country at a particular moment in time and the difference in the recognition rates for men and women from that country was absent. The other additional hypothesis was that a high degree of pressure on the relevant civil servants (in terms of the number of decisions in a particular year) would favour women. If civil servants are pressured to produce numerous decisions, they may reject male immigrants in particular as they are viewed as more of a threat than female immigrants. The expected correlation between workload and the difference in the recognition rates for women and men was absent however. We can therefore conclude that the relative advantage of women over men is not related to the under-representation of women, not related to the general level of recognition rates, and not related to the workload of the administration.

Two other correlations involving general recognition rates nevertheless appeared to be relevant. The first involves the number of decisions made for a particular country of origin in a year. If the number of decisions is higher than 1500, the recognition rate is correlated with the number of decisions. In other words: with the exception of small countries of origin (in terms of the number of decisions, that is), the overall recognition rate for a country tends to be higher when the number of decisions is higher. This correlation can be explained in several ways. One might argue, for example, that people tend to flee in large numbers for good reasons and that this fact is reflected in the decisions of the relevant civil servants. One might also argue the reverse, namely that decision makers take many people fleeing from a country as an indication of good grounds for doing so. Yet another explanation may be that an influx of many people from one country leads decision makers to conclude that efforts to discourage them have failed. Having resigned themselves to this, the administrators may then direct their efforts at the discouragement of asylum seekers from other countries by issuing numerous negative decisions.

The second correlation is that as the absolute number of decisions in a particular year for a particular nationality gets higher, the percentage of female applicants gets closer to 50%. In other words: when more people flee, more women tend to flee as well. When we combine these two correlations, we can conclude that women appear to have a higher recognition rate than men because they disproportionately come from countries with higher recognition rates. As can be seen in Table 2.4, 47.6% of all female applicants come from a country with a recognition rate higher than the average of 27.2%. For male applicants, 38.2% came from a country with a particularly high recognition rate. In other words: Women more often come from countries with a high recognition rate than men, and this in part explains the relatively higher recognition rate of women. A clear correlation exists between the percentage of decisions pertaining to women and the percentage positive decisions.25

| Table 2.4 Distribution of men and women across countries of origin by recognition rate (The Netherlands 1989-1995) |
|---------------------------------------------------|----------------|----------------|----------------|
| men                                              | women          | total          |
| count                                            |                |                |
| recogn. rate < 27.2                              | 61.8%          | 52.4%          | 58.5%          |
| recogn. rate ≥ 27.2                              |                |                |
| count                                            | 38.2%          | 47.6%          | 41.4%          |
| column                                           |                |                |
| total                                            | 65.5%          | 34.5%          | 100%           |

Nevertheless, this correlation does not explain the entire difference in the recognition rates for women and men. Examination of Tables A.1-A.13 per country shows a relative advantage of women across the board which is only explained in part by the disproportionate occurrence of women from countries with overall high recognition rates.26 The unexplained part of the difference between men and women may be related to how the civil servants perceive this difference. It may be that civil servants simply think that women are less prone to adventure than men; in other words, civil servants may operate under the hypothesis proposed by Van den Bedem et al. A study carried out by the Research Department from the Dutch Ministry of Justice confirms that civil servants think that "men are more frequently trying to improve their economic situation, while women mostly flee because of the unsafe and bad general situation in the country of origin."27 Civil servants may also find female immigrants less threatening because they do not expect them to engage in criminal activities, for example, and consider them less of a threat to the domestic labour market. The ideas of the decision makers may thus explain the otherwise unexplained part of the male/female differences in recognition rate.

I would like to make three more remarks at this point. The first concerns the claim that women are discriminated against. As we have seen, this claim is routinely made by critics of refugee practice. On the basis of the
data presented here, however, it is impossible to give a definitive response to this claim because women are under-represented among asylum applicants in the West which includes Canada and The Netherlands. Initial inspection of Tables 2.2 and 2.3 suggests that women may actually be better off than men, which obviously speaks against the possibility of discrimination. However, the relative advantage of women over men has just been shown to be explained in part by the demographic composition of asylum migration. When we try to correct for this, women still have slightly higher recognition rates, but this still does not exclude the possibility of discrimination. It may be that women’s claims to asylum are indeed stronger than those of men. If this should be the case, however, their relative advantage should probably be higher than found here. In any case, to maintain that women are discriminated against is not the most plausible interpretation of the data. A more plausible view is that women are not discriminated against.

My second remark concerns the fact that the explanation I submit here is indeed based on the under-representation of women among asylum applicants in Western countries. In contrast to Van den Bedem et al., I have not related this under-representation to the (perceived) weight of the asylum motives, but to the skewed distribution of the under-representation depending on the country of origin. This unequal distribution partially explains the overall advantage of women observed here. That is, the under-representation of female asylum applicants suggests that resources for fleeing to the West are primarily allocated to men. It is nevertheless the under-representation of women which appears to give them an advantage over men in the asylum statistics. The observed “preferential” treatment of women is thus ironic, to say the least, because it occurs in a situation shaped by prior discrimination.

My third remark pertains to the observed patterns of flight. At first glance, the pattern identified here seems to fit with the theory that, when an immigrant group tries to get a foothold in a new country, men (the “quartermasters”) tend to go first, followed by women. However, the hypothesis put forward by Van den Bedem et al. (holding that men are more predisposed to try their luck than women and hence women’s claims to asylum are actually stronger) was rejected. This suggests that the patterns observed here cannot be interpreted on the basis of so-called chain migration disproportionately consisting of women. Several authors have disputed the correctness of this idea in general. My statistical data also show women to form in some cases about half of the asylum seekers right from the beginning of the influx for a particular nationality (most notably Somalis and Bosnians). It therefore seems to me that the demographic composition of asylum populations cannot be explained by preconceived notions about the risk seeking behaviour of men as opposed to women. A number of issues presumably plays a role, including the necessity to leave, the capacity to organise the money necessary to flee to the West in particular, the availability of networks in the West; perceptions of the availability of opportunities in the West; and the gender composition of emigration from the country of origin prior to the asylum emigration.

2.5 Representativeness of the Sample

As already mentioned, the primary material for Chapter 3 and the first two sections of Chapter 5 is a select sample of asylum files on independently arriving female applicants. In the present section, I will discuss how I selected the pool of cases from which the sample was taken, the non-response rates and the representativeness of the sample. Initial selection was limited to cases of women who had applied in so far as this could be seen from the computer for asylum without their fathers, husbands or brothers. This selection was done to restrict the field of research and avoid the question of whether women who apply together with male relatives are given genuinely independent evaluation. Dutch asylum practice holds that women receive an independent interview and decision in any case. Ironically, my attempt to escape this issue was unsuccessful. Even when women arrive without male relatives, the experiences of the men related to them still receive a lot of attention. This issue will be taken up in Chapters 3 and 4.

Choosing the period to sample was simple. The focus of my research is on the decision. For this reason the date of the first decision was the relevant date. I wanted to cover a time period not too long ago. I also wanted to have a substantial number of cases with final decisions, so the cases could not be too recent. I therefore selected cases with the first decision made in 1994. An additional advantage of selection after 1 January 1994 is that the Aliens Act was radically changed on that date and the Dutch Immigration and Naturalisation Service was also restructured. Older cases would have been examined under the old system.

Selecting the nationalities to be included in the sample was more difficult. For this, I used one primary criterion and two secondary criteria. Given the qualitative nature of this part of the research, I primarily wanted to optimise the chances of the nationalities being diverse. In addition, I wanted to choose the nationalities such that a reasonable regional distribu-
tion would occur and the nationalities that have been important in the Dutch debate on refugee women would be included. I therefore weighed diversity in terms of the number of applicants, overall recognition rate, differences in recognition rate for women and men and the percentage female applicants. I wanted to include Bosnia-Herzegovina because of its role in ongoing debates; the war there has suddenly made the West aware of mass rape. I also wanted to include Iranian cases, as Iran is the single most prominent country in the debates on refugee women. Sri Lanka is also important because the Dutch debate on the role of sexual violence in refugee law was triggered by a number of Tamil cases. And China is of particular interest because of the one child policy. On the basis of these criteria, I made an initial selection of six countries: Bosnia-Herzegovina, China, Iran, Nigeria, Sri Lanka and Turkey. The number of decisions on Nigerian women proved too low to sample so I substituted Zaire as the country most closely resembling Nigeria in terms of the aforementioned criteria. The characteristics of the various countries are summarised in Table 2.5.

Table 2.5 Characteristics of selected nationalities (data concerning 1989-1994)

<table>
<thead>
<tr>
<th>Nationality</th>
<th>Initial Selection (abs)</th>
<th>Single Appl. (abs + perc)</th>
<th>Seen (abs)</th>
<th>Non-Resp. (perc)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosnia-Herzegovina</td>
<td>111</td>
<td>38 (34%)</td>
<td>32</td>
<td>16%</td>
</tr>
<tr>
<td>China</td>
<td>109</td>
<td>83 (76%)</td>
<td>80</td>
<td>4%</td>
</tr>
<tr>
<td>Iran</td>
<td>124</td>
<td>62 (50%)</td>
<td>56</td>
<td>10%</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>107</td>
<td>50 (47%)</td>
<td>50</td>
<td>0%</td>
</tr>
<tr>
<td>Turkey</td>
<td>86</td>
<td>29 (34%)</td>
<td>27</td>
<td>7%</td>
</tr>
<tr>
<td>Zaire</td>
<td>93</td>
<td>51 (55%)</td>
<td>42</td>
<td>18%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>630</strong></td>
<td><strong>313 (50%)</strong></td>
<td><strong>287</strong></td>
<td><strong>8%</strong></td>
</tr>
</tbody>
</table>

There is no reason to presume that the non-response rate of 8% affected the validity of the sample. It was possible to check the representativity of the selected cases by comparing the initial decisions in cases included in the sample with the initial decisions for all female applicants from that country in 1994. The recognition rates for the sample of independently arriving female applicants were comparable to the recognition rates for all of the female applicants from the countries concerned in 1994 (see Tables A.14-A.19). The one exception was China where 38% of the independently arriving female applicants from the sample received a humanitarian residence permit and 15% of all female applicants received a humanitarian residence permit. This difference is explained by the fact that all of the humanitarian residence permits in the Chinese sample of independently arriving female applicants were granted because the applicant was an independent minor; given the fact that the files on non-independent applicants were omitted from the original sample, an over-representation of independent applicants is to be expected. Apart from this non-representativity of the cases of Chinese independent minors, there is no reason to doubt the representativity of the other Chinese cases included in the sample. I have there-
fore omitted the Chinese independent minors from the remainder of this study.

2.6 An Introduction to the Sample

The analyses in Chapters 3 and 5 are organised along lines inspired by the refugee definition; as a consequence, there will be no presentation of the files on a country by country basis there. In this section, I will therefore provide some background information on each country. For each country, I will shortly sketch (a) the characteristics of the influx up to 1994, (b) the policy regarding asylum applicants having the relevant nationality, (c) the statistical data on the decisions for men and women and (d) the flight motives and the decisions characteristic of the sample of independently arriving female applicants. In so far as the information on the influx of and policy regarding the relevant nationalities is not based on my own material, it is based on the available literature and hence varies from country to country.

Bosnia-Herzegovina

The influx of Bosnian applicants followed the secession of Bosnia-Herzegovina from the Federal Republic of Yugoslavia in 1992. In addition to the thousands of people resettled in The Netherlands at the request of the UNHCR, many Bosnians came to the Netherlands "irregularly" and applied for asylum. Their number has also risen abruptly in both absolute and relative terms over the years. Bosnian applicants constituted more than 16% of all applicants in 1994 and almost half of the Bosnian applicants were women (see Table A.20). Bosnians initially received a temporary protection status. Since 1993, however, the Dutch administration has also granted refugee status to Bosnian applicants. The initial policy, as laid down in the policy guidelines for this group, was quite general: applicants are admitted as refugees, unless they have a criminal record or another country of first asylum. According to the guidelines: "This covers many Bosnians who have fled the civil war". The policy was changed as of 1 December 1995 following the Dayton agreements and, since then, Bosnian applications are assessed individually; temporary protection is also still being granted. The recognition rate for Bosnian applicants (see Table A.2) is uniquely high with some 80%. A small advantage of women over men, ranging from 1% to 4%, can also be detected. The high recognition rate is also clear in the Bosnian sample of independently arriving female applicants. In 22 of the 31 cases, refugee status was granted. Thirteen applicants received refugee status without being interviewed – which is normally unheard of in Dutch asylum practice (see Table A.26). It is also interesting to see that, contrary to the general picture in the media, the Bosnian applicants are not exclusively Muslim; compared to the ethnic composition of the Bosnian population, however, the Serbs are underrepresented in the sample of independently arriving female applicants (see Table A.27). The data in Table A.27 also show that the Dutch authorities do not recognise all Muslims as refugees or refuse all applications of Serbs. Negative decisions were often based on another country of first asylum or disappearance of the applicant. The flight motives for all of the Bosnian applicants in the sample, regardless of their ethnic background, were very similar: they all fled "ethnic cleansing." In light of the attention which has been drawn to sexual violence as a means of ethnic cleansing, it is noteworthy that only two applicants (out of the fifteen interviewed) reported being the victim of sexual violence. One of these cases will be reported in section 3.4 (the case of Laurie). In light of the fact that sexual violence was the reason for including Bosnia-Herzegovina in the sample I chose this exceptional case for longer description. The case of Laurie also provides a noteworthy contrast to yet another case concerning sexual violence to be described extensively, that of Anne (see the section on Sri Lanka below). It should be added that many of the Bosnian applicants mentioned sexual violence as one of the things they felt endangered by.

China

The number of Chinese applicants reached its peak, both in absolute and relative numbers, in 1991; about one third of them was female (Table A.21). There was no specific policy for Chinese asylum applicants. The general policy debates on Chinese applicants have focused on the unwillingness of the Chinese authorities to take back undocumented Chinese citizens. Another aspect highlighted in the public debate is the special policy on unaccompanied minor applicants; they are generally issued a residence permit when no reception facilities for them appear to be available in their country of origin. The Dutch courts found the general facilities for children without parents in China to be insufficient and have therefore required that the Immigration and Naturalisation Service give concrete indications of facilities for the individual minor. However, the Chinese authorities have refused to co-operate in providing such individual indications, according to
the State Secretary of Justice. As a result, many unaccompanied minor applicants from China have received a residence permit.

The recognition rate for Chinese applicants has been relatively low with around 15%; women have a relative advantage ranging from 3% to 16% over men (see Table A.12). The category of unaccompanied minor applicants (so-called UMAs) was the largest category of cases identified in the Chinese sample. Of the 35 unaccompanied minor applicants, 31 had received a residence permit at the moment I saw the file. A positive decision was not provided on substantive grounds in any other case (see Table A.28). The only other positive decision in a Chinese case was granted because the applicant had found a partner in The Netherlands. Fourteen Chinese cases concerned the one child policy. One of these will be described extensively in Section 3.3 (the case of Betty). The other cases concerned problems on account of a relative who was, for example, suspected of political activities (6 cases); no freedom to select a spouse (4 cases); religious or political activities (4 cases); financial problems (3 cases); and the possession of pornographic videos (3 cases).

Iran

Iranians have been a constant in Dutch asylum law, at least since the 1979 revolution in Iran and the beginning of the war with Iraq in 1980. As many as 30,000 Iranians live in The Netherlands, with the overwhelming majority having arrived as a direct result of the 1979 revolution. Some 30% of all the asylum applications of Iranians in Europe between 1992 and 1994 were lodged in The Netherlands. In the past decade, their number fluctuated but their share remains considerable. Women form about one third of Iranian asylum applicants in the Netherlands (see Table A.22).

Up until January 1995, Iranian asylum applicants were granted some form of residence (informally called toleration) regardless of the outcome of their procedure. Council of State case law held that applicants “tolerated” before January 1994 had to be granted a residence permit (in practice referred to as a “toleration permit”). This decision applied regardless of the nationality of the applicant and appears particularly relevant for the Iranian and Sri Lankan cases from the sample, as Iranians and Sri Lankans were “tolerated” before 1994. The general policy of non-deportation was terminated in 1995, and in principle Iranian applicants can now be deported after rejection of their application. This has given rise to extensive litigation and political concern; repeatedly, groups of rejected Iranian men have engaged in prolonged hunger strikes. It is also often argued that the asylum procedures have not been carried out with due care because the Irani-ans (up until 1995) were never deported anyway. This criticism appears, moreover, to have been acknowledged by the State Secretary of Justice’s promise to re-examine the Iranian cases decided in 1994, 1995 and 1996. Explicit guidelines for the making of decisions in individual Iranian cases were only published in 1996. According to this document, refugee status may be granted to Iranian applicants who have undertaken opposition activities involving more than the distribution of pamphlets, applicants who have attended demonstrations or possessed forbidden materials, and applicants who have come to the attention of the authorities on account of political activities. Groups considered potentially at risk are religious dissidents, homosexuals facing prosecution or repression by fellow citizens, and members of ethnic or religious minorities facing repression. According to the policy guidelines, candidates for a humanitarian residence permit are persons who systematically transgress rules of behaviour (“such as women who do not obey dress codes”) and persons who face prosecution on account of adultery. It is thus clear that transgression of social mores is not considered an expression of a political opinion; otherwise repression on account of such would be an indication for refugee status.

The recognition rate for Iranians has varied from some 5% in 1989 to around 40% in 1992; the advantage of women over men varies from 0% to 6% (see Table A.3). The largest category of Iranian cases in my sample concerns applicants running into trouble because of their activities. Most of the activities were “normal” activities such as participation in demonstrations, being active in oppositional organisations, and the like. The less ordinary involve: co-founding of a women’s group (which will be extensively described in section 3.3, the case of Diane); a physiotherapist giving two speeches critical of the health care system in Iran; and a woman who kept a record of human rights violations coming to her knowledge. I selected the exceptional case of Diane for detailed description because it allows us to analyse the demarcation of the political and non-political in asylum practice. The second largest category is that of women who have experienced problems on account of relatives mostly their fathers, husbands and sons. The third group of cases involves such “improper” behaviour as working with male colleagues or running a business. In only one case did the transgression of a dress code stand central although this is often seen as the prototypical problem for Iranian women. Yet another group involved family law problems such as a widow deprived of the custody of her children or women not allowed a divorce. The final category is that of “mommies” (a term I recalled from my days as a practitioner) or older single women who (supposedly) have no other flight motive than to be reunited with, typically, their son.
With respect to the granting of humanitarian residence permits (see Table A.29), it should be noted that 11 of the 13 were not granted on the basis of flight motives but simply because the application was submitted before 1 January 1994 (the so-called toleration permit, see above). Only two were granted on substantive grounds involving the categories of activities and family law respectively. Only one woman was granted refugee status; this concerned an applicant with parents who had worked for the Shah’s secret service and were executed in the 1980s. Interestingly, a comparable flight story for a widow from Iran was dismissed although she was given a toleration permit.

**Sri Lanka**

The Sri Lankan applicants in The Netherlands are overwhelmingly ethnic Tamils. The conflict between the Sri Lankan authorities and Tamil groups (particularly the Liberation Tigers of Tamil Eelam, LTTE) erupted in 1983, and has yet to be resolved. This has led to a mass migration of Sri Lankan Tamils. By 1995, three quarters of the total Tamil population in Sri Lanka of almost 2 million was either internally displaced or had fled abroad. Between 1983 and 1991, some 700,000 Tamils were displaced within Sri Lanka itself; 160,000 Tamils fled to India; and 320,000 fled to Europe and North America. In Europe, 55-65,000 Tamils went to Germany; 25-30,000 went to Switzerland; 20-25,000 to France; and 14-17,000 to the former coloniser, Britain. In The Netherlands, the influx began to pick up pace in 1984/1985. In 1983, 41 Tamils had applied for asylum; in 1984, their number had risen to 835; and, in the month of January 1985 alone, 373 Tamils sought asylum in The Netherlands. Between 1983 and 1989, some 4500 Tamils fled to The Netherlands. Since 1989, their share of the total asylum population in The Netherlands has hovered around 5 to 10 percent; 1991 represented a peak in absolute and relative terms when 14% of all asylum seekers in The Netherlands had the Sri Lankan nationality. About one third of the Sri Lankan applicants are female (see Table A.23).

In the second half of the 1980s, the Tamil issue actually dominated the Dutch public debate on asylum and immigration in general. The sudden and, by comparison, large-scale influx of Tamils created a panic in the press and political circles. The Tamils were presented as “illegal” refugees leaving Sri Lanka not out of fear of persecution but in order to take advantage of the Dutch welfare system. In such a manner, Tamils became paradigmatic asylum seekers and, by implication, abusers and economic adventurers. They were routinely referred to as “young men.”

At the request of the UNHCR, in 1984 the Dutch State Secretary of Justice promised not to return Tamils to Sri Lanka until the situation had improved. In early 1988, the State Secretary of Justice put an end to this general policy of “tolerating” Tamil asylum seekers. Amidst extensive litigation and quite prominent media attention, the individual assessment and at times deportation of Tamil applicants began. Since then, the policy has regularly changed under pressure from the courts. The policy generally held that Tamils could not be returned to the North where the civil war was raging and could be returned to Colombo — provided they had some foothold there. As practically all of the Tamil applicants arriving in The Netherlands had travelled via Colombo, their stay there was routinely used to argue for a foothold there and an internal flight alternative in the face of possible persecution in the North. Tamil applicants qualified for temporary protection from the moment it was introduced in 1994 until July 1996.

The specific instructions for dealing with Tamil applications were as follows. An indication for refugee status is that the applicant has held a leading position in the LTTE and that his activities may be known or are already known to the authorities and that there are indications of excessive or discriminatory punishment and that acts referred to in Article 1F of the Convention have not been committed (i.e. serious crimes like terrorism). In the cases of people from areas under effective control of the LTTE, forced activities for the LTTE, prolonged detention by the LTTE and military training by the LTTE (voluntary or not) are in principle insufficient for refugee status. In these cases, an internal flight alternative is available. The guidelines also specify that general trauma policies apply as well. The trauma policy applies regardless of the nationality of the applicant and holds that applicants who have left their country as a result of trauma (because they themselves or people close to them have become the victim of arbitrary violence) should be granted a humanitarian residence permit.

The recognition rate for Tamils has been low at about 10%. The difference in the recognition rates for men versus women has varied from a female advantage of 2% to a male advantage of 10% (see Table A.5). The effects of the restrictive general policy are visible for the decisions in the sample of independently arriving female applicants. Only one refugee status was granted; all four humanitarian residence permits were so-called toleration permits and not permits based on substantive grounds (see Table A.30). The case in which a refugee status was granted concerned the only applicant coming not from the north of Sri Lanka but from the east. As a consequence it was not argued that she had a domestic flight alternative. This woman was also persecuted by a Tamil group with links to the Sri Lankan army (the EPRLF). The largest category of flight motives was that
of people forced to work for the LTTE in the form of providing food, money, working as a nurse, digging trenches or undergoing military training. Another category of flight motives is that of problems related to a relative, which may include the "crazy mothers" of young men who have disappeared or been executed, and cases of suspected guilt by association. In section 3.1 I will extensively describe a case which combines these two different flight motives (namely a refusal to work with the LTTE and problems concerning a son who had been executed; the case of Anne). However, in 34 of the 50 Sri Lankan cases, the flight motives were simply unknown because the applicants left without giving notice and mostly before they could be interviewed (defined by the immigration authorities as "With Unknown Destination" and abbreviated WUD).

Turkey

Turkish asylum seekers were one of the first groups of "irregular" asylum seekers in the 1970s and predominantly Assyrian Christians and Armenians being harassed by fellow citizens in the east of the country. These so-called "Turkish Christians" became the subject of media attention when they occupied churches with the consent of the pastors involved. "Turkish Christians" have been semi-collectively granted a residence permit on several occasions. The next group of applicants came after the coup d'état in December 1980, and their cases were decided on an individual basis. Between 1983 and 1986, the recognition rate for Turkish applicants was 50%. Between 1983 and 1989, a total of 5450 Turkish nationals applied for asylum in The Netherlands; some 35% of them were recognised. Since 1989, a few hundred Turkish nationals can be seen to apply for asylum each year, and about one third of all applicants is female (see Table A.24).

It should be noted that the Turkish population in The Netherlands is the largest non-Dutch immigrant group. Turkish "guest workers" were recruited to work in Dutch industries throughout the 1960s and early 1970s. Just as The Netherlands, Turkey is a member of NATO and the Council of Europe. Turkey has been associate member of the European Community since 1963 but was excluded from the negotiations on the enlargement of the European Union which began in 1998. The European/non-European status of Turkey is unclear.

Guidelines for deciding individual Turkish applications were published in 1996. A refugee status is indicated for "Kurds and other Turks" who have engaged in "most notably political, parliamentary, journalistic or intellectual activities." It is nevertheless stipulated that recognition as a refu-gee may be problematic in light of Article 1F of the Convention (because of possible terrorist activities of applicants); in addition, the possibility of a threat to Dutch public order as a result of recognition should be acknowledged. Another group of people who may qualify for refugee status are specific groups of draft evaders.

The percentage of 10% to 30% positive decisions is higher than one might expect on the basis of these guidelines; the advantage of women over men ranges from 4% to 18% (see Table A.11). In my sample of independently arriving female applicants, three of the four women actually granted refugee status (see Table A.31) were granted a so-called dependent refugee status because their husband or father had applied for and received asylum in The Netherlands after them. The flight motives for the applicants in the sample can be grouped into two large categories: that of women fearing persecution on account of belonging to a "suspect" family (11 cases) and that of women having been politically active themselves (8 cases). Three of the applicants in the sample of independently arriving female applicants belonged to the same extended family, which gave me the opportunity to examine the position of this extended family (the Joneses) and the position of the three women within the family in greater detail (see section 5.2). Three of the eight cases with political activities as a flight motive concerned a refusal to become politically involved because the applicants wanted to remain neutral.

Zaire

The initially insignificant number of Zairian applicants up to 1992 increased to more than 2000 in 1994. The percentage of female applicants has also risen from about 25% to just under 33% in 1993 and 1994 (see Table A.25). Whether or not Zairians were the object of a special policy in the early 1990s has actually been subject to litigation. The County Court ruled in the end that from 1991 until late 1994, the Dutch administration indeed had a practice of non-deportation. In 1994, the County Court issued a ruling that would dominate decision-making practice in Zairian cases for years to come. Although it did not prohibit the deportation of Zairians in general, it was decided that Zairians who had been detained before they left Zaire could not be returned as they risked being arrested upon arrival and thus torture. Since then, groups of Zairians have indeed been deported on chartered flights. There have been protests against the deportation of Zairian asylum seekers, such as prolonged church occupations with the consent of the church board, but these have not been very successful.
The recognition rate of Zairian applicants is generally less than 10%; the advantage of women has ranged from 0% to 6% (see Table A.9). The advantage of women over men was most noteworthy in 1992 while men had a (minimal) advantage over women in two other years. What struck me most with regard to the Zairian cases in the sample was the incoherence of the flight motives. In section 3.2.1 I will extensively describe a representative case with indeed incoherent flight motives in the initial interview report (the case of Karen). In 15 cases, the flight motives concerned persecution on account of the (suspected) activities of relatives, which involved the applicant’s husband in most cases (see Table A.32). In 12 cases, the applicant’s activities were the source of trouble. Five other cases involved market women who have played a role in the opposition to the monetary reforms introduced in 1993. Two additional cases concerned relatives of the disappeared, and two other cases concerned domestic violence.

2.7 Conclusion

The issue of women in refugee law was first raised by NGOs, academics and the UNHCR. Refugee women have been represented as a forgotten majority treated disfavourably and the victims of male dominance. This portrayal has allowed feminist critics to advocate the cause as both important (because it concerns the majority of the world’s refugee population) and just (because it involves a fight against wrongful discrimination). It is nevertheless telling that these critics seem to lose sight of the difference between women and children when claiming that women constitute the majority of the world’s refugee population. That is, both women and children are not men, which suggests that these critics take men as the standard (with “womenandchildren” being a deviation).

In most statistical overviews of asylum seekers and asylum decisions, a breakdown by gender is not provided. This suggests that most governments, demographers and international institutions do not consider gender relevant in the context of asylum practice. In The Netherlands, gender breakdowns have only been produced in studies of gender and refugee law (which includes this book). Canada is the only country to systematically produce asylum statistics with gender breakdowns but appears to have ceased doing this since 1995.

Following the course of what Harding calls “victimology” appears to be quite risky in the present context because it leads to false claims. Women constitute 50% of the world’s refugee population and not the majority. In the West, the percentage of women among asylum seekers is low; in the Netherlands and Canada, it is about one third. However, these statistics differ for different countries of origin. For some nationalities (e.g., Nigerians in The Netherlands) the percentage of women is under 10%; for other nationalities (Bosnians and Somalians in The Netherlands), women constitute roughly half of the asylum seekers. The share of asylum seekers who are women generally appears to be rising. The factual claims put forth by the critics with regard to the disadvantages of women in asylum procedures also appear to be incorrect. Women do not receive fewer positive decisions than men but more. The relative advantage of women over men can be explained in part by the unequal distribution and underrepresentation of women across different countries of origin. Women tend more often than men to come from countries with high recognition rates.

The recognition rates for applicants in general are primarily related to their country of origin and the general policy regarding applicants from that country. This is, to a certain extent, obvious as the human rights situation in the country of origin should be a critical factor in the determination of refugee status. However, it is not at all obvious why women fleeing the conflict in Bosnia-Herzegovina have consistently been recognised as refugees in The Netherlands, while only a small percentage of the women fleeing the conflict in Sri Lanka have been recognised as refugees. Many of the Sri Lankan applicants benefited from general toleration policies of one kind or another. Similarly, the low recognition rate for Zairian applicants is hard to understand when one only considers the human rights situation in Zaire. It is thus plausible that general policy decisions unrelated to the human rights situation in the country of origin influence the outcomes of asylum cases for women and men alike.

It is surprising that the decision-making authorities in Western countries have not used the incorrectness of the numerical claims put forth by feminist critics to dismiss their critique. In fact, just the opposite has occurred. In Canada, asylum decisions with a gender breakdown were published between 1990 and 1995. Since 1990, thus, the authorities have known that women are not numerically at a disadvantage to men. Yet the same authorities issued gender guidelines in March 1993. Similarly, the Dutch authorities became aware of a relative advantage of women over men in The Netherlands in 1994. Yet the State Secretary asked the Emancipation Council for advice and issued gender guidelines (be it of a limited scope) in 1997. It is thus very difficult to consider these policy instruments a reaction to critique as the strongest claims of the feminist critics were known to be incorrect. The picture gets even more complicated when the policy guidelines for the six nationalities central to this study are examined as the feminist
critique does seem appropriate for them. Women are mostly ignored; the activities used to indicate refugee status are typically “masculine” and, when women are mentioned, their problems are considered compassionate grounds for granting a humanitarian residence permit and not a refugee status.

In sum, we can see that feminist critics have construed the issue of gender in refugee law as an issue of discrimination against women. However, the most plausible interpretation of the available data is that discrimination does not occur. This is a remarkable conclusion in light of the fact that social practices of Western countries do discriminate against women in many other fields (e.g., the exclusion of women in welfare law and the unequal remuneration of women and men). Notwithstanding their knowledge of the numerical data, both the Canadian and Dutch governments have acted as if discrimination does occur and issued policy guidelines to remedy the purported discrimination. However, initial inspection of the Dutch policy documents for particular countries of origin appears to support the feminist critique. The remainder of this book constitutes an effort to clarify this confusing and contradictory picture. In Chapter 3, the question of how female applicants are actually represented in refugee law practice will be considered. Chapter 4 will address the issue of the representation of women in published case law. In Chapter 5, the attempts of applicants, lawyers and academics to resist the dominant discourse on refugee women identified in Chapters 3 and 4 will be reviewed together with the reactions of governments to these challenges. In Chapter 6 and by way of conclusion an attempt will be made to integrate the different perspectives.

Notes

1 I will refer to “independently arriving female applicants” hereafter.
2 E.g., Dentz 1978, Platt 1981, Maclaurin and Tipton 1993
3 A “majority” according to Conclusion 39 (XXXVI) of the UNHCR Executive Committee (1985), Kant 1995, 143, Kelly 1993, 625, Love 1994, 133, and UNHCR 1988; a “high proportion” according to Leiss and Boeije 1994, 5; a “cast majority” according to Mawani 1993, 7 and Reddy, Salem, Samara and Terzian 1998, 27; “two thirds” according to Bhalla and Sutter 1994, 229; “more than 80%” according to a German refugee law advocate, Frankfurter Rundschau 2/3 October 1997
4 Oosterveld 1996, 570. For women and children, the percentages are 70% according to the Australian Law Reform Commission. 236; Kelly 1993, 626 gives several estimates ranging from two thirds to eighty percent; over 80% according to Macklin 1995, 217, Wallace 1996, 702, Anker 1997a, 127, Anker/Gilbert/Kelly 1997, 716, Gottstein 1998, 217 reports that two thirds of the world’s refugees are women and children, and considers this to be a large share in need of an explanation.

5 See for example the data on 1996: UNHCR 1997, 47.
8 The 1994 report of the Netherlands Interdisciplinary Demographic Institute, compiled on behalf of the European Commission, showed 21.4% of all asylum applicants in France to be female in 1990, p. 79 and 138. The share of women among Turkish asylum seekers in Switzerland in 1992 and 1993 was 29%, and in Sweden 28% 1992 and 27% in 1993; the share of women among Somali asylum seekers in Switzerland was 45% in 1992 and 48% in 1993, and in Sweden 57% in 1992 and 48% in 1993, see Tornstensson, Issaksson, Cotter and Heiniager 1997, 29. The estimated share of women among asylum applicants in New Zealand is 15%, Haines 1997, 130. The annual demographic statistics produced by Eurostat for the European Commission do not contain a gender breakdown for migration, while the reports of the Inter-Departmental Consultation equally ignore gender, see European Commission 1997, Secretariat of the Inter-Departmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia 1997.
9 Neef and De Ruiter 1984.
10 UNHCR 1998.
12 See for example Pitzacka 1998.
13 For example Evenhuis 1996, 15.
14 Kelly 1993, 627.
15 Leiss and Boeije 1994, 5.
16 Schilders 1989, 5.
17 The only data that I could find on countries other than Canada and the Netherlands show 66% of all asylum applicants admitted to Italy in 1991 to be male and 34% female, Netherlands Interdisciplinary Demographic Institute 1994, 142; 63% of all asylum applicants admitted to Germany between 1978 and 1984 were male and 28% female, while 9% were children under 16, Schneider 1998, 12. However, no gender breakdown is provided for the asylum applicants, which makes it impossible to tell whether women had a higher or lower recognition rate than men.
19 As far as I can determine, the Canadian Immigration and Refugee Board ceased publishing this type of data in 1995.
23 For 1989 and 1990, moreover, the data were not available for the first and second instances separately.
24 The average recognition rate was computed by dividing the total number of positive decisions by the total number of decisions.
25 The bivariate correlation (which is merely illustrated in Table 2.4) was .33. It is possible that this correlation may have been caused by only a few large countries of origin. However, after correction for the size of the country of origin, the partial correlation was still found to be .26.
26 For very similar findings, see Van Weteren/Dijkhoff/Heide 1998, 47-61. However, they conclude that there is no relation between recognition rate and sex, i.e. they argue that women do not have a higher recognition rate compared to men. But from Table 3
(Van Weteren/Dijkhoff/Heide 1998, 48) it is clear that women do have a higher recognition rate than men, i.e. Van Weteren et al. start with the same data as I do. They then also find that women more often than men come from countries with a high recognition rate. However, the nature of their data (a limited sample) does not allow them to compare the recognition rates for men and women with the same nationality. My analysis is based on such a comparison of men and women with the same nationality. Van Weteren et al. could not reach the conclusion I reach because of the nature of their data. For this reason, the outcomes of our researches are not necessarily incompatible.

I do find their conclusion that there is no relation between recognition rate and sex an imprudent formulation, as well as an extrapolation from their limited data which seems not entirely justified.

28 For example Böcker 1992. Although they do not address the gender composition of asylum migration flows, Böcker and Havenga also conclude that the migration of asylum seekers reflects a pattern of chain migration (1997, 81), comp. Kosier 1997, 694.
31 Zlotnik 1995 shows the gender composition of migration flows to vary substantially.
32 See on this issue most notably Schneider 1998.
33 There was a final decision in 194 cases; the procedure had not yet been finalised in 47 cases and whether a final decision had been made or not was unclear in 11 cases.
34 In a comparable study, the non-response rate was found to be 17%, Doornheim and Dijkhoff 1995, 89.
35 An important source of information on the policies regarding applicants of a particular nationality are the "werkinsturcties" of the Dutch Immigration and Naturalisation Service, referred to here as (policy) guidelines. Most of these were only published in 1996 but nevertheless reflect policies already in place for several years.
37 According to the 1981 census in Bosnia-Herzegovina, 40% of the population was Muslim, 22% Serb, 18% Croat and 8% "Yugoslav"; Ramet 1992, 180.
38 For example TK 1995-1996, 19, 637, nr. 210, p. 10.
40 See generally Brongersma 1990, 82-83.
45 See on the gendered nature of these actions Van Baalen 1997.
47 Werkstructuur nr. 69 d.d. 10 May 1996.
49 McDowell 1996, 5.
3 The Construction of the Female Applicant in Decision Making

In this chapter, I will present an extensive analysis of the construction of female applicants in decision-making practice. The analysis is based on the 252 cases I studied. The analysis is illustrated by five extensive descriptions of rich cases; a sixth is presented in section 5.2. I have chosen to give the applicants in these cases English names in order to resist implicit “ethnicisation.” One may object that this makes the case descriptions less authentic, but that is precisely the point. I will argue that the applicant we see in the asylum procedure is a Dutch product. The use of familiar names for foreign people is intended to have an interrupting and alienating effect.

In the first section, I will argue that the thesis that social reality is constructed clearly applies to the asylum procedure. In other words, I will argue that asylum applicants are constructed. In the remainder of the chapter, I will analyse just how this happens and distinguish several aspects of the construction of female applicants. One major aspect is that of credibility: how is it decided that applicants are telling "true stories", how are "liars" detected? This point of construction precedes all others. The next aspect is how the concept of the political is conceptualised in individual cases. The notion of the "political refugee" dominates asylum practice and, as a consequence, the question of what is political is of primary importance. The final aspect I will address is the issue of persecution. Some acts are seen as insufficiently serious to constitute persecution while others are seen as serious but nevertheless part of the normal situation in the country of origin.

3.1 The Construction of Asylum Applicants

Most of the literature on the representation of flight motives is concentrated on how the interview report can be made as accurate as possible. Although this is an important issue, I will not address it here. Instead, I want to argue that the flight motives of an applicant are always the product of
choices made by the people involved in getting them down on paper – the applicant, the translator, the interview official, the lawyer, the decision maker. The same story can be told in very different ways, and the way in which the story is told inescapably reflects the perspectives of the person doing the telling.

The Dutch interview report is not a verbatim report of what is said during the interview. First, the questions the interview official asks are normally not included in the interview report. General subject headings suggest the kind of questions which the official may have asked but nothing more. Sometimes the questions are recorded, however. This may occur indirectly with the statement of the applicant in the interview report reading something like: “In reply to your question, I state that...” The questions of the interview official may also be recorded directly. All of the questions are never included in the report. Which questions are included and just where in the report is up to the discretion of the interview official. In practice, this is most often done when the official thinks the applicant may not be telling the truth and asks precise questions in an attempt to get things straight.

What the applicant herself says can be rendered in various ways. In the words of the Dutch ombudsman: “It has been established that the interview official often renders in his own words what the applicant has said; he paraphrases the story of the applicant. [...] Furthermore the investigation has shown that it is the interview official who decides which information is relevant for substantiating the asylum application and which is not.” Of course, the words of the applicant may be rendered literally, but this again never happens throughout the report. In addition, there are no explicit clues as to whether the words in the report were literally those of the applicant or not.

The case of Anne (Sri Lanka)

In the case of a Sri Lankan applicant whom I will call Anne, the interview report is of high quality, but the perspective of the interview official dominates the case. Anne’s case is not representative of the Sri Lankan cases from the sample. Anne was born in 1957 and is older than most of the Sri Lankan applicants; she is not Hindu, as most Tamils, but Roman Catholic. Her case combines the two issues found to be most frequent in the Sri Lankan cases in the sample: forced recruitment by the LTTE and family-related problems. The case provides a good impression of the relevant issues and how the administration deals with them.

Anne used to live in a village on the Jaffna peninsula, which was in the hands of the LTTE at the time of the story. She has a son born in 1978, and a daughter born in 1982. An uninterrupted quote of the reasons for fleeing Sri Lanka is presented from the interview report below.

Chronological overview of the statements of the alien concerning her flight motives

My biggest problem began on December 22nd 19**. Before that I had a few little problems. By this I mean that we were asked for rice and money by members of the LTTE. By “us” I mean myself and my son. My daughter was never asked for anything. She was too young. Up until December 22nd 19** there were no other problems.

On that date, five members of the LTTE came to our house. They beat my son and said he had to leave the house. You ask me why they reacted that way and why they didn’t ask for rice and money this time. In that period, the price of rice was high in town. In order to go to the market, you had to travel by tractor. There were very few buses. I had rice and groceries at home but no other food. The men had apparently drunk a lot of alcohol. I could smell this. The men treated me very mean. I was raped by their leader while my son was present. I don’t know the name of the man. I only know he is from the LTTE. Interrogation took place. Two of the four men held my hands to the ground. They did this by standing on my hands with their feet. My son protested. He screamed and therefore he was beaten by the other two men. I was also beaten by the men. I don’t know what my son was beaten with. I heard so many sounds. After the rape the men left. My son and I did not seek the treatment of a doctor. There are no doctors where we live. The rape had consequences for me. I ran a fever and got confused. I did not get pregnant as a result of the rape.

My son fled while the men were still present in the house. He did not return home. I did not know where he was until December 24th 19**. Four of the five men left. One of them stayed behind in order to catch my son. He walked behind me all the time. On December 24th, at 8 PM, my son came back. He was caught by the man who had stayed behind and was tied to a pillar in the house. The man informed his leader with a walkie-talkie. You tell me that you don’t understand how this walkie-talkie can still be working after two days, in the light of the fact that it runs on batteries. I don’t know. In any case, he called up the others with that walkie-talkie. Reports were received with that machine as well.
The Construction of the Female Applicant in Decision Making

My rapist returned with two people unknown to me. They beat my son and wanted to know where he had been and to whom he had passed on information. My son told them nothing. My son was unjured, and they wanted to take him to their place. My daughter and I began to scream, upon which we were beaten by the men. My daughter fell down, and I went to her. My son was brought outside. My daughter and I walked outside and screamed. We were held by one of the men. We were in the garden. Nobody helped us. My son was taken outside the fence of our yard by three men. After about five minutes, we heard someone scream "Don't run away." We heard gunshots. The neighbours came out of their houses. The man who had remained behind with me and my daughter went away. Together with the neighbours, I went to see what had happened. The three men had gone. I saw my son, and I saw that he had been shot. He was shot in his chest, and his head was bleeding because he had fallen to the ground. My son was dead. I couldn't do anything anymore. I was very sad and because of my grief I couldn't cry. The neighbours also were sad. I got angry and asked everybody to leave. Together with an old man, I brought the mortal remains of my son to our house. I dressed him in new clothing which I had bought for Christmas and buried him. We celebrated Christmas, because my ex-husband and children are Catholic.

You ask me whether anything occurred between December 24th 19** and * [the date on which Anne went to Colombo, TS] that led me to leave. Yes. The leader of the LTTE came by frequently. I never heard his name. He was called "leader." I don't know where he lived. He was a local leader of the LTTE. Twice he came by because he wanted sex. He had intercourse with me twice against my will. If I should scream, the neighbours would hear, and also he said: "Remember, you have a daughter." He visited me a total of about 10 times. The other times he wanted me to cook. He also sent others for food. There were also others, not sent by him, who asked for money. This did not happen only to me but to all of the inhabitants around me.

Anne leaves Sri Lanka and comes to The Netherlands via first India (where she leaves her daughter behind “with the nuns”), and then Singapore, Italy and Germany. It is interesting to see how the decision, which declares the application unfounded, presents the flight motives.

The applicant declares that on 22 December 19**, five drunken members of the LTTE paid a visit to her house in * and both raped her and beat her son. She also says that her son left after this happened and returned on 24 December 19**. The applicant declares that a member of the LTTE stayed in her house from 22 December 19** until 24 Decem-
In the appeal documents, Anne’s lawyer provides a different perspective on her flight story. In the interview, Anne said that she had “a few little problems” prior to December 22nd. Anne’s lawyer has more to say about these problems.

In the fall of 19**, the applicant was visited several times by members of the LTTE and ordered to provide money and food. Because the applicant in no way felt a bond with the LTTE, and even repudiated the movement, she refused to follow these orders. The LTTE members did not accept that position and maltreated her. In vain, the applicant sought the support of her neighbours and other inhabitants of the village. “As a group, we stand strong against the Tigers,” thought the applicant, “if we resist as a group, they will leave us alone.” But the other inhabitants of the village thought otherwise and advised the applicant to comply with the wishes of the LTTE. “The LTTE is simply in power, everything is under their control, even the police has nothing to say any more, they are simply intimidated,” the applicant says.

On 22 December 19**, the applicant was again harassed by the LTTE. Again she refused to comply with the wishes of the LTTE members. This time, the applicant was treated even more aggressively. [A short description of what happened follows next.]

In the part of the appeal letter dealing with the evaluation of the facts in light of the refugee definition, Anne’s lawyer pursues this path.

By resisting LTTE activities and most notably by trying to find allies among the village population, the applicant triggered violent reactions by the LTTE. When her son fled during a visit of the LTTE to the applicant and stayed away for a few days, moreover, the LTTE got suspicious. (...) Because the applicant had a higher education (mathematics and English) and lived unmarried since 1982, she was perceived as very unusual in the Tamil community and as a remarkable person in the village. The applicant comes across as critical; for example, after her divorce she didn’t want a relationship with a man for an extended period of time.

A year after the appeal was filed, the Immigration and Naturalisation Service informed Anne that she would be granted a permanent residence permit, because she applied for asylum before 1 January 1994 and belonged to the category of applicants tolerated at the time. In reply, Anne’s lawyer informed the Service that Anne intended to pursue her procedure to obtain a refugee status. At the moment I saw the file (more than one year after the lawyer’s letter), no further procedural steps had been taken.

In the report of Anne’s interview, she can be seen to refer at many points to questions which have apparently been asked (“You ask me why...”, “You tell me that...” etc.). At other points, it is almost sure that a question was asked. For example, a statement like “I could smell this” is very likely a reply to the question “How do you know that the LTTE men had drunk a lot?” Nevertheless, other statements may have been given in reply to specific questions with no indications whatsoever in the text. Because the first part of Anne’s interview report contains many implicit references to questions, one may conclude in her case that the interviewer was initially critical. But the interviewer seems in the end to have believed her. This is especially clear from the vivid and moving details which the report contains in the passage on the execution of the son, which lend strong credibility to Anne’s statement.

In the report, the rape is mentioned in a very concise manner, without any emotional expressions. It may be that Anne reported the rape in this manner, but it may also be that the civil servant noted her statements rather summarily. The execution of the son is rendered in such a manner that I am inclined to think that parts of it are the exact words of Anne. In such a manner, the son’s execution is given greater weight in the narrative than the rape. The passage on the execution contains arresting but strictly speaking superficial details, such as the picture of the daughter falling and Anne going to her; Anne’s feelings of loneliness (“Nobody helped us”); and the filmic description of Anne standing at her dead son’s body, registering precisely where he was wounded, her sadness and her anger. These expressive details culminate in Anne’s statement that she buried her son in the clothes she had bought for him for Christmas. The result, again, is that the execution is stressed more than the rape although the effect of this is equivocal. One may find the rape quite striking precisely because of the sober way in which it is presented or less striking because of the lack of detail.

At three points in Anne’s story, the question of whether she and/ or her son should be considered political opponents of the LTTE arises. First, Anne’s lawyer says that she rebelled against the LTTE. This is significant, because it could be the reason for Anne running into such serious trouble on December 22nd. If Anne indeed advocated disobedience of the LTTE and both her rape and her son’s execution were a retaliation, then it is certainly wrong to say that Anne suffered from arbitrary acts of violence. It is possible that the interviewer did not think of food as the potential focus of political activity. By passing over the “few little problems” prior to December 22nd the interviewer may have written political activism out of Anne’s report.
A second point where the report is vague is that of the relation between the LTTE and the son. When the LTTE men came to Anne’s house, they reportedly beat her son and said he had to “leave the house.” Just exactly what this means is not clear, however. In the context of the report, one gets the impression that the interviewer thought that the LTTE men simply told the son to go outside (e.g., because the leader wanted to rape his mother). But it could be the case that they told the son to leave home and thereby meant that he should join the LTTE. In the latter case, Anne’s rape could be an act of retaliation on account of the fact that Anne and/or her son resisted being drafted. And if the latter interpretation is correct, Anne’s rape again becomes less random and more specifically directed at her.

Finally, the interview contains information suggesting that the son was suspected of having passed on information to rival Tamil groups or the Sri Lankan authorities upon his return on December 24th. Whether the suspicions were true or not and whether they already existed or arose in response to his December 22nd disappearance is also not clear from the interview report.

Both the interview report and the decision downplay the possibly political aspects of Anne’s case and emphasise those aspects suggesting that what happened was a result of general violence. The version of the facts presented in the decision lacks any reference whatsoever to political issues. Even the fact that the son was suspected of being an informer immediately prior to his execution, which is mentioned in the interview, is overlooked. What is not overlooked, however, is the fact that the LTTE men were drunk. The decision thus presents alcohol as the cause of Anne’s first rape. The latter two rapes which are not referred to in the decision, moreover, are attributed to “he wanted sexual contact” in the interview report. The death of the son is also ignored in the decision’s passage on refugee status. All of this suggests that the leader can be seen as an ordinary stalker and that things like this can happen in “the generally unsafe situation in the North of Sri Lanka.”

Anne’s lawyer resists the depoliticisation of Anne’s position. She portrays Anne as a politically conscious, critical and brave person who stands up for her convictions and suffers as a result. In order to represent Anne in this manner, the lawyer need not contradict the text of the interview. She merely adds some details without changing the substance of Anne’s story and thereby shifts the perspective on the story in a major way.

Among the Sri Lankan applicants in my research, the majority report close relatives having died in the war. Anne’s case is one example of this. Of the sixteen Sri Lankan cases in which the applicant was interviewed, only three do not mention this. The other thirteen applicants each report one to five casualties. A total of thirteen women report 31 dead. Some died during bombardments; eleven were executed by the LTTE, the IPKF or the Sri Lankan army; and others died fighting for the LTTE.

In the 80’s, the “trauma policy” was developed initially for Tamil cases. A residence permit can be granted on humanitarian grounds when an applicant, close relatives or friends have become the arbitrary victim of general violence. The decision in Anne’s case shows two ways in which the Immigration and Naturalisation Service may attempt to evade the effects of this so-called “trauma policy”. The Service’s fear, of course, is that many Tamil applicants will say that a close relative died and therefore qualify for permanent residence. For this reason, evidence of the death is required. In Anne’s case, however, this requirement is applied inconsistently. Her statements on her son’s execution are taken as true (but insufficient) in the first part of the decision, while they are considered to be in need of further proof in the second part. In addition, the decision objects that Anne left Sri Lanka six months after the execution of her son. This is an implicit reference to the requirement that one leave the country on account of (and therefore apparently shortly after) the traumatising event.

What we see here, which we will also see in other places, is that when a policy rule holds that specific facts can lead to a residence right, the burden of proof will be more stringent on the issues of (a) whether or not the fact occurred and (b) whether the fact was the reason for the departure or not.

In Anne’s case, we see two opposing constructions of refugee women which predominate in the sample. On the one hand we see the construction preferred by the administration: the powerless victim of Third World violence and/or unleashing male lust. The line of thought is then something like: much as we would like to admit this particular woman, we cannot let them all in. Admitting this victim may set a precedent which can later be held against us, so we have to deny her a residence right. If we admit her, it should be on grounds unrelated to being a victim. On the other hand, the case shows the applicant’s lawyer transforming the passive victim into a grass roots political activist. In the lawyer’s version, she stands out in her community (a single mother with a higher level of education), has campaigned against her oppressors (although without success) and has been hurt where she is most vulnerable: via her sexuality and via her only son.

The focus in this chapter is not so much on who is right. Even if the Immigration and Naturalisation Service and the applicant’s lawyer should agree on the facts, both constructions of Anne are still very possible. What
I will try to pinpoint in the following sections is how the respective constructions work, how they achieve coherence, how the participants try to convince us of their construction, and how the constructions fit into a broader political picture.

Conclusion

The case of Anne illustrates that the applicant is constructed. The constructed nature of the applicant is not a consequence of the specific character of the Dutch asylum procedure. In his discourse analysis of the asylum hearing, Barsky argues that the, in his case Canadian, interview report (which is a literal version of everything said) is aimed at producing a limited life story of the claimant. The claimant is expected to provide certain facts, and no others. Factual information on, for example, political activities and acts of persecution are to be given. The interviewer may help the applicant distinguish relevant from irrelevant facts. The interviewer may quickly pass over less interesting aspects (or state explicitly that something is irrelevant) and ask numerous questions about issues viewed as important for refugee status determination. The asylum interview thus constructs some issues as relevant and others as irrelevant. And "(the hearings [...] are...) revealing in an unexpected way; they have permitted us to read backwards, to evaluate the institution more fully than the refugee." In other words, the interview report is one source for the identification of gendered concepts of the refugee.

Specific to the Dutch asylum procedure is the fact that just how the words spoken during the initial interview are put on paper cannot be checked. When applicants later say that the interview official left out an element of their story or that they felt intimidated, this may simply not be believed. Even worse, it may make the applicant look like the standard abusive claimant who tries to improve her story when the initial version has proved to be insufficient. Be this as it may, the comparison with Barsky's analysis of a Canadian asylum hearing, which was tape-recorded and then typed out, shows construction to be a key element in the asylum interview in general, and not just the Dutch asylum interview. The perspective of the official dominates the portrayal of the flight motives. Paraphrasing Foucault, one can say that domination here is not on the side of the one who speaks, but on the side of the one who listens and remains silent; not on the side of the one who knows the facts and answers, but on the side of the one who interrogates and is presumed not to know yet.

My claim is not that a true construction exists for us to pin down. Of course, the interview report may be better or worse, just as the applicants may tell things as they happened or lie. My claim is that the meaning of well-recorded "true facts" is necessarily constructed and that not all constructions are equal. Each particular construction reflects particular political and ideological projects.

3.2 Credibility

A primary process in the writing of interview reports is the labelling of an applicant as credible or not. For a statement to be credible, it must first of all not be inconsistent. Applicants may provide conflicting statements about dates, places and persons. Such inconsistency is subject to a familiar critique, namely that asylum applicants may be afraid of officials or simply nervous. In addition, some inconsistencies may be the result of cross-cultural miscommunication. An entire body of literature has grown up around the issue of how these problems are further complicated by the issue of gender. These issues nevertheless fall outside the scope of the present research, as I have not observed the interviews. I analysed only written documents and will therefore investigate how credibility is constructed within these documents. In the remainder of this section, I will discuss three central issues: appropriate behaviour as a mother or wife; the display of emotions; and ethnicity.

The appropriate mother or wife

When an applicant has a family, attention is paid in the interview report to the applicant's behaviour towards her husband and children before, during and after flight. If the behaviour of the applicant is considered inappropriate, this is taken as an indicator of incredibility. The behaviour used as the norm may be specifically Western and is often traditional by any standard. Female claimants leaving their families behind are considered incredible. Such an assumption is often only clear from the interview report and simply remains unmentioned in the decision. On occasion, however, the issue may be mentioned in the decision, as in the following decision in a Turkish case.

It is surprising that the applicant has left her children behind in Turkey, as she has stated she left Turkey partly out of concern for the well-being of her children. It is not deemed probable that the chil-
dren of the applicant will benefit from the departure of their mother abroad. This damages the statements of the applicant.

Later, the applicant was caught smuggling her children into The Netherlands illegally. After a positive ACV opinion, the applicant was admitted as a refugee.

In exceptional cases, unbecoming behaviour may play a central role in arguing that the applicant has other motives for leaving her country than the ones she pretends to have.

In an Iranian case, the applicant based her claim on fear of persecution for keeping a human rights record. The State attorney argues:

It seems more likely that the applicant left her country because of the personal problems with her husband and the reunification she desired with her old love *, whom the applicant’s father forbade her to marry. The applicant indicates in the interview that she is not particularly interested in whether her husband is still alive. The Court dismissed the claim and found it probable that the applicant left the country because of “problems in her private life.”

Conversely, “proper” behaviour is typically rewarded with credibility and vivid descriptions of the behaviour. Most notable are the portrayals of women grieving the death of a husband or a son, where interview officials often display almost literary skills (as in the case of Anne).

Yet another common ground for disputing the credibility of flight motives occurs in cases of feared persecution on account of kinship. If the applicant does not know enough about the activities of her husband or son, the flight motive is often found incredible.

**Emotionality**

In order to be considered credible, applicants must show the appropriate emotions at the appropriate moments. An applicant who does not show any emotion when speaking of sexual violence is deemed incredible; a restrained display of emotions is deemed eminently credible; and showing an excess of emotions is seen as playing acting. In the following, three examples of just how precise the expectations of interview officials are on this point will be presented.

A Zairian woman says she was arrested together with her one-year-old son on account of both distributing pamphlets and because her husband was active for the opposition party PDSC. She was detained for four days and raped by five soldiers. She was released after the intervention of a doctor, because her baby was ill. In the passage of the interview where she describes in short and factual words that she was raped, the interview official notes: “The applicant showed no sign of any emotion.” The flight story is considered incredible.

One of the few cases in which a Zairian applicant was found credible concerns a market vendor who was arrested together with her husband because she refused to accept a new bank note. In prison, her husband was shot in front of her eyes, and the applicant was tortured and raped. At two points, the statement of the applicant is interrupted by a remark of the interview official. When she tells about the death of her husband, he writes:

When the applicant tells about the murder of her husband, she cries in a composed way. The crying has something apathetic, as if something in her is dead.

When the applicant describes the rapes, the interview official notes:

The translator found it hard to give a good and literal translation. The applicant was granted a humanitarian residence permit.

In the case of a Turkish Kurdish applicant born in 1950, the interview report is of a kind that I have never seen before. It is atypical in its (seemingly) literal rendering of the applicant’s words, and in the scarcely veiled mocking of the applicant. The flight story is about her problems as a result of the activities of her sons. The report is interspersed with remarks of the interview official, such as:

Remark interview official:

to the translator she asks: Can’t you help me?

or

Remark interview official:

to the translator she said the following: Tell her that I do not tell lies and that I never will.

Then this passage follows:

Remark interview official:

the applicant at this moment – 10.55 hours – goes into a kind of epileptic fit and falls from her chair immediately onto the ground. Before lying still on her side, she makes jerky movements. From this moment on, she is not approachable. At 11.08 hours, the applicant slowly regains consciousness. She says she has a headache and swallows a painkiller she brought herself. Her scarf is now tied around her head to combat the headache.

She states:

I now have pain in my shoulder.
Remark interview official:
at about 11.12 hours, the applicant has yet another comparable fit
after which, sitting on the ground, she falls sideways. At 11.30, tele-
phone contact is sought with the medical service of the refugee cen-
tre. The doctor of the centre, *, says that in the case of Ms. *, there
is no physical ailment but an experience which can be expressed in a
serious form of hysteria. Therefore, as a doctor, he found it necessity-
ly to be present at the remainder of the interview, as a rare excep-
tion.
Remark counsel [a refugee council worker, TS]:
The applicant becomes emotional and regularly has fits when she
speaks of her two sons, * and *. Such a talk is a relief, on the one
hand, but afterwards she has attacks like this which may last as
much as 20 minutes.
When, two weeks later, the interview is resumed in the presence of a
doctor, things don’t go smoothly. The applicant repeatedly and emphati-
cally criticises the interview official. Apparently, the translator trans-
lates literally, which has a “comic” effect. Examples are:
To your question of how he [i.e. one of the applicant’s sons, TS]
knows about the whereabouts of his brother, I answer you, that you
don’t give your ear to me!
Remark interview official:
the applicant intends to say with this that I, the interview official, do
not listen.
or
Give me ears!!
Forget about the door. [The applicant has mentioned a door being
kicked in by soldiers eight lines earlier, TS.] I am going to speak
about wheat and butter!
or
Give me your ear; I have become an actress and I should in fact be
on TV. What I have experienced even a cooked chicken hasn’t ex-
perienced.
The applicant has one more fit that lasts about 10 minutes. The flight
motives are deemed incredible.

In sum, applicants should display emotion but not too much. The evocative
formulation which the interview official uses in the case of the Zairian
woman considered credible is informative in this respect. It suggests that
he believed this applicant because she was almost overwhelmed by her
emotions but made an effort to control them. What makes the other Zairian
applicant incredible is her complete lack of (recognisable) emotion, while
the Turkish applicant is simply seen as (over-)acting when she does not try
to control her emotions at all.

Ethnicity

There seems to be a relation between ethnicity and credibility. Table A.26
shows that Bosnians are often not asked about their flight motives appar-
ently because they are considered self-evident. When Bosnian applicants
are interviewed, credibility is not raised. In Zairian cases, incredibility is
routinely invoked against applicants; in 23 of the 37 Zairian cases in the
sample credibility was a central argument given for rejecting the claim.
The cases of Turkish, Iranian, Chinese and Sri lankan applicants fall some-
where in between. In these cases, incredibility is regularly invoked but is
not a standard issue.

A quantitative indication of the generally negative attitude towards Zairian
applicants is the frequency of standard text blocks in the male form in in-
terview reports concerning female applicants (see Table 3.1). This is ac-
tually inconsequential and merely a matter of pressing the wrong buttons,
but it is nevertheless interesting to see that it occurs more frequently with
respect to some nationalities than others. That such gender errors occur in
Zairian cases confirms my impression that these reports tend to be sloppy.
The finding that Iranian interview reports contain numerous gender errors
initially came as a surprise. Such sloppiness, nevertheless, seems to fit with
the claims of those who criticise the Dutch policy on Iranian claimants;
they argued that the procedure as a whole was sloppy because Iranian ap-
plicants were not returned up until 1995 anyway. This meant that both civil
servants and lawyers found saw little was at stake in such cases and thus
became sloppy (see section 2.6).

Table 3.1 Gender errors in interview report

<table>
<thead>
<tr>
<th>Country of origin</th>
<th>Relevant cases</th>
<th>Gender errors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosnia-H</td>
<td>14</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>China</td>
<td>75</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Iran</td>
<td>39</td>
<td>6 (15%)</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>16</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Turkey</td>
<td>22</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Zaire</td>
<td>36</td>
<td>8 (19%)</td>
</tr>
</tbody>
</table>

A factor that may further complicate things is language. All of the appli-
cants with the exception of the Zairians were interviewed in their mother
tongue. Most of the Zairians (29) were interviewed in French, which is the official language in Zaire. Going by the names of the translators (which is an unreliable source, but the only one I have), in only four cases was the translator a Zairian; in the other 25 cases, the translator had a Dutch or a French name. In the only case where the interview report provides fully coherent flight motives, the French translator was probably Zairian. In seven other cases, Lingala was the interview language. In five of these cases, the translator appears to be a native speaker. In the other two cases, the translator was a man with a Dutch name. Finally, in one case, with the interview in Swahili, the translator was probably a native speaker (see Table 3.2).

<table>
<thead>
<tr>
<th>Language</th>
<th>Zairian translator</th>
<th>Non Zairian translator</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>French</td>
<td>4</td>
<td>25</td>
<td>29</td>
</tr>
<tr>
<td>Lingala</td>
<td>5</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Swahili</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>10</td>
<td>27</td>
<td>37</td>
</tr>
</tbody>
</table>

My thesis is that, especially in Zairian cases, interview officials expect incoherent flight motives. For this reason, they do not normally try to clarify problematic statements. Quite to the contrary, when confronted with the incoherent flight motives of a Zairian applicant, they note "nonsense as usual." I would illustrate this with one case, in which the interview report fits the general picture of the Zairian cases. What makes the case interesting in the present context is the submission of a medical report from Amnesty International with perfectly coherent flight motives which are not so much in contradiction with those recorded in the interview report but, rather, a consistent version of them.

The case of Karen (Zaire)

In the case of an unmarried woman born in 1967, whom I will call Karen, the name of the Lingala-Dutch translator suggests a Zairian background. The interview report of four pages begins with a half page of standard text in the male form. This is followed by the text below (with punctuation and capitals as in the original):

Reason for asylum application
I was arrested on 4th of September at a prayer service. I lead the choir. After the service I brought the girls outside to hold a meeting. It was about 9 PM. We saw range rovers driving they came from the direction of 4th. They surrounded us. There were about 15 girls. There were about 10 range rovers. About 20 soldiers were in them. We were put in the cars and taken to the town of 4th. There we were brought to a military camp and put up in a large hall.

The next morning on 4th, one day after the arrest, TS were called into a little office one by one. Our identity papers were asked for. My father is village chief. He is a member of the party Abaco. This party is for the tribe Bacongo. This party is against Mobutu. It was said that Mobutu is not to be made fun of by my father and that they would teach him a lesson. I would never see him again. For the rest nothing was said or asked.

I was raped on the nights of 4th and 5th (the first nights of her detention, TS) by 05 soldiers. I was blindfolded. Both nights by 05 soldiers. For the rest I don’t know who they are.

The next day on 4th, two days after the arrest, TS I was brought to the zone 4th in Bas-Zaïre, to the prison there. I was brought there alone. I do not know where the other 15 girls are.

In this prison I was beaten with a thread that soldiers use as belt and in order to descend of a thread (a cordelit). This was on 4th, two days after the arrest, TS at the moment that my identity was passed on in the prison. And that was told about my father. I have a scar of this on my left shoulder. (seen by the interview official, A dark spot the size of a quarter with a T-shaped scar in it) I was put in a small cell alone.

Now and then I was interrogated. About five times. I was then beaten and kicked but that was not so terribly hard. I was questioned about - What was said at the meetings of my father.
- If he was against Mobutu.
- If during my arrestation I wanted to organise something against Mobutu.

I tried to explain that I only wanted to hold a meeting for the church and not for something else. I was not able to see the prison well because I was put in the cell and taken out of the cell in the dark. There was illumination with candles.

I was helped to flee on 4th (about 2 months after the arrest, TS). A soldier helped me escape at 07.00 hours. He released me because we both spoke kikongo. He had pity on me, in view of my situation. He thought that maybe I might be murdered in that prison. As far as I know there were no other reasons to release him.
Karen was arrested along with fourteen others, it says, and there was therefore no action directed against her personally. The statements about her escape are incredible; it is incomprehensible that a single soldier could get her out and unlikely that he should take such a risk solely because he spoke the same language and pitied her. Karen only undertook minor activities, so her fear of being persecuted on account of them is not well-founded. And it is strange that while she was arrested for organising a religious gathering, she was interrogated about her father’s political activities. Finally, her statements about her father’s activities are insufficiently concrete.

In the review application, a doctor from the Medical Examination Group of Amnesty International gives a lengthy (1.5 page single spaced) version of the flight motives, which I will summarise. Karen’s father was a village chief and the leader of the entire region of Bas-Zaire. He was harassed by the Zairian authorities because of his political activities; the Mobutu regime wanted to keep the region in its sphere of influence because of its natural resources. The father was regularly arrested, beaten and released shortly after. Two of Karen’s brothers had been arrested several times as well. Karen was arrested after directing her choir and talking with the choir outside the church. Soldiers accused them of holding a meeting in order to prepare a march against Mobutu. After initial interrogation in a camp and the soldiers found out who she was, only Karen was transferred to a prison. Here she was interrogated and tortured. Karen was raped in the camp during three nights by several men. The police officer who helped her escape was the son of a friend of her father and held a senior position. Karen got pregnant as a result of the rapes (which was her first sexual contact) and has the child with her.

The case was referred to the ACV and was still pending when I saw the file. The point in this case is that coherent and compelling flight motives existed, as shown by the medical report. However, the interview report is so sloppy that the attitude of the interview official is very plausibly a cause of the incoherent flight motives in the report, regardless of actual incoherence of Karen. The Amnesty report contains a completely coherent version of the same facts. The incredulous attitude of the interview official and the decision maker in Karen’s case are indicative of the attitude encountered in the great majority of the Zairian cases which were part of the sample.

Conclusion

Credibility is obviously a central issue in refugee status determination, and the issue is typically decided by the initial interview report. An analysis of
these reports (and to a lesser extent of later documents) shows credibility to be constructed around three axes. First, those female applicants who have a family are routinely judged according to the appropriateness of their behaviour as a wife and mother. That a woman would leave behind her husband or children is considered hard to believe. In some cases, the issue of whether the applicant is, in fact, married and has children is central to the application (e.g., Chinese one child cases). In most cases, the marital status of the applicant seems irrelevant. In the such cases, the appropriateness of the applicant’s behaviour is judged in order to determine whether the applicant is credible in general and a reliable person. Although I have not researched cases of men, on the basis of my experience as a lawyer, I am rather sure that an evaluation of their behaviour as a husband or father is not a routine issue in the asylum procedure.

A second axis is emotionality. Applicants relating awful things (e.g., the death of a child, sexual violence) should show some emotion. If no emotion is shown, this is seen as an indicator of incredibility. If the applicant shows a lot of emotion, this may be seen as an excessive display and suggestive of incredibility as well. If an applicant has difficulties mastering her emotions, this is seen as a sign of credibility.

A third issue is ethnicity. The material suggests that Bosnians are generally considered credible; that Zairians are generally considered incredible; and that Turks, Sri Lankans, Iranians and Chinese fall somewhere in between. The experienced (in)credibility of applicants from a particular nationality may lead to very fixed expectations on the part of interview officials. And I suggest that these expectations clearly played a role to the benefit of Bosnians and to the detriment of Zairians.

I would like to make two further points here. First, this manner of constructing credibility is not necessarily detrimental to female applicants. It can work both for and against them. It works against those who act in contrast to that which is expected of them (e.g., women- leaving their children behind). It works in favour of those who fit the mould (e.g., women grieving the death of male relatives and showing appropriate behaviour and appropriate emotions). It nevertheless seems clear that the expectations with regard to the display of emotions and appropriate behaviour are specific to women. We can thus see that a practice which is gendered need not necessarily constitute gender discrimination.

The second point I would like to make is that the three axes underlying the determination of credibility may intersect. It may be that black women are expected to be more emotional than white women and that the display of emotion sufficient for a Bosnian woman is judged as insufficient for a Zairian woman. Conversely, women from less developed parts of the world may be expected to grieve less about the loss of a child than other women because “they have more of them”. Finally, applicants are also supposed to adhere to traditional norms but when they do not, this is simply taken to indicate that the applicant is lying and not to indicate that the applicant is less traditional than expected.

3.3 The Concept of the Political Act

The persecution ground “political opinion” is of central importance in the cases in the present sample (and in Dutch practice more generally). The idea of refugees as “political refugees” is nevertheless nowhere expressed in the form of a requirement in policy documents or individual decisions. Despite this lack of explicitness, it is the persecution ground which the vast majority of the cases turn on, which makes the meaning of the term political crucial for the determination of asylum claims. The content of the persecution ground “political opinion” is not identified in a positive manner in asylum decisions, moreover. In order to delineate the concept, thus, we must focus on cases in which it is articulated what does not count as a political opinion.

The subsections hereunder concern the following categories. First, acts which are viewed as based on emotions are labelled non-political. An extensive case description within this category concerns non-compliance with the Chinese one child policy. Second, acts which are considered self-interested are seen as non-political. Third, both acts which are voluntary and acts which are involuntary (!) are seen as non-political. Fourth, minor acts are not considered political. Yet another long case description falling under this rubric concerns an applicant who had been active in a women’s movement. Finally, we will see that applicants are attributed flight motives which lead to disqualification while according to another perception of their motives these might have been found relevant.

Emotions or mere personal preferences

The most prominent category of motives considered non-political are motives involving emotions or mere personal preferences. I have clustered these cases into those concerning: missing relatives; problems with husbands, fiancés and the like; dress code problems; and pornography cases. An extensive case description will concern the Chinese one child policy.
Women who have tried to trace missing relatives (sons, husbands) or protested against their disappearance are portrayed as people inspired by grief or by a longing to be reunited with their beloved ones.

A widowed Sri Lankan Tamil based her claim on the fact that she had publicly protested against the execution (by the LTTE) of her only child, a son. The decision does not consider her protest political activity, hence it is implicitly seen as an expression of personal grief:

The applicant, who has stated that she has never been a member or sympathiser of an organisation which opposed the government in the country of origin, personally never experienced problems from the side of the Tamil Tigers. She has declared that her son was killed by the Tamil Tigers, but it has not been established that as a result of this the applicant has personally experienced problems. The circumstance that the applicant says she was visited by Tamil Tigers does not change this, as this statement is based solely on presumption and has not been substantiated in any way.

In cases of missing relatives, the dominant perception is that this is a personal problem and thus, a consequence, not political. This emphasis on personal tragedy has a clearly depoliticising effect: it zooms in on suffering and not resistance. Yet the Tamil mother just mentioned can easily be perceived as a protester. In fact, one Zairian case shows the transformation of such a “mater dolorosa” into a character we can and do recognise as a political activist: The crazy mother from Latin America in the 1970s. Initially, the application was rejected because the applicant had not been politically active; after review she was granted a refugee status.

Refugee claims in which problems with husbands or fiancés play a central role or claims in which an applicant has refused to start a relationship with a man are always dismissed as being about “problems of a personal nature” or “personal problems.” In the words of one decision: “The Refugee Convention is not intended to provide protection in such a situation.”

The idea that private problems cannot lead to refugee status is very apparent. In several cases, the interview reports show the interview official to say this to the applicant and suggest in so many words that she withdraw her application.

Cases with “personal problems” standing central are thus routinely dismissed. In most cases, the statements of the applicants noted in the interview report also do not discuss their refusal to marry, remain married, or stay in an abusive relationship in political terms. Interview officials do not see the conflicts which the applicants are part of as potentially of a political nature. Nevertheless, in Iranian cases, a humanitarian permit may be granted.

In one Iranian case, concerning a woman born in 1956, the interview report was lively and dramatic. The applicant and her husband chose each other for marriage and were married in the early 1980s. The husband, an engineer, did very well and became quite successful. Because of this, he also relied more and more on his prestigious and very religious family living in the holy city of Qom. The applicant, who by then had a daughter, was completely absorbed by her in-laws. She could hardly bear it. Her husband refused a divorce. She established contact with an opposition group and acted as an informer and courier. Her husband found out and, in order to prevent embarrassment, had his wife supervised all day. Shortly thereafter, he divorced her. He was appointed custodian of the child and, after a transitional period, the applicant was denied any contact. When she was caught secretly visiting her child at school, she was followed by the local Komiteh. She escaped arrest by fleeing over the rooftops. She then abducted her child and fled. With regard to refugee status, the decision argues:

It is noted that the problems the applicant has invoked, which are characterised by problems in the private sphere, cannot lead to refugee status as the aforementioned does not fall under one of the grounds mentioned in the Convention.

Discontent with the general situation in Iran does not lead to refugee status.

The applicant is granted a residence permit on humanitarian grounds without further motivation.

In a case concerning a woman who considers herself a Bosnian national but has a Croatian passport and is married to a Croat, sexual violence in their relationship stands central to the claim. The couple is from Vukovar, where the parents of the woman moved from Bosnia-Herzegovina. The husband started to rape her and to cut her with a knife while they were staying in a refugee camp in Germany. After their return to Croatia, they stayed in a refugee camp. The abuse became worse. The applicant didn’t dare to report the abuse to the police, and says: “I think the war has made my husband crazy.” The initial decision argues that the applicant could have sought protection against the abuse from the Croatian authorities.

Problems labelled as private are seen as too general (family law is a law of general application) or too specific (personal problems). A case like that of the Iranian woman described above is not viewed as one in which the family constitutes the site of a conflict about politics and religion in which the
man's position of superior power was created by (State made) family law. The case of the Croatian/Bosnian applicant looks very much like cases of inter-ethnic violence or ethnic cleansing (which have led many Muslims to leave Croatia). Given that the perpetrator (an "ethnic Croat") and the victim are married, however, the woman is constructed as a victim of private violence. In fact, political, religious and ethnic conflicts are seen as merely personal precisely because they occur in the context of the family. The family is apparently only personal, only private, only emotional.

The interview reports of Iranian applicants show that interview officials are keenly aware of problems surrounding improper dressing. The issue is apparently addressed in a standard question, as many of the applicants mention such problems (including being lashed) in isolated passages after the immediate flight motives have been dealt with. The only case in which dress was considered the expression of a political opinion concerned a Turkish Kurdish protest singer who wore a coloured scarf during a concert.

I wore a shawl with the colours green, yellow and red. The police, which supervised us, came to me and confiscated my shawl and ID card. They thought that the colours of the shawl symbolised the Kurdish community. I wore this shawl as an accessory, but of course I also wore it because I am proud to be Kurdish. As this event was not the cause of her flight, which occurred years later, the issue was not thematised in the procedure.

The only example of a case in which the imposition of a dress code is not portrayed as irrelevant is a Bosnian case.

A woman of Croat ethnic background living in an area dominated by Muslim troops receives anonymous telephone calls. In an angry tone, they told me I didn't belong here and had to leave. Either I had to dress like a Muslim woman, with a scarf, long sleeves and a skirt down to my ankles, or I had to leave. I was very afraid when they called and I hung up quickly. They threatened to rape me if I wouldn't listen. These facts are followed by more examples of ethnic cleansing of which the applicant was a victim.

Transgression of a dress code is not seen as a conscious act of defiance. At most, a dress code is seen as a discriminatory practice (which may then be dismissed from a refugee case as pertaining to a law of general application). As in the cases of relatives who have disappeared, the sympathetic view focuses on the victimisation of the women and not on their disobedience. The case of the Kurdish woman wearing a scarf with the Kurdish colours is depicted as a different case altogether. She is not transgressing a dress code; she is wearing a clearly delineated political symbol. This is an example of a pattern I will return to, namely that activities undertaken outside formal structures (with the "political party or organisation" as the prime example) are not considered to be political. Transgression of dress codes other than by wearing something like a party scarf is seen as whimsical, careless or a matter of a mere preference for one kind of clothes over another. In the interview report of the Bosnian applicant, however, the imposition of dress codes is depicted as consistent with the other forms of ethnic cleansing.

Another example of applications perceived as merely involving a preference on the part of the applicant (or her husband) — and an embarrassing preference at that — concerns possession of porn videos, which is apparently illegal in China. Remarkably, the lawyers of the applicants attempt to shift the emphasis from this issue to another issue in these cases.

Possession of pornography is considered a civil offence unrelated to refugee law:

[The applicant's] husband was afraid of being prosecuted for buying a porn film, which at most should be qualified as a civil offence. The applicant has in no way made it plausible that she has a reason to fear persecution in the sense of refugee law.11

While pornography is seen as an issue related to freedom of expression in the West, none of the applicants in these cases (or their lawyers) appears to have a shimer of the idea that prosecution for the possession or import of pornography may actually be prosecution for the exercise of a basic human right. To the contrary, the applicant's lawyers try to get rid of the pornography aspect of these cases. This further substantiates the general assumption that emotions are unpolitical. The portrayal of a case in terms of lust — the most "emotional" or even "base" emotion — brings the case not only outside the realm of the political but also outside the domain of human rights.

The case of Betty (China)

A final example of flight motives being considered emotional and not political consists of cases pertaining to the Chinese one-child policy. I will ex-
tensively describe one case which represents many aspects of the other Chinese one-child cases. The particular combination of factors makes the case atypical but nevertheless illustrative of how the Dutch authorities reacted to one child cases in the sample.

The applicant, whom I will call Betty, was born in 1963. In 1985, she married a man five years her senior. Her first child, a son, was born in 1985 and followed by a daughter in 1987. The children are still in China with a brother-in-law. In mid-1992, Betty was eight months pregnant with her third child. When three women and two men from the Bureau for family planning entered Betty’s house for inspection, Betty’s husband pushed a civil servant from the stairs. The man had to be brought to the hospital; Betty later learned that the man’s legs were paralysed for good. Betty was taken to the hospital and given an injection. An hour later, she experienced pains in her stomach. After 24 hours, the baby had still not come out and Betty lost consciousness. When she regained consciousness, the abortion had taken place and Betty had been sterilised. A week later, she was allowed to leave the hospital.

During her stay in the hospital, her husband had fled. Betty cannot explain why he wasn’t arrested immediately after he had pushed the civil servant from the stairs. A few days after coming home from the hospital, the Security Service handed her an arrest warrant for her husband. He was charged, Betty says, with deliberately acting against the family planning policy and assaulting a Family Planning executive. Betty was repeatedly visited by a son of the injured man; the son said he would take revenge if she did not tell him where her husband was. On one occasion, he wrecked the furniture; on another occasion, he threatened her with a knife. An acquaintance who had received a letter from Betty’s husband told her that he was in Hong Kong and would probably go to The Netherlands. When, shortly after, a Security Service official visited her and said that she would be prosecuted as an accomplice to her husband if she didn’t say where he was, Betty fled. After applying for asylum, she asked a social worker in the refugee camp in The Netherlands to help her find her husband, but he has not been found.

After a negative initial decision, the case was brought before the ACV. An extended quote from the interview report provides insight into how the ACV views the issue of forced abortion.

In China, it was no problem that she [i.e., Betty, TS] had two children. In 1987 that was still allowed. It is not allowed to have a third child. To the question of why she got pregnant under these circumstances, the applicant replies that she loves children and that she got pregnant by coincidence. She hoped to be able to have the baby and to be able to pay money to the authorities in order to keep it. A mother does not want her child to be removed. To the question of whether she knew that this would lead to problems, the applicant answers that it is hard to say. Sometimes it is possible to ask the authorities for permission to have a third child. She had not asked for permission. In her village, one could wait until after the birth of the child. After that, one just had to wait and see. The authorities do not use fixed rules. The applicant is confronted with the fact that the Chinese authorities do use fixed rules. This has happened for a long time. The applicant then says that such rules may exist, but at a local level one is dependent on whether or not the rules are applied by the authorities. This depends on the situation.

She did not request permission to have the baby during the pregnancy, because the family planning people hold a campaign once or twice a year in China. She had hoped that such a campaign would not occur during her pregnancy. If that should happen, she hoped she would still be able to keep the child in one way or another. To the question of what was the problem with asking permission to keep the child before the child was born, the applicant replied that she could not do that because she would not have received permission to keep the child. She is sure of that, as she was breaking the rules. The child would have been removed. She had hoped that she would be lucky and be able to have the baby with help of her friends. She didn’t dare to report herself.

The ACV’s opinion, which was adopted by the State Secretary, motivates the rejection of Betty’s application in the following manner.

[I] is taken into consideration that the statement that she has been forced to undergo an abortion and been sterilised, even if one can presume her statements to be correct, is no ground for refugee status, if only because the abortion and sterilisation cannot be related to one or more of the grounds mentioned in Article 1(A) of the Convention. In addition, the applicant was conscious of the policy – which is identical for everybody – on family planning in China and she consciously took the risk of not being allowed to keep the child. In so far as she fears being punished by the authorities in China on account of that, it is remarked that these sanctions, as is clear from the statements of the representative of the Minister of Foreign Affairs during the hearing, are primarily of an economic nature. In so far as the applicant fears persecution because of her husband’s problems with the authorities, his act is considered a civil offence (in-
jury) not based on political motives and no clues can be found in the statement of the applicant that the authorities attribute him [the husband, T] a political opinion they find disfavourable. As a consequence, it is not plausible that the applicant will be attributed a political opinion which the authorities find disfavourable and will lead to acts of persecution. That the son of the civil servant involved purportedly threatened her (and her husband) does not change this, if only because it cannot be understood why the applicant could not reasonably have invoked the help of the Chinese authorities to deal with the postulated threat which has not been established to rest on political motives.

With regard to the postulated abortion and sterilisation, it is considered that it has not been established that she was traumatised thereby to such an extent that a residence permit on humanitarian grounds could not reasonably be denied.

The State Secretary’s decision to adopt the ACV’s reasoning adds that the arrest warrant for her husband, which Betty’s lawyer submitted during the review procedure, does not change the fact that “this case concerns prosecution for a civil offence.”

The complex manner in which pregnancy is portrayed should be noted. The first thing to note in this respect is that the report pays attention to Betty’s reason for wanting to get pregnant and remain pregnant. The issue might have been considered as trivial but in Betty’s case, wanting (or wanting to keep) a child while knowing that this can lead to problems is portrayed as stupid. The ACV speaks of a risk of forced abortion being consciously taken.

It is remarkable that in the decisions in Betty’s case and those in comparable cases, no references are made to the idea that forced abortion or sterilisation may be a sanction for violation of the one child policy. This seems only possible when forced abortion or sterilisation are taken as administrative measures to restore the lawful situation as it existed before the violation (in the case of abortion) or to do something which the citizen should have done herself in order to make the situation lawful (in the case of sterilisation). This construction as an administrative measure is particularly suggested by the ACV. Involuntary abortion is implicitly considered as a foreseeable consequence of unlawful pregnancy. Accordingly, the opinion first considers the issue of Betty not being allowed to keep her child, and then addresses the topic of possible punishment (“In so far as she fears being punished ...”).

The manner in which the problems of Betty’s husband are addressed should also be noted. Betty says her husband injured a civil servant in a conflict over the implementation of the one child policy. The fight is nevertheless not portrayed as the expression of a political or religious opinion but as a personal reaction. The punishment that the husband can expect is normal prosecution and not persecution. A remarkable aspect of Betty’s case is that the Chinese authorities charge her husband with more than just the “civil offence.” According to the arrest warrant, he is also charged with “serious sabotage of family planning” and not just the injury of a civil servant. Nevertheless, this is also construed as a civil offence.

I think that we can conclude that the Immigration and Naturalisation Service is of the opinion that it is necessary to prevent claims based on the one child policy from being accepted. This defensive attitude is suggested by the strong emphasis on the need for evidence to validate propositions which are already rather plausible (e.g., that the applicant is married and has children) and the complete disregard of evidence in support of Betty’s statements (the wording of the arrest warrant). Also, such arguments as that the forced abortion or sterilisation was not the reason for the applicant’s flight or that the traumatising nature of these events has not been established seem rather desperate attempts to dismiss the claims. Most markedly, the use of forced abortion and sterilisation is said to be a proportional means to a legitimate end. This implies that such practices are not punitive but administrative measures and thus appropriate. I interpret this defensiveness as a sign that the Immigration and Naturalisation Service and the courts fear large numbers of Chinese claimants. They may fear claims of women who are not married or do not actually have one or two children, but whose statements on her marital status and number of children cannot be disproved by the administration. The Dutch authorities may also fear Chinese women who are not allowed to have more children simply coming to the Netherlands to have another child.

An essential element in the attitude towards the one child cases is that a violation of demographic policies is not construed as the exercise of a human right or the expression of a political opinion; rather, the violation of demographic policies is seen as governed by emotions and intimate desires: the wish for a child, objections to abortion and protective male rage against the one child authorities. There are also hardly any signs of other participants (particularly refugee lawyers) trying to reconceive these matters in terms of conscience or politics.
Desire to improve living circumstances or economic gain

The case of Betty provides an example of perceived emotional or personal motives excluding a political motivation for her acts. A second category of cases concerns applicants perceived as merely wanting to improve their living circumstances and having, thus, non-political flight motives. Although in the public debate, this motive is commonly associated with male asylum seekers ("economic" refugees), the assumption is also often applied in cases of women as well. The clusters which I have been able to distinguish are specific to particular countries of origin within the sample: cases of women refusing to co-operate with the Tamil Tigers; cases of Chinese one-child officials sabotaging the policy; and cases of Zairian market vendors opposing the monetary policies of the Mobutu regime.

A first economic example is provided by cases in which Sri Lankan women refuse to (continue to) co-operate with the Tamil Tigers. Sri Lankan Tamil applicants who have refused to give food and money to the LTTE or refused to join the organisation (or escaped from a LTTE camp after forced recruitment) are not systematically asked for their motives. In quite a few cases, their reasons are simply not noted or remain very vague. In some cases, the motive is recorded as being connected to the fact that a close relative (sister, brother, husband) of the applicant has already died for the LTTE, or alternatively has been killed by it. In other cases, the interview report notes that the applicant's father found it better for her to go. No interview report describes the motives for refusing to co-operate with the LTTE in explicitly political terms. None of the lawyers do this either, with the exception of Anne's lawyer.

One of the few lawyers who tried to highlight these motives at all, did this in emotional, non-political terms:

She didn’t feel like doing that at all. Until now everything which was dear to her in life had been lost in the struggle between the Tigers and the Sri Lankan army, which she also abhorred as a result. She didn’t want to have anything to do with it and refused to lend the Tigers support, as a result of which she nevertheless became involved in the struggle.

The lack of interest in the reasons to refuse co-operation with the LTTE suggests that the motives are seen as so obvious that they go without saying. The lack of interest also suggests that the wish to avoid something unpleasant (parting from your possessions in the case of refusal to give money or food; fear of life and limb or the wish to live normally in the case of evasion of forced recruitment) is also assumed to exclude a political motivation.

Of equal interest in this light are three cases of Chinese one-child policy officers who were disloyal. The motives, as given in the interview reports, range from emotional to fundamental, but the decisions still construe these motives as economic. In one case, the applicant said that she spared a woman a forced abortion in return for money. In a second case, the applicant stated that she was under pressure from her personal surroundings to write receipts for people who were supposed to pay a fine but had not paid it. She feared punishment for misappropriation of government funds. A third applicant stated her fundamental objections to the use of force within the framework of the one child policy and said that she therefore helped women escape from the clinic and issued false sterilisation certificates. She was blacklisted in China and could no longer get work or a home as a result. The first case was indeed dismissed because the applicant did not have fundamental objections to the one child policy. The second case was rejected because the prosecution concerned a civil offence. The third case was refused because the applicant had based her claim on economic motives (no work and no house).

A third group of economic cases is that of Zairian market vendors who opposed the monetary reforms of the Mobutu regime.

A good example is the file which contains one of the few coherently presented Zairian flight stories to which I already referred above (page 57). The applicant, a woman born in 1964, traded textiles at the market in Kinshasa together with her husband. The first paragraph of her flight motives reads:

The reason that I ask for asylum is that I have resisted a monetary reform measure of the Mobutu government. As a result of this resistance, I have been arrested and detained together with my husband, *. My husband was murdered in front of my eyes and I have been raped several times. With the help of someone, I fled to The Netherlands because my life was at risk in Zaire.

The applicant and her husband were "market leaders" which means that they were responsible for 3 rows of 15 vendors at the market. At the suggestion of the applicant, the group of vendors decided not to accept the new 5 million Zaire bank note. On one particular day, the applicant refused to accept such a bank note. The person offering the bank note to her turned out to be a soldier. She was arrested with her husband. Her husband was shot, the applicant was interrogated and raped. She ex-
caped and fled. The decision gives as substantive arguments for refusing refugee status but granting a humanitarian status:

The above (i.e., the facts of the case, TS), however may be of them, does not indicate that the applicant is considered to be an important political opponent by the Zairian authorities and as a result would have to fear persecution.

[...]

It is probable that the applicant has experienced the above mentioned occurrences as very shocking, therefore in this case there are grounds to grant the applicant a residence permit without restriction (i.e., a humanitarian residence permit, TS).

The preceding implies that persecution on account of resistance to a monetary reform measure is not viewed as persecution on account of the applicant's political opinion. The socio-economic character of the protests is equated to the socio-economic character of the flight motives of the applicants. That is, the opposition between "economic" and "political" refugees is so strong and so total in the context of refugee law that anything related to the economic is assumed to be non-political.

Those aspects of a flight story which are perceived as self-interested are often seized to contaminate the flight motives of the applicant. Information which does not square with the image of the applicant as an "economic refugee" is simply suppressed. Even in the Bosnian cases (where applicants were interviewed predominantly to detect any criminal antecedents or countries of first asylum and otherwise were admitted as refugees) the flight motives were sometimes summarised as self-interested.

A Muslim woman from Brcko tells that her husband was killed while digging trenches for the Serbs. She was harassed, there was raping and she feared for her daughter. Her flight motives culminate in:

In the end, I decided to flee for the benefit of my children and myself and because we didn't have anything any more.

That such a summary of flight motives is provided in the interview report for an applicant who belongs to a group which was, in fact, collectively recognised as refugees indicates that reducing flight motives to economic motives is so ingrained in the asylum procedure that interview officials are scarcely aware of it.

(In)voluntary acts

A further reason to find acts non-political is that they were either forced or voluntary. In cases of women who were forced to be active for the LTTE, a standard text block in the interview report reads: "I have never been a member or sympathiser of a political party or movement in my country and I was never active in the field of politics." Even in cases where applicants have stated that they were recruited into the LTTE and worked in LTTE military camps for prolonged periods, inclusion of the foregoing statement is not considered inconsistent. Thus, the fact that membership of the LTTE was forced is considered to make it non-political and even irrelevant.

Conversely, it seems that the motives of Chinese women such as Betty for wanting a child or for not wanting an abortion are construed as irrelevant. Their violation of the one child policy is seen as voluntary in nature which makes it non-political. Also, the applicants are portrayed as wanting a child "just like that".

In sum, involuntary acts are considered non-political because they apparently lack the motivation which makes an act political. Acts construed as voluntary and purely a matter of free choice, such as having a child, are somehow also construed as not relevant. In other words, applicants cannot simply turn themselves into refugees.

Merely subordinate or minor acts

An obvious reason to dismiss the claim of an applicant invoking fear of persecution because of her political activities is the size of her activities, which may be so minor that they cannot have triggered persecution. This argument is laid down in several almost identical standard text blocks resembling the following:

The applicant has stated that she has not been a member or a sympathiser of a party or movement which resists or has resisted the regime in the country of origin. Also, the applicant has stated that she has never undertaken activities of a political nature; as a consequence, it cannot be assumed that she is known to the Iranian authorities as an important opponent.

I would like to point out that, in some cases, the reasoning takes the form of a circular argument: because the activities were minor, they cannot have triggered persecution, and the detention (etcetera) which the applicant has undergone must therefore be either not credible or an instance of general
violence. I would also like to point out that activities occurring outside a “political party or movement” are construed as non-political.

The circular reasoning described above is rather frequent. In the case of a Zairian woman arrested during a political meeting, interrogated and then raped, the decision holds:

Although the applicant, according to her own statements, has come into contact with police officers, whatever may be of that, in no way has it been established that there is a relation to any of the grounds for fear of persecution enumerated in the Refugee Convention, which could lead to a successful appeal to refugee status. The applicant, rather, has been the victim of acts of aggression based on arbitrariness and not acts of revenge or persecution from the side of the authorities concerning her personally.

Such circular reasoning is obviously inconclusive. One might just as well argue that the fact that the applicant has undergone detention indicates that the authorities in her country of origin find the activities of the applicant less insignificant than the Dutch authorities. My point is not that the latter conclusion is more (or less) justified, but that the choice that is made is considered not to be in need of further explanation.

Even when indisputably substantial activities are undertaken outside a political party or movement, they are routinely considered non-political, as in the case of Diane below.

Another example is the case of an Iranian physiotherapist who gave a speech critical of the organisation of the health care system. She got in trouble and fled when, after a second speech (which she thought was much more careful), she was threatened again. The decision argues that she has not been politically active. Her dissatisfaction with the general situation in Iran is said to be insufficient for refugee status. Also, the decision finds it “surprising” that she went ahead with the second lecture in light of the trouble with the first lecture – giving a critical speech is considered merely an imprudent act and not an act inspired by principled views.

The insignificant character of activities reinforces itself: When activities are considered minor, the interview official (lawyer, ACV, court) has little reason to inquire further about them. As a result, they continue to seem insignificant. It is also almost impossible for lawyers to correct this self-re-

inforcing trend; when an applicant says that her activities were of greater significance than suggested in the interview report, this is often seen as contradictory and thereby damages the credibility of the applicant. In only a few cases were the corrections to such an initial picture accepted.

In such a manner, the perception of the activities of an applicant (as significant or insignificant) becomes crucial. If the activities are seen as insignificant, the fear of persecution may be considered incredible. The acts of detention or torture may then be attributed to random violence (and not inspired by the activities). Acts undertaken outside a formal political framework tend to be seen as non-political. The stigma of insignificance is hard to get rid of, moreover: Activities perceived as minor receive little attention during the interview while later corrections may be perceived as efforts to improve on an insufficient flight story.

The case of Diane (Iran)

The claimant I will call Diane was born in 1957. The report of the interview begins with the usual half page standard text block, in which the interview official states that s/he has interviewed the applicant, asked “him” to provide all relevant information and only the truth, etcetera, while all the time referring to the applicant as a man. The concluding phrases of the report also refer to “him.” The rest of the report shows that this was merely a word processing error; the interviewer is aware that the applicant is a woman.

In a passage headed by the words “preliminary remarks,” Diane says that she is married and has three children. Her daughter born in 1980 and her son born in 1989 are with her in The Netherlands. A third son, born in 1984, and her husband have remained in Tehran. Further, she says that her brother, his wife and their son are also in the refugee camp where she is staying; they arrived in The Netherlands a few weeks before Diane and have already been interviewed. The next section of the report reads:

REASON DEPARTURE / REASON ASYLUM APPLICATION

My arrest on 19** was the last drop. I did not feel safe any more in Iran in a physical and mental sense. We visited the holy city of Mecca in 19**, and therefore from that moment on we were “Hadji.” Since then, my husband was asked to go and work for the security service. In Mecca, we had fierce discussions with
clergyman as a result of the slogan “A healthy mind in a healthy body” which we propagated. My husband was a professional soldier (pilot) and refused to comply with the aforementioned request. From that moment on, we were constantly supervised by security agents and my husband was temporarily banned from flying. In 19**, our family was even exiled for a year to the town of * in south Iran.

From the moment I began to study psychology at the university in 19** until the beginning of 19** [four years, TS] I did not hide my opinion on the equal rights of women. I formed a kind of little society [een soort clubje, TS] with other female students. My brother *, who was also a student, shared my views on equal rights for men and women. He was detained from * until * [seven days, TS] and interrogated by the Security Service and I was detained and interrogated on * [the second day of the detention of her brother, TS].

After this my brother (with his family) and I (with two of the three children) decided to flee abroad. I did this in the end on * [three months after her detention, TS].

I have now told you everything about the circumstances which led to my departure from my country. There were no other problems which could have induced me to decide to leave my country.

**POLITICAL ACTIVITIES**

In my country, I never was a member or sympathiser of a political party or movement and I was never politically active.

**ARRESTS / DETentions / MALTREATMENT**

In my country, I was arrested on * at about 16.00 at home in Teheran, by three men and one woman in civilian clothes who turned out to be from the Security Service. They searched the house for forbidden literature and took among other things papers of mine about the equal rights of men and women and the frustrating effects of that on mentally informed women. [Sic! TS] After a little car ride [autorijte, TS] of about 25 minutes, I was brought to a building that looked like a school in the * area. I was interrogated twice by mister *, who first asked me about my conduct, contacts and places I had visited in the last month. When I declared I had done nothing special, I was asked about the doings of my brother * in a second discussion [gesprek, TS]. I was kept briefly in a cell and I protested to a clergyman connected with the Security Service. I said I was innocent of anything and that I wanted to return to my children. After this, I was released at midnight. I was not maltreated.

[...]

WHY THE NETHERLANDS

The decision to ask for asylum in The Netherlands in particular was made by myself and my travel agent. I knew the International Court of Justice resided in The Hague and I knew about the Maastricht Treaty. By the way, my husband loves The Netherlands and hopes to be able to begin working as a pilot here in the near future.

In a one page letter, Diane’s lawyer makes the following corrections. First, she remarks that in the introduction to the report the applicant is referred to as a “he”, which is incorrect. The statement on her political activities is corrected to:

Although I never was a member of a political party, the activities I undertook for the rights of women are considered as such and are considered, in any case, actions against the regime.

Diane has made “propaganda for the rights of women.” Furthermore, she has heard that her husband was arrested a few weeks ago; she does not know why. These corrections were put in Diane’s file by the Immigration and Naturalisation Service only after the decision had was made; however.

The negative decision is motivated, first, by stating that Diane reported leaving the airport of Teheran with a false passport. This is simply not credible in light of the strict control procedures in force there, as described in two official letters from the Ministry of Foreign Affairs.17 Furthermore.

The applicant has stated that she has not been a member or a sympathiser of a party or movement which resists or has resisted the regime in the country of origin. Also, the applicant has stated that she has never undertaken activities of a political nature; as a consequence, it cannot be assumed that she is known to the Iranian authorities as an important opponent.

The circumstance of the applicant purportedly being interrogated by the authorities for one day in itself is insufficient to presume a well-founded fear of persecution. After all, the applicant was released within a day with no conditions attached to her release, which does not indicate special objections to her from the side of the authorities. At that, it has been established that the applicant did not experience any trouble from the authorities in the months before she left Iran.
That the applicant cannot agree with the general position of women in Iran and does not feel safe in that country any more is seen rather as dissatisfaction with the general situation in Iran. Dissatisfaction with the general situation in the country of origin in itself is insufficient for a well-founded fear in the sense of the Convention.

The application for review is rather short (two pages) and put mostly in general terms. On Diane’s own flight motives, the lawyer writes that her safety and that of her family was endangered as a consequence of her dedication, both at the University and outside, to the liberation of women and her activities in this end, being spreading pamphlets and holding meetings with and for women. Her lawyer writes that, in Iran, women are treated as “dogs” and that Diane tried to change that mentality. She is suspected of subversive activities and should be recognised as a refugee. Women in Iran are persecuted “on account of the cultural diversity of norms and values and on account of religious, racial and gender differences.”

Two and a half years after the request for review, Diane is heard by the ACV. This is surprising, as initially the Immigration and Naturalisation Service wanted to withhold suspensive effect and apparently found the case weak. Only cases considered strong are heard by the ACV. Apparently, a second look showed her case to be stronger.

At the ACV hearing, Diane’s husband was present; the chair informs her that the hearing is about her and not about him. Seemingly spontaneously, but probably in response to a request by the chair to summarise her flight motives, Diane says:

On *, she [i.e., Diane, TS] left Iran because she feared persecution on account of her activities for a women’s movement. After she and her brother ran into trouble in June of that year, they decided to leave Iran. Together with her two children and her brother and his wife and their child, she left Iran. She only brought two of her children because traveling with three children is harder and she had a closer tie with these two than with her son *. She was conscious that on account of her departure without her husband, who was an officer in the air force, he could get in trouble. Her husband, however, considered her situation urgent and said she had to flee. In addition, there was not enough money at the time to pay for all to depart from the airport.

The chair then asks some questions about the departure from the airport and about her travel route. The report continues:

On being asked, the applicant states that she was a member of a, probably unknown, party called * [an acronym, TS]. This party focused on the position of women in Iran. In order to promote the equal position of women, the party wanted to restore a statute for the protection of the family, which had been passed under the reign of the Shah and declared invalid after the revolution. She, the applicant, experienced problems as a result of her opinion on the position of women. With her fellow students in psychology, she followed a course on research methods and they researched certain things together, such as the law that in absence of the father, custody over a child is not given to the mother but to the grandfather. She has written a dissertation on this very controversial law. She has put her opinion into words. She tried to submit the dissertation for grading, but she did not succeed because her professor found the content much too dangerous. For that reason, her house was raided on * 19**, during which her dissertation was taken and she was arrested. Before that she had never been arrested by the authorities. She pretended to be an exemplary student and to follow the Islamic rules so she could pursue her studies. She didn’t dare to make herself known as a clear opponent of the regime.

Her brother was detained from * until * 19** [seven days, TS]. She does not know precisely what he did or what his activities were. She thinks he had other activities apart from only criticising the authorities. She thinks that she was released quickly because the authorities wanted to keep an eye on her in order to discover the members and leaders of her party. She was not given a duty to report, but quite soon she noticed she was being followed.

She plans to write her dissertation, of which she has no copy, again in The Netherlands, but right now the illness of her daughter hinders her in that plan.

She also states that she went to Mecca with a special passport which was valid for only one trip.

To a question from her lawyer, the applicant replies that she does not know how many members the party * has because it is a rather new movement. At the university, the group of supporters consisted of eight people who were all members of the party. She, the applicant, had a leadership function in the group. From the newspaper, Kehan, she learned about three months ago that one of the members of the group is missing. People in the refugee camp were able to get hold of the paper and pointed it out to her.

A member of the Commission expresses surprise at the fact that the applicant does not produce a copy of that report and asks why she did not state before that she was engaged in political activities in Iran.
The chair points out that in the lawyer’s corrections it is said that she was never a member of a political party but that the activities she undertook for the rights of women must be considered as such and as actions against the regime. The applicant has now made a political party out of it, and a member has disappeared. The chair wonders to what extent she has been politically active.

The applicant’s lawyer admits that earlier this was not clear from her statements. He wants to know from his client why she didn’t talk about her political activities earlier.

The applicant replies that during the interview she was only asked about occurrences after [date of her arrest, TS] and what the reason of her departure from Iran was. She has already told about her research, but not about how it came about. She thought this was sufficient. Nothing was asked about occurrences before that date.

The rest of the interview is about the (rare and serious) illness of the applicant’s daughter, for which she is being treated in a children’s hospital.

According to the summary in the negative opinion of the ACV, Diane fled Iran because she has been active for the women’s movement in her country and because of the political activities of her brother. Also, her husband was arrested after her departure from Iran or her arrival in The Netherlands.

Her activities are rendered as “she has not hidden her opinion on the rights of women and she has formed a kind of little society with other female students.” Diane had not made herself into a political opponent of the Iranian authorities. She says she spoke out on women’s rights and formed a kind of little society, but her statements on this point are so vague that no significance can be attached to them. During the first interview (probably this refers to the intake), she said she fled on account of the problems of her brother and that she was harassed on account of him. Then, the advice renders Diane’s additional statements during the ACV hearing. These statements are disbelieved because the facts were not mentioned during the interview, in the corrections or in the application for review; she has stated repeatedly that she was not a member of a political party. Furthermore, the ACV notes that Diane was released and did not report any trouble in the three months afterwards. Her statement that her husband was arrested is incredible, because the husband himself has stated that he was never arrested. In a long passage, the advice argues that Diane’s brother is not a refugee, with as a consequence that Diane also is not a refugee in her position as his sister. Then in two long passages, the way in which Diane and her two children, and later her husband and third child, left the airport of Teheran are characterised as conspicuous and a sign that the Iranian authorities had no problems with them. The advice ends by noting that the deportation of the family has been suspended for the medical treatment of the daughter.

I saw Diane’s file shortly after this opinion was given; the State Secretary of Justice had not yet made a decision.

Diane’s case is interesting on several points. First, Diane is primarily represented as a wife and mother and also as a sister. Second, throughout the file, words are used with respect to Diane’s activities which make them seem trivial. Third, whether speaking out on the rights of women is considered a political activity is not completely clear. Fourth, there is the credibility issue.

The interview report begins by depicting Diane as a mother. It explains that Diane has two kids with her while her husband and the third child have remained in Teheran. Then, the report mentions her brother. And when her flight motives are given, the first detailed passage is about her husband while those experiences are actually peripheral to the asylum claim. As to the question of why she fled to The Netherlands (instead of another country), Diane gives the usual polite and vague answers. Just why her husband wants to flee to The Netherlands is answered in a more concrete manner.

The first decision treats Diane as an applicant who has submitted an independent application, notwithstanding the emphasis the interview report places on her being a wife and a sister. The ACV hearing, in contrast, characterises Diane as a person related to others. In stating her flight motives (presumably in reply to a question) she explains why she left her husband and one son behind. This takes up more space in the report (four sentences) than her activities and the problems she encountered as a result of them (rendered in one sentence) and the role of her brother (rendered in two sentences). Diane also appears to have been confronted with the fact that during her absence, and partly as a result of it, her husband was in danger (this is used in the opinion as an additional argument against her credibility).

The summary of Diane’s flight motives in the ACV opinion gives equal weight to the problems of Diane herself, her brother and her husband.
However, she is confronted with her statement during the intake that she fled on account of the problems of her brother. Still later, the husband and brother are mentioned extensively, although Diane receives primarily independent attention. The ACV follows a double track in its opinion: it treats Diane both as an independent applicant and a dependent female.

The most authoritative Dutch dictionary defines clubje as "a group of friends; vaguely: a bunch of people: to go out with a clubje; a merry clubje." The effect of consistently saying "een soort clubje" is to minimise the relevance of Diane's women's group. Less clear is the use of the Dutch word autorite (a little car ride) for how Diane was transported to the place where she was interrogated. The word autorite evokes a ride you take with grandma on a pleasant Sunday afternoon, not transport to a Security Service building. I am less definite about the effects of this language, however, as the means of transport is not very relevant to the flight motives and because the term is not repeated later in the procedure. Another way in which Diane's flight motives are minimised is to speak of a "discussion" (gesprek) on one occasion in the interview report when "interrogation" by a member of the Security Service is meant.

This use of language gains weight when it is recognised that a central question in Diane's case is whether she has been politically active or not. The first interviewer simply did not think of Diane's membership in a women's group as a political activity. This is clear from the fact that s/he does not inquire further about the group, which would have been the normal course of events if such membership was considered politically relevant. Similarly, the report contains the standard passage stating that the applicant has not been politically active, if the interviewer had seen an inconsistency there, s/he would have asked further questions. The decision turning down Diane's application also follows this track. In a standard passage, it reduces Diane's view on the position of women to dissatisfaction with the general situation in her country, which is then found insufficient for refugee status.

Only when Diane's lawyer makes some corrections is some new light shed on this point. The words the lawyer uses are, however, ambiguous. Diane is quoted as saying that although she was never a member of a political party "the activities I undertook for the rights of women are considered as such and are considered in any case as actions against the regime." This is clearly meant to say that Diane's activities were political, but does Diane also mean to say that she was a member of something like a political party (the kind of little association)? If so, Diane's statement during the ACV interview, namely that she was a member of a political party, is far less contradictory than at first sight. There is even less of a contradiction in light of Diane mentioning that the party probably is unknown, which suggests that it was not yet formalised and was small. Also, during the ACV hearing Diane uses the word "movement" on two occasions and also refers to the same as a "party." This suggests that the two words are interchangeable for her (or the interpreter...). The man acting as Diane's lawyer during the ACV hearing, however, finds the terms contradictory, as does the ACV. In other words, the term used in the initial interview report suggests a group of chatting women. The words used by Diane's first lawyer are ambiguous; Diane's second lawyer and the ACV, interpret the words as being in contradiction with Diane's later statement that she was a member of a political party.

A more basic question and one resolved more clearly is whether Diane's activities (in a party or not) were political in nature. The interviewer and the first decision do not think so (and come close to ignoring them as a consequence), but the lawyer corrects this. A member of the ACV later either forgets this correction or disagrees. When Diane tells the Commission that she has been a member of a party, he asks her why she didn't state that she was politically active before. Apparently, this member does not consider activities outside the framework of a political party political activities. The member of the ACV is corrected by the chair. In the opinion, however, the issue remains unresolved; references are made to Diane's activities for the women's movement and to the political problems of her brother.

Diane's credibility is undermined in two ways. First the plausibility of what she says is impaired by the attention paid to the fact that she has left behind her husband and a son. This happens both during the interview and during the ACV hearing. The point is nevertheless not taken up in the decisions but left to suggestive passages in the reports.

A second manner in which Diane's credibility is undermined is by constructing two aspects of the case as contradictions. Diane appears to make her activities seem bigger over time and she later claims that her husband has been arrested. As I have indicated above, I am not at all sure that Diane's statements with regard to the type of organisation she was a member of are contradictory. The fact that she does not mention the arrest of her husband during the interview but does in the corrections is also not problematic, as she indicates that she only learned of the arrest after the interview. The fact that her husband, who had apparently fled Iran by the time, says that he has never been arrested is, however, problematic. If Diane cannot explain how she got this incorrect information, her credibility is dam-
aged. The surprising thing is that her lawyer does not see that Diane provides an explanation and that the ACV does not ask for it. The ACV then uses the lack of an explanation against her in its opinion.

I initially decided to take Diane's case for extensive description in part because I wanted to describe a case in which I was convinced that there was a credibility problem. At first sight, I found the contradictions in Diane's statements to be clear. Closer examination suggests that the administration may not consider membership in a women's group a political activity and that her lawyers chose to portray her as primarily a victim of Muslim male chauvinism.

The attribution of flight motives

In summarising the foregoing, it can be stated that applicants are assumed to be motivated by factors other than politics when their acts can be perceived as emotional, personal, voluntary (i.e. in their own self-interest), purely involuntary, or of minor significance. In the following, I will attempt to show how factors considered irrelevant to refugee law may also actually be emphasised in decision-making practice, with as a result that the application of the woman is unacceptable. In some cases, flight motives other than the applicant's own activities are foregrounded. This is most notably the case with married women, where the problems of a husband are given greater weight than one's own problems. In other cases, the applicants are attributed entirely new flight motives nowhere mentioned in the interview report. And there is a general tendency to attribute the flight of the applicants to the general situation in the country of origin.

In the literature, persecution on account of the activities of male relatives is often found characteristic for the flight motives of women. Although I initially shared this idea, my material suggests that such a flight motive is also partly the result of the problems of male relatives being privileged over those of the applicants themselves. The sample contains quite a few examples of women with flight motives perceived as being inspired (in part) by the problems of their male relatives. The case of Diane is an example of this. In the case of a Zairian applicant, moreover, the facts are explicitly conceptualised as being about persecution on account of kinship instead of political activities.

According to the interview report, the woman said that her husband was active for the opposition party PDSC. As a part of this, the couple made a day trip to Brazzaville, the capital of Congo Brazzaville which is located on the Congo River opposite Kinshasa. The applicant had a film with photographs of tortured prisoners in her handbag. They were arrested, the film was found and the applicant was interrogated, tortured and raped.

The decision argues among other things that, as far as credible, the flight motives suggest that the attention of the authorities was directed more towards her husband than herself, so she has no personal fear of persecution.

The perception of the facts in this case focuses on the husband at the expense of the applicant herself. It was the woman who smuggled the film, and the imposition of the kinship perspective in the decision goes against the facts. Such a perspective simply blocks the case as being seen as about the applicant's own activities. This tendency has also been noted in a study from the Research Centre of the Dutch Ministry of Justice. When interview officials and decision makers from the Immigration and Naturalisation Service were asked if it made a difference whether an asylum applicant was male or female, they initially responded that it should not make a difference. Later, however, they added that "With women I go into the husband's problems more thoroughly, because these are mostly the reason for departure", or "With women I mainly look if she has left the country on account of problems of her own or only on account of problems of her husband." The researchers argue that this idea is confirmed by their research, which shows fear of persecution on account of the activities of male relatives to be a frequent flight motive in their sample. This conclusion is flawed, however, as it is based on the flight motives reported in the interview report. In other words, the reported frequency of this flight motive may simply reflect the preconceived opinions of interview officials.

The attribution of new flight motives occurs regularly. A frequent phenomenon is that the applicant is attributed economic reasons for leaving the country. We have already seen Zairian market vendors depicted as trying to improve their living conditions along with disobedient Chinese one child officials. In cases in which problems with husbands or fiancés play a role, an applicant's political flight motives are often played down in favour of 'private' motives (see above page 66-68). In other cases, applicants are assumed to have left the country of origin because of discontent with the general situation. This attribution was particularly frequent in Iranian cases, but also found in two Turkish case and one Zairian case.
The idea that applicants have fled the general situation in Iran is almost routinely invoked in cases where women have problems presumably caused by their improper behaviour.

An Iranian applicant who, according to the interview report, was tortured, raped and condemned to death by lapisation on account of working late at night together with a male colleague is first confronted with the argument that she has not substantiated her flight story. Then the decision goes on:

But whatever one may conclude about the detention and the sentence, this cannot lead to the conclusion that the applicant is a refugee in the sense of the Convention, as there is no persecution on account of one of the enumerated grounds. The incidents are a consequence of legislation in force in Iran, and therefore the applicant bases her case on the general situation in the country of origin. This in itself is insufficient for a well-founded appeal to refugee status. In such a manner, the argument that what happened to the applicant is part of the general situation and the attribution of the general situation as a flight motive coincide.

The two Turkish cases in which attribution of flight motives occurs are both about women who, according to the interview report, claim persecution on account of the activities of their husbands. One example follows.

An illiterate Kurdish woman born in 1971 was investigated several times in a hospital in order to determine whether she had recently had intercourse with her husband who had gone to northern Iraq to fight for the PKK. The decision argues:

The problems which the applicant, according to her own statements, has experienced are related to the general situation in Eastern Turkey, which is characterised by conflicts between the Turkish authorities and Kurdish resistance fighters. In this respect it has not been established that the Turkish authorities pay specific attention to the person of the applicant.

Dissatisfaction with the general situation in the country of origin in itself is insufficient ground for a well-founded fear of persecution in the sense of the Convention.

In the Zairian case, the flight motives are clearly political but still attributed to dissatisfaction with the general situation in the country of origin.

According to the interview report, the applicant has said she was arrested and detained for one and a half months following a UDPS (an opposition party) manifestation. The initial decision finds the story incredible because the applicant says she was released in exchange for sex with a guard. The Court finds that it appears from what the applicant has stated that her application "is based primarily on the general situation in Zaire which, the applicant says, is characterised by total arbitrariness of the authorities, of which she has become the victim".

These examples illustrate how flexible the "general situation" argument is. Analytically, the attribution consists of two steps. The first step is to characterise a phenomenon as part of the general situation. "Total arbitrariness of the authorities" in Zaire, harassment of the relatives of political activists in Turkey, discrimination of women in Iran are construed by decision makers as part of the general situation; in other words: as normal there. This argument alone will be addressed in the next section, which focuses not on the perceptions of the flight motives but on the perceptions of the acts of persecution. The second step is to decide that, having found no other compelling reason for the applicant to leave the country, the reason must have been the general situation. The question is why, in these cases, the decision makers do not simply limit themselves to rejection of the flight motives as insufficient but add the "general situation" argument. My tentative conclusion is that the extra argument is intended to provide some minimal recognition of the fact that the applicant indeed had a problem in her country of origin - an insufficient problem, but nevertheless a problem. This seems to be the predominant characterisation of the flight motives of Iranian women fleeing problems on account improper behaviour. In the other cases, the argument seems to be applied at random.

Conclusion: What is political?

Now that we have seen what is considered non-political, we can try to obtain a picture of what is viewed as a political flight reason. We have seen that a political conviction is taken up freely (and therefore voluntarily). It is not a matter of mere preference or simply an idea like any other, a political conviction must be dictated by one's conscience (and therefore in some sense is not voluntary). The political conviction is a consequence of a rational choice (and therefore not emotional). A political conviction concerns matters pertaining to direct State authority; ideas about the immediate surroundings of the applicant such as relations between men and women, the treatment of relatives, but also ideas about a profession are therefore seen as non-political. A political conviction is only not about State authority but also takes concrete form and is expressed in public, namely: in a formal po-
political party. Acts occurring in what is viewed as the private realm (within a marriage) or at least outside the official public domain (a women's group) are seen, at most, as insignificant acts. Furthermore, political ideals and convictions are not self-serving, and this is preferably illustrated by the fact that the applicant is willing to take risks for them as opposed to only or potentially gaining from them.

How does this compare to cases in the sample where a refugee status is granted? Comparison is hard, as the grant of an A-status is not motivated. However, two cases are usable. One case concerns the Zaïrian woman who was active for an organisation involving the relatives of people who have disappeared. In the above, I pointed out the shift in the perceptions of her from a "mater dolorosa" to a Latin American "crazy mother." The crazy mother is a clearly gendered notion but also seen as a human rights activist, which meets the stereotype of the refugee. She is a gendered stereotypical refugee.

The other case is particularly insightful because a shift can be observed from a standard non-qualifying woman in the initial decision to an applicant who is "just like a man" and thus a refugee in the review procedure.

The applicant, a Turkish woman born in 1962, has been politically active since the 1970s. She was arrested and tortured for the first time in 1979, and in the 1980s served a prison sentence. She and her husband were members of a leftist party. The applicant was the chair of the women's committee, her husband was the party leader in one province and the second national secretary. The party was banned in the 1990s. The couple was arrested during highly publicised demonstrations. After their release, they and their children (born in 1984 and 1988) were followed by the security service. Fearing prosecution on account of their functions in the now banned party, they went underground. They lived apart and only had contact via the telephone. In an effort to relieve the problems of the applicant, the couple divorced in 1993, but this did not change the applicant's situation. The applicant decided to flee because her children could no longer stand the pressure.

The unusually long negative decision argues that the party of which she was a member was not illegal; she was released after last arrest, so no further measures are impending; the activities of her husband have not led the authorities to have a specific interest in the applicant herself and, at that, they are divorced so the authorities have no reason to.

In review, the case is referred to the ACV. The ACV advises the grant of refugee status, and the State Secretary adopts its opinion. This is the only case in which the grant of an A-status is motivated, and therefore the motivation merits attention. Instead of a long and detailed version of the flight motives, as the ACV gives in other opinions, the opinion says: The applicant bases her application— in brief— on her fear that she will be persecuted upon return to her country because of her political activities, among other things, for the now prohibited *Party and in particular on account of her participation in a demonstration on the occasion of [...].

The opinion is very short, but the two most important catchwords are taken as a fact: political activities for a forbidden party. The ACV finds nothing about the nature of the applicant's activities to be problematic or in need of explanation. At first sight, gender seems to play no role, but it does. The applicant is represented as a man and rewarded with a refugee status. There are no vague elements in her flight motives such as the sheltering of fighters or being arrested on account of your husband without knowing why. The applicant is represented as a long standing classical political activist, with a long history of arrests, detention and torture.

Steendijk accurately observed that the prototype of the refugee is "the critical, intellectual, active and profiled in the illegal resistance, organised, ideologically well informed." On the basis of the present research, it is not possible to say whether (as some claim) women are politically active in different ways than men; such a conclusion requires explicit comparison of the activities of the male and female asylum applicants. What we can conclude is that those activities of women which might just as well have been considered political are construed as non-political in ways that closely conform to the stereotypes identified by such authors as Steendijk. As I have tried to show, women's activities are relegated to a separate women's sphere at both the cognitive and normative levels; that is: in decision-making practice the activities of women are conceptualised as "special" in comparison to those of men (cognitive level) and frequently labelled as non-political in the context of the refugee definition (normative level). It is here that my analysis differs from those of most feminist critics who argue that women's activities are "special" and that these gender-specific activities should constitute grounds for recognition as a refugee. I do not argue that women's activities are "just like those of men" (which is something that most of the critics also say can be the case); I argue, rather, that "men's activities" and "women's activities" simply cannot be distinguished usefully in the context of refugee law. What I have analysed in the present section is how the concept of the political is produced as a gendered concept.
3.4 The Concept of "Normal" Violence

In the preceding section, the focus was on the question of whether the acts the applicant had undertaken were of a political nature or not. In the present section, I will focus on the nature of the harm the applicant fears. This issue is the other substantive element central to the cases from the sample (and in Dutch practice more generally). The argument frequently raised by decision makers is that the harm the applicant fears is in some way not specific to her. This argument mostly takes one of two forms: either that she fled the general situation or that she has not been the object of "personal persecution." I have distinguished four distinct applications of this argument. In the first situation, the argument is in fact that the applicant is only the victim of random violence in the country of origin (as in the case of war). In the second situation, the argument is that what she fears actually is rational violence (such as the application of the law). In the third situation, the applicant fears ordinary violence between civilians (such as sexual violence). In the fourth situation, it is argued that the applicant fears unpleasant but sufficiently serious harm (such as dismissal or non-admission to the university). Many of the phenomena presented below are related to those presented in the foregoing.

Random violence

The idea that the acts of violence undergone by the applicant are random acts and therefore lack the discriminatory character required by the refugee definition is routine in Sri Lankan and Zairian cases. In these cases, the interview reports construe the acts of violence as random in part because the applicant is simply not asked about the possible causes of the acts. Construal of the acts of violence which the applicant has undergone or fears as random lends a character of irrationality or naturalness to them. The applicant is seen as just fearing the lack of good order, the Hobbesian state of nature.

In the Sri Lankan cases examined, the majority of the acts of violence are presented as happening out of the blue, with no clear cause and simply being part of what happens in civil wars. The interview reports show no indications of specific questions on how the rapes or assassinations came to happen. It may very well be that in some or many of the cases, the violence indeed occurred out of the blue. But the interview reports also show the interview officials to expect this. In many cases, the acts of violence are rather extreme and it is not at all obvious that they were random. Nevertheless, the acts are treated as random in the interview reports; no further questions are asked; and both the decision makers and many of the lawyers appear to accept this. It is not just a matter of the technical skills of the interview official, as illustrated by the case of Anne, because the interview report was of a very high quality in that case. A comparable "randomisation" of the violence occurs in Zairian cases. In the cases from the other countries in the sample, the argument that the acts of violence were random acts occurs but not as routinely as in the Zairian and Sri Lankan cases. We may conclude that the "randomisation" of violence (i.e., acts of violence interpreted as random without consideration of a realistic alternative) is specific to particular countries. Zaire and Sri Lanka are considered countries with a weak State and resulting chaos.

Rational violence

As we have seen, random and hence irrational violence is not taken to constitute persecution. Rational violence also does not constitute persecution, however. In this line of thought, acts which might be viewed as persecution are not seen as such because they are considered normal sanctions. One example of this is the treatment of Iranian women being construed as falling under a law of general application. The most striking example is provided by the Chinese one child cases, where forced abortion is interpreted as a restorative measure (intended to restore the situation to what it was before the woman's illegal pregnancy) and forced sterilisation is viewed as an enforcement measure (to impose the legal situation of inability to have more children). Such measures are not considered as potentially punitive sanctions for non-compliance.

These examples show measures portrayed as rational, and thus as predictable acts of a bureaucracy to not be considered persecution, which fits with the image of China and Iran as strong bureaucratic states. Conversely, the collective recognition of Bosnian applicants as refugees can best be understood by assuming that they were also viewed as the victims of rational violence. Although my material does not contain data to support this standpoint because the decision to recognise a refugee is not motivated, it seems to me that the "obviousness" of Bosnian cases is related to the perception of ethnic cleansing as a well-planned and concerted action reminiscent of the "rational" annihilation of the European Jews. In fact, it is precisely the perceived rational nature of the procedure which makes it so abhorrent.
The case of Laurie (Bosnia-Herzegovina)

We have seen that the rape of Anne by drunken soldiers is considered an act unrelated to her ethnicity or political position. The rape is seen as the result of a drunk with a gun. This stands in sharp contrast to the case of a Bosnian woman whom I will call Laurie. Although there is no substantive interview and no reasoned decision, what happened to her obviously is not seen as an act of armed drunkards but an instance of ethnic cleansing.

Laurie is a Muslim from Mostar. Her year of birth is not clear from the file. There is a copy of a handwritten note by a UNHCR field officer which makes clear what happened to her. It is written in telegram style; "translated" into grammatical English, it gives the following flight motives.

Laurie experienced heavy shooting and bombing in Mostar. She lived in the basement and was often threatened because she was a Muslim. One day, a drunken soldier from the Croat army HV0 came to her in the house and took her away for questioning. Instead, however, she was taken to a house. About 30 men were there. The applicant was forced to climb to the first floor. She was threatened with beating if she should scream or fight. First the soldier who took her with him raped her; four others followed. Laurie begged them to release her or to kill her, but they just smiled. The sixth man took her out of the house and released her. Her boyfriend, a Croat, left her the same night. Friends took her to Croatia. The note describes her as an "extremely traumatised, destroyed person, crying all the time, parents and brother don't know anything, very afraid".

She has been invited to The Netherlands at the request of UNHCR. The text of the interview report is restricted to the conclusion that she has been invited to The Netherlands at the request of UNHCR, and therefore need not be interviewed.

Consideration of the foregoing cases presents an unstable picture. Irrational violence does not count as persecution; rational violence also does not count except when it seems to fit the mould of genocide. It is noteworthy that interventions with women's sexuality (dress codes) and reproductive functioning (the Chinese one-child cases) are considered rational violence and hence insufficient for refugee status. It is also noteworthy that these considerations appear to be specific to particular countries. Brutalities in Sri Lanka and Zaire are seen as part of the normal chaotic situation while brutalities in China, Iran and Bosnia-Herzegovina are seen as part of conscious policy. The possible parallel between Sri Lanka and Bosnia-Herzegovina as countries in civil war with an "ethnic" background is disregarded.

It is remarkable that one can discern patterns of decision-making practice in connection with such an unstable phenomenon as irrational or rational violence. The observed regularities cannot be a function of such an unstable concept. It is therefore plausible that the stability of the decision-making practice is related to issues of gender (e.g., the idea that reproductive intervention is a legitimate subject of State policy) in combination with ethnicity (e.g., the status of the Sriankan versus Bosnian cases involving rape).

Private violence

We have already seen many examples of cases in which sexual violence is viewed as the act of a private person, and not the police officer or soldier involved. This line of reasoning can take several forms. It may remain implicit altogether; it may be vaguely formulated as "The applicant has become the victim of acts of aggression based on arbitrariness" (as in a Zairian case in which a market vendor said she was raped and had an abortion as a result); or it may be formulated explicitly and take the following form:

In so far as the applicant has nevertheless been the victim of rape, it is considered that in and of itself this is no ground for the opinion that she has a well-founded fear of persecution in the sense of the aforementioned Convention. After all, in light of everything that has been considered above, it is not probable that this has been a consequence of negative attention directed at her personally by the Zairian authorities and that it has occurred on account of political reasons. More likely, the applicant has become the victim of a civil offence, which cannot be a ground for refugee status.

This argument is most frequent in Zairian cases. Whether it is related to the fact that reports of rape were most frequent in the Zairian cases is hard to say. We can conclude, however, that there is a strong and general (although possibly variable) tendency to consider sexual violence a private act related to phenomena on the side of the perpetrator (such as drunkenness or lust) and not the setting (such as detention, interrogation, suspicions regarding the victim's political loyalties). This conclusion is even more striking in light of the Bosnian cases, where (the threat of) rape is unflinchingly viewed as part of ethnic cleansing.

The "privatisation" of violence is not restricted to sexual violence. In Iranian cases concerning marriage and divorce, we can see that violence is viewed as private because it takes place in the family context (see section
3.3). Just as opinions regarding family law are not considered political because they concern the family, violence occurring in the family is also not viewed as a potential act of persecution because it takes place in the family.

One Turkish case, which already involves an exceptional flight story, illustrates just how subtle the issue is. Three rather different versions of basically the same story emerge as a result of viewing the assassination of the applicant’s husband as part of a blood feud, as a way of collecting a debt or as a political assassination.

What is sure is that the applicant’s husband was shot in 1991 at a beach in the city where the family (the couple had two sons and a daughter) lived. Two children witnessed the murder from a few meters distance. After two years of living in several places, but being followed by men, she can’t identify, the applicant fled from Turkey in 1993, because she feared her children would be killed as well. The assassin has been arrested and a criminal procedure is underway. The identity of the man who commissioned the assassination is known.

In a first letter from the applicant’s lawyer, the background to the murder of the husband is given as a political one. The husband had been active for a left wing party and detained for a total of seven years. The man who had ordered the assassination was a member of the Grey Wolves, the paramilitary branch of the ultra conservative MCP (Nationalist Workers Party). The children are in danger, because they were witnesses to the crime.

During the initial interview, the applicant says that the local chair of the MCP ordered the assassination, “probably because the father of my husband murdered a relative” of this man. Upon return, she fears that her children will be pressured by the family of her late husband to take revenge; also, the relatives of the man who ordered the assassination of her husband may take further revenge by killing one of her children. A newspaper clipping which the applicant submits during the interview says that the assassin has told the police he was hired because the late husband had a huge debt. The applicant denies this, as her husband did not have debts of any significance. Also, the newspaper clipping says that an arrest warrant has been issued for the man whom the applicant says ordered the murder, while the applicant herself says that the police is doing nothing about him.

The application is rejected as the assassination is seen as inspired by financial motives and not related to one of the persecution grounds.

During the review procedure, the applicant’s lawyer says that the motive for the killing was the husband being approached by the MCP with the request to assassinate somebody else. When he refused, he was killed himself. The MCP people who ordered the assassination have made it known to the applicant that, if she doesn’t testify that the assassin’s statements about his motive were true (which would cover up the role of the MCP), her children would be killed. That is why she fled. Also, her late husband’s family wants the oldest son (born in 1979) to take revenge.

Later during the review procedure, a second version of this background to the assassination comes up. The applicant’s late husband was given the choice between assassinating one of two people with whom he had regular contacts. When he refused, he was killed. The lawyer explains that the truth came out only so late, because the whole issue is very delicate.

The variation in the different versions of the same story, although obviously problematic, is of particular interest here because the main difference pertains to the motives of the man commissioning the assassination. If, for the sake of argument, we accept that the assassin was a member of the Grey Wolves, all three versions are still possible. And although the risks for the applicant and her children remain the same, it seems clear that the political version of the assassination is most likely to lead to recognition as a refugee and not the other two versions.

Minor harms

An obvious issue is whether the things which the applicant has experienced were sufficiently serious. Some things are considered unpleasant and nothing more. Examples of this are dismissal, degradation, denial of education or denial of public healthcare, eviction and short detentions. This kind of argument is obvious, which is why I will not consider it further here.

The attribution of motives to potential persecutors

In section 3.3 on the concept of the political, we saw that decision makers tend to attribute particular flight motives to applicants. It is assumed that applicants leave their country of origin on account of the activities of male relatives; for economic or private reasons; or out of discontent with the general situation in the country. Similarly, acts of persecution are often assumed to be inspired by motives on the side of persecutors which are, in the eyes of decision makers, irrelevant in the context of refugee law. Most notably, acts of persecution are often deemed to be random or private violence in a speculative way. The acts of the applicant are not viewed as (possibly) politically inspired and, as a consequence, what the applicant
suffered cannot have been persecution on account of the applicant’s political opinions (either attributed or actual).

In cases of Sri Lankan women who refuse to co-operate with the LTTE, the LTTE is assumed to not see this as insubordination. Similarly, in cases of women who were forced to work for the LTTE but escaped, the Sri Lankan authorities are not assumed to see their activities as politically inspired. As a consequence, any trouble which the woman may have with the LTTE or the Sri Lankan authorities is viewed by the Dutch authorities as part of the general situation. A similar approach is taken in Chinese one child cases. The refusal to abort, for example, is seen as related to anything but the applicant’s political or religious convictions, which precludes the perception of forced abortion as persecution on account of one’s convictions.

The phenomenon of attributing irrelevant motives to persecutors was brought to my attention by a sarcastic brief submitted by a lawyer on behalf of a Zairian applicant.

Of the by now hundreds of Zairian flight stories that I have seen, I have never witnessed that the means of escape is not disqualified as incredible. [...] Loosely interpreting which course of events the State Secretary would have found more logical than the one rendered in the interview report, the incredibility of this story is ascertained. [...] The purported incredibility is based entirely on presumptions on how things go in a country like Zaire in the eyes of the decision maker during a detention period and an escape.

Indeed, with only a very few exceptions, the flight motives are rejected in Zairian cases on the basis of speculations as to the motives of the State agents involved. The motives can make the flight story incredible (because the agents had no reasonable motives) or construct acts of violence as arbitrary acts (because the agents were not politically inspired).

It seems to me that the speculations as to the motives of persecutors varied from country of origin to country of origin. Such speculation was standard in Zairian cases, quite frequent in Sri Lankan and Chinese cases, it occurred in Iranian cases and was rare in Turkish cases. It is difficult to distinguish these speculative arguments from other arguments, so I have not counted them as this would give the reader an incorrect idea of the “hardness” of this impression. Also, the Bosnian cases show speculation regarding the motives of the persecutors to the benefit of the applicants.

We have seen an example of this already, in the comparison of the rape by drunken soldiers of a Sri Lankan woman and of a Bosnian Muslim.

The rape of the Sri Lankan woman was considered a civil offence while the rape of the Bosnian woman was seen as an instance of ethnic violence.

Conclusion: What is persecution?

In the preceding, we have discerned what is not considered to be persecution: random (irrational, natural) violence, rational violence, private violence or minor harm. The question, then, is what the picture printed on the basis of this negative looks like. We can conclude that persecution is generally considered physical in nature (i.e., not about such things as employment or education). It must nevertheless be directed at the mind of the victim and not the body; when directed at the body, it is considered private violence. Sexual violence against women is typically viewed as directed at the victim’s body, thus. The requirement that the violence be directed at the applicant’s mind also implies that violence which is part of the normal state of things in the country of origin (general violence, law of general application) does not count in the context of refugee status determination; acts of persecution must somehow be exceptional. Finally, persecution must be public. In the perception of the decision makers, what happens in the family is not public, and what happens in public (e.g., during an interrogation) may also turn out to be private upon closer examination. In short, the decision makers in the present sample appear to define persecution as exceptional State violence directed at an applicant’s ideas.

The same two cases illustrating a positive case of the political (see section 3.3) also illustrate what is construed as persecution. The Turkish case provides a stereotypic example of persecution: prison sentences, being followed by the secret police and involvement with a banned political party. The Zairian case similarly provides a standard example of persecution (detention and torture) when the applicant’s activities for the relatives of the disappeared are construed as political (which I dealt with above). There is, of course, the Bosnian exception. Ethnic cleansing is by definition collective and thus not exceptional; it is not directed at the applicant’s mind but at a collective characteristic (ethnicity); and in the Bosnian cases sexual violence was not considered a private act but part of a conscious and general strategy.
3.5 Conclusion

During the asylum procedure, a particular truth about the applicants is produced. The most decisive factor in this process is the interview report. In asylum interviews, the interviewer occupies the dominant position; s/he asks the questions and decides what is important and not important. In such manner, the interviewer has a decisive influence on the outcome of the procedure. In the Dutch asylum context, the dominant position of the interviewer is strengthened by the fact that the interview report is a free reproduction of the interview; no audio or video records are made. This situation makes it dangerous for the applicant to contest the perspective of the interviewer; if she disputes the correctness of the interview report, the most probable course of events is that she be considered abusive. The applicant’s position can then further deteriorate as a result.

The production of a truth about applicants is not only a matter of skill or technique. Of course, a certain degree of tact and awareness of the potential intercultural communication problems on the side of the interviewer are important. But the material presented here shows that the position of power of the interviewer to be such that s/he sets the limits on what can be said, noticed, understood. Central to all of this is the concept of politics. For refugee status, the persecution is required to be triggered by a political act; and the persecution itself must be politically motivated. These constructions of the refugee are not a matter of individual bias; the construction of the female applicant in the empirical material presented here is quite coherent and the reflection of larger structures.

One of the larger structures is the family. In the asylum procedure, women are seen as related, as mothers and as wives. Women are not so much relegated to the family in the normative sense that “women should be good mothers and wives”. Women are, rather, considered inherently part of the family; when they behave contrary to the expectations of decision makers, the conclusion is not that the applicant is not a good mother and wife; instead, what the applicant says cannot be true. Furthermore, the family is seen as entirely separate from the State; what happens in the family is not political but private because it happens in the family. This notion is maintained even in situations where it is rather clear that the family is the subject of political conflict – be it the Chinese one-child policy cases, the cases involving Iranian family law or cases of ethnic violence. Viewing the family as entirely separate from the State also excludes the possibility of perceiving a husband as an agent of persecution or the regulation of sexuality as a political issue. At the same time, the family is seen both as a protected and protective institution. There is a somewhat strange exchange of roles between the husband and the State. As exemplified by the angry husbands of victims of the Chinese one-child policy, the husband is readily perceived as the protector of the family. Conversely, when the husband is the perpetrator of the violence against the applicant, she is referred to the State for protection. The State and the husband trade places as protectors against each other.

Another notion found to structure the truth about female applicants is the market. Women are not always assumed to be inspired by economic motives, but they are suspected of this quite often. Effects of the (free!) market are not viewed as the work of the State and, even when they clearly are (as in the case of people excluded from work or housing), labelling such sanctions as “economic” is considered sufficient to make them irrelevant. The Zairian market vendors disagreed with Mobutu’s economic policies and therefore boycotted the new currency. This is nevertheless not viewed as a (potentially) political act but a socio-economic act. Once the term of “economic” has been attached to either a sanction or an act which triggered sanctions, the case is seen as non-political. Politics and economics thus function as opposites; the “political refugee” stands in clear contrast to the “economic migrant.” People who claim to be refugees are first of all suspected of being economic migrants. It came as a surprise to me that this phenomenon was at work in women’s cases as well, as I had assumed that the flights of women would be attributed more to emotions (as in family reunification) than to financial gain.

The sphere of politics is furthermore opposed to the physical. Acts which are forced (forced labour), acts concerning the body (trying to escape abortion) and acts seen as physical (sexual violence) are not viewed as potentially political or related to the State. Of course, the opposition between the political and the physical is problematic: what makes “recognised” torture less physical than sexual violence? And why is giving a speech less physical than disobeying the one child policy? Acts are physical by definition, yet some acts are seen as a matter of the mind while others are not. The physical and the political are considered mutually exclusive. Sexual violence is viewed as a physical act and thereby is presumed to be unconnected to the context in which it occurs; disobedience of the one child policy is considered to concern reproduction, and is therefore non-political.

The spheres of the family, the market and the physical are constructed as the opposite of the political. Political interventions regulating the family, the market and the physical are also construed as non-political. The laws
sion holds that “Trinidadian women subject to wife abuse” may also constitute a particular social group.\textsuperscript{112} A British court, however, rejected the claim that battered Iranian women form a particular social group, reasoning that a cohesive social group is not created by one person persecuting another person and this pattern then repeating itself with individuals under other circumstances.\textsuperscript{113}

It appears that the courts are unwilling to assume refugee status in cases with sexual violence as the only basis for the claim. They do not perceive sexual violence as being based on a persecution ground. In some cases, however, it is nonetheless held that battered women may constitute a particular social group. Recently the British House of Lords gave a judgment to this effect.\textsuperscript{114}

Conclusion

At first sight, case law appears to be inconsistent with regard to the persecution grounds. Closer inspection reveals a pattern, however. There is a tendency to perceive the cases of women as specific and not normal. From the perspective of the administration, women’s cases are specific when they concern phenomena which decision makers consider as typically female: tending to rebels, organising support meetings, problems with specific rules for women, sexual violence, problems on account of husbands and reproductive issues. When the courts reject the applications of women, they adopt the perspective of the administration. When the courts disagree with decisions, they reformulate the cases as “normal cases” and not specific “women’s cases.” It is also significant that the landmark decisions on the Chinese one-child policy in both The Netherlands and Canada concerned men. Similarly, the first Dutch decision explicitly stating that the transgression of social mores can be seen as an act against the regime concerned a man. The involvement of a male claimant seems to have helped these cases to be seen as normal (as opposed to being seen as “women’s”) cases. In other words: situations often labelled as gendered in the literature can lead to recognition as a refugee when constructed as not gendered but normal by decision makers.

4.5 The Singled Out-Criterion and the Motivation Doctrine

The effects of the singled out criterion\textsuperscript{115} and the motivation doctrine\textsuperscript{116} can be analysed in a series of decisions on Sri Lankan Tamils. The women in question were among the first Tamils to be deported to Sri Lanka from The Netherlands in June 1988. The court refused to grant an interim injunction in the case of several Tamil women who were the victims of sexual violence by the Indian intervention force in Sri Lanka (IPKF). The applicants’ problems “seem to concern predominantly the danger which the applicant faces as a woman to become the victim of sexual violence. In light of the general situation in Sri Lanka however, it is unfortunately not unusual for women to be the victim of sexual violence. (...) The applicant is therefore not in an exceptional position.”\textsuperscript{117} The decision was overturned upon appeal. The Court of Appeals found that “[t]he fact that many women in Sri Lanka are the victim of sexual violence increases the risk for the appellant that, as a member of the group of (young) Tamil women, she will again become a victim of sexual violence which is apparently, although it does not emanate from the authorities, insufficiently combated by the authorities.”\textsuperscript{118} Nevertheless, the Court of Appeals only accepted this argument as grounds for the granting of a humanitarian residence permit and not recognition as a refugee. Furthermore, the Court of Appeals only quashed the decisions on women having already suffered sexual violence and summarily dismissed the appeals of women “only” fearing what had happened to other appellants.

In one of these cases, the Supreme Court upheld the Court of Appeals’ view that “even if one presumes that Tamil women run the risk of becoming the victim of sexual violence from the IPKF or the Sri Lankan army, this cannot in and of itself lead to the conclusion that the applicant personally has a well-founded fear of persecution in the sense of the Refugee Convention;” the Appeals Court could in fairness rule that “a risk of rape in a country where, as a result of domestic unrest, two armies are active” does not constitute persecution.\textsuperscript{119} In the same case, the appeal was rejected by the Council of State on the grounds that although “(...) it has become clear that in the areas in Sri Lanka where the IPKF has operated with the consent of the Sri Lankan government, there have been excesses, during which there has been sexual violence directed at Tamil women”, there are nevertheless “insufficient indications to conclude that the IPKF in Sri Lanka (...) used sexual violence aimed at Tamil women as a means to systematically oppress the Tamil population.”\textsuperscript{120}

It should be kept in mind that the appellants in the cases before the Supreme Court and the Council of State did not report already being the victim of sexual violence. They simply argued that, as Sri Lankan Tamil women risked being raped by the IPKF, they were \textit{prima facie} refugees. However, both the Supreme Court and the Council of State went further than merely arguing that the risk was not sufficient. The Supreme Court
considers the risk of rape as an element of the general violence encountered in war and insufficiently directed at the person of the applicant. That is, the risk does not concern the applicant individually but all women. The Council of State recognises that the sexual violence has been directed at Tamil women and thereby acknowledges that Tamil women (and not others) were its victims. This seems to suggest that the rape of women from one ethnic group is not considered an element of the general violence of war. However, the Council of State then requires that the perpetrators act with a particular animus, and be motivated to systematically oppress the Tamil population, which the applicant could not establish. Here, we can see that the singled out criterion, which requires that the persecutor aims at the applicant and at the applicant only, and the motivation doctrine, which requires a particular animus on the part of the persecutor, are related.

These decisions – applying a fuzzy combination of the singled out criterion and the motivation doctrine – are part of a larger pattern in Dutch case law. Most published case law concerns sexual violence, which may be the result of selection on the part of the relevant journals. However, it should be stressed that the singled out criterion has been applied in leading case law, the motivation doctrine has been expressly rejected in major decisions. The two show considerable overlap and the case law concerning sexual violence illustrates this. What the courts find problematic is that, in their view, sexual violence may occur “just like that” and thus as part of the general situation in a country. From such a perspective, sexual violence is undifferentiated violence. An example of this is the case of a Turkish Kurd, who had assisted the PKK materially and was subsequently raped by the Turkish army during a search of her house. The court finds it plausible that, as a Kurdish woman, she will not be able to get protection from the Turkish authorities for the “misbehaviour” of the soldiers. Nevertheless, the rape “cannot be characterised as an act of persecution directed against the person of the applicant. In light of the fact that she was not the only woman who was raped, it is not plausible that the rape was related to her support of the PKK.”

One might observe, in this context, that a phenomenon that primarily befalls women is simply not undifferentiated. Courts take this view in cases of ethnic warfare (Tamils, Kurds), but also in cases where political activists or the wives of activists are interrogated and tortured. It is normatively incorrect to consider sexual violence part of the general warfare situation as sexual violence is a violation of rules of humanitarian law applicable in times of war. It is also incorrect to consider ethnic violence undifferentiated – decision-making practice appears to acknowledge this in cases of Bosnian applicants.

Sexual violence is seen as inherently different from other forms of violence. In the absence of indications to the contrary, it is considered private, aimed at satisfaction and unrelated to the political context. Only from this perspective does it make sense to require additional evidence as to the animus of the perpetrator even when the perpetrator is a State official interrogating a woman about political activities committed by herself or her husband. In many cases, the violence of which the applicant was a victim seems not lead to recognition as a refugee because it was sexual. As the Bosnian cases show, rape is only constructed as having a relevant motive when the female body is seen as a symbol of a larger entity – such as the nation – and not the woman, but something more general is thought to be raped.

In some cases, the requirement of additional evidence regarding the animus of the perpetrator is clearly rejected. In the case of the Iraqi woman referred to above, the District Court held that “the argument that the rapes by members of the Security Service in the case of the applicant concern personal acts which cannot be attributed to the authorities, fails to recognise that the applicant was raped by members of the Security Service during the exercise of their function while she was being detained on political grounds.” And in one case, the requirements of the motivation doctrine were considered fulfilled; the court was “of the opinion that it cannot be excluded beforehand that in the South of Sudan, Christian women are systematically raped by Sudanese government troops with the aim of dispersing the population or at least part of it.” In a few other isolated cases, application of the motivation doctrine has also led to positive decisions for women. In the case of a Chilean communist, the Council of State reasoned that “it cannot be established for sure that it was related to the activities of the applicant. It is known, however, that rape is deployed by the Chilean security services as a means of intimidation. (...) In this light, the defendant (State Secretary, TS) cannot limit himself to considering that it has not been established that this rape was not inspired by political motives.”

Finally, it should be noted that the application of the singled out-criterion is not limited to cases of sexual violence or women. The motivation doctrine does, however, appear to be restricted to cases concerning sexual violence against women. In both cases, it is required that the perpetrator have a special interest in the victim or her political, religious, ethnic (et cetera) characteristics. These criteria thereby collide with other elements of
the definition, as is exemplified by the formulation of an American court holding that the applicant is required to show that "the Iranian government's potential act of persecution stemmed from its desire to single out for unique punishment because of [...] political or religious beliefs." It is found that a State agent acting against a female political opponent or a woman belonging to a minority group does not have a special interest in the applicant as a political opponent or as a minority person but "only" as a woman—that is, as a body. And this kind of interest "is unfortunately not unusual."

4.6 Conclusion: "Normal" Versus "Women's" Cases

In the preceding, a distinction between people and women could be observed along with a distinction between normal versus women's cases. When women are seen as people their cases may be viewed as normal asylum cases. When women are viewed specifically as women and their cases are thus seen as "women's cases," they are rarely recognised as refugees. If they are considered to have acted as a woman, then their activities are construed as minor or inspired by "personal and not (...)", for example, political reasons. If persecution on account of kinship is seen as "persecution of a wife," the application is often dismissed; when the application is granted, the persecution is characterised as persecution of someone related to the opposition. If what happened to the female applicant is viewed as something that can happen to people (such as detention and torture), the case may be successful. When what happened to the female applicant is viewed as an act against a woman (with sexual violence as the main example), the acts are seen as insignificant or, more often, as private. Also, acts directed at a woman are construed as having the woman's body (as opposed to the person and her nation, political opinion or religion) as the target.

Three more general examples can serve to illustrate the construction of the distinction between "normal" versus "women's" cases. Circumcision of men is seen as a normal issue while circumcision of women (which has dramatically different effects) is considered a difficult case. In German case law, compulsory circumcision of Christian men in the Turkish army is seen as sufficiently serious and not gender specific. Female circumcision is, after ample deliberation, seen as sufficiently serious and related to a persecution ground—but this decision may then be published on the front page of the New York Times, in the International Legal Materials and widely commented. Second, the relation of men to laws of general application is viewed in a different light than that of women. Conscientious objection is a classical topic in refugee law; the idea that this topic may be gender-specific is never raised, however. When women claim that their non-compliance with a law of general application (dress codes, Chinese one-child policy, family laws) should lead to recognition as a refugee, the issue is set apart as gender specific. Third, sexual violence against women is set apart as gender specific. While definitions of sexual violence tend to be very broad and as a consequence also cover many forms of torture of men, case law nevertheless makes a sharp distinction between sexual violence against women and other forms of torture. In such a manner, the perceived difference between normal cases (which may include cases of women) and gender-specific cases is reproduced. The normal cases are associated with men, assertivity, politics and the mind; the special cases are associated with women, vulnerability, culture and the body. This has as a consequence that cases constructed as normal are largely viewed as legally unproblematic (although such claims may fail), while "special" cases require the claimants to hurdle the additional legal barrier of first establishing the potential relevance of what they say.

The distinction between "normal" versus "women's" claims is a crucial element in distinguishing successful and unsuccessful claims in decision-making practice in several ways. An implicit or explicit label of "special" fosters unfavourable treatment in legal practice. First, "gender-specific" claims that are considered "deserving" are construed as exceptions. An exception invites restrictive interpretation. An example of this is provided by the US decision recognising some Iranian women as a particular social group in the sense of the refugee definition. According to the applicant, the relevant social group consists of women who refuse to conform to gender-specific rules. The court notes that this group does not consist of all Iranian women holding feminist views nor all those objecting to gender-specific rules (which is apparently seen as a smaller group). The social group consists of women who so strongly object to these rules that they refuse to conform to them despite the risk of severe punishment. Only if a woman is willing to take that risk does the court find her beliefs so fundamental to her identity or conscience that she cannot be required to change them. This interpretation is, in fact, so strict that the standard is higher than for the political opinion that the women in this group must hold; that is, this interpretation requires, in the words of a decision in a comparable case, "some missionary fervor" to defy the law. The threshold for persecution is also set higher than usual by requiring severe punishment. A parallel
exists here to the tendency to place the refugee claims of persecuted homosexuals within the social group category which sets gays and lesbians apart in a manner that fosters unfavourable treatment. A second consequence of treating claims of women as gender-specific is that this invites the idea that the claims do not belong to the core of refugee law and should therefore be dealt with by granting something less than refugee status. In case law, we encounter examples of complete contradiction: women fleeing violence by relatives are argued to have sufficient State protection within the context of refugee law but not within the context of a humanitarian residence permit. In Sweden, the rule that persecution on account of gender or sexual orientation will lead to a humanitarian residence permit (and hence no refugee status) has even been laid down in an amendment to the Aliens Act.

A third consequence of opposing normal to special cases is that it seems normal to introduce special requirements in “special” cases. It is often argued that the relevant social group consists of, for example, battered women in country X without government protection. The argument typically first requires that the applicants establish membership in that social group. In apparent fear of “opening the floodgates,” it is also often required that the applicants establish an individual fear of persecution. However, membership in the group of battered women without State protection establishes an individual fear by definition as the women would otherwise not be a member of that group. In the Dutch and Canadian one-child decisions, however, the legal principle can be seen to be decided to the advantage of the claimant while the standard of proof is raised to control the number of successful claims.

The distinction between normal versus women’s cases is nevertheless unstable and subject to attack. It may be helpful if a problem formerly considered a women’s problem (Iranian dress codes, the Chinese one-child policy) turns out to be a problem for male applicants as well for, as we saw, the relevant Dutch and Canadian landmark decisions have concerned men. This need not always be the case, however. The claims of female applicants can be reconstructed and thereby cease to be strictly women’s cases. The most common examples concern women’s political activities and kinship cases construed as more or less normal cases in the end.

While the cases of female claimants may shift from one category into the other, the opposition of normal versus women’s cases remains largely intact. A good example is the US decision recognising a woman fleeing female genital mutilation as a refugee. The definition of the relevant social group represents the claim as gender specific: the applicant is said to belong to the group of women having intact genitalia, which is considered so fundamental to the individual identity of a young woman that she should not be required to change it. In other words, a special category is created to accommodate the women’s claims.

In a few exceptional decisions, the courts can be seen to completely undermine the distinction. In a few cases of no State protection, for example, relatives are indeed viewed as the agents of persecution or the requirement that the applicant produce evidence regarding the animus of those committing the sexual violence is ignored. In such cases, the courts refer to the gender specificity of the applicant’s situation but evaluate it in normal doctrinal terms. These decisions do not attack the distinction but simply ignore it or defy it.

There are also indications that the distinction between normal versus women’s cases relates to ethnicity. Sexual violence directed at Tamil women is not viewed as being directed at the Tamil population. However, sexual violence directed at Christian women by the Sudanese army (fighting for the Islamist government) is viewed as possibly being directed at the entire group of Christians. The Bosnian cases of sexual violence were apparently so clear to decision-makers that they hardly ever reach the courts. And finally, in cases of family violence and forced prostitution, deportation is prohibited on humanitarian grounds with explicit references to the emancipated cultures of Jordan, Morocco and the Turkish countryside.

There is also a clear tendency in case law to see what women do and what is done to them as related to culture. Although there are cases in which this tendency is not followed, women’s refusal to obey formal or informal dress codes, marriage law, child custody rulings and the like is seen as a cultural issue. Similarly, the institutionalised discrimination of women (which may take the form of forced marriage, denial of education, clitoridectomy, forced abortion, sterilisation) is often seen as a matter of the general situation in the country and thus of indigenous culture. And somehow, that which is cultural is considered as non-political.

The analysis in the present chapter on jurisprudence provides a less coherent picture than the analysis in the previous chapter on decision making by the administration. This is in part because the present analysis of case law was not limited to Dutch decisions on six nationalities. We also saw examples of rules being changed to the benefit of applicants and court decisions clearly departing from standard practice. We may therefore conclude that lawyers’ contestation of first-instance decisions may at times be successful. One caveat should be noted. In the sample of independently arriving fe-
Notes

1. Rechtbank 's-Gravenhage (Netherlands) 8 August 1955, NJ 1955, 558 (Poland). This case was brought to my attention by Betty de Hart, see De Hart 1997, 23-24, De Hart 1999.


3. As sources of foreign case law I used the International Journal of Refugee Law; the cases published on the website of UNHCR's Centre for Documentation on Refugee Cases (UNHCR); the weltlexis database (USA); Martin 1994 (USA); Zeitschrift für Ausländerrecht (Germany); Streit (Germany); Marx 1991 (Germany); Immigration and Nationality Law (Australia); and Appeal Reports (United Kingdom). I have homogenised the citations in the following way: first I give the name of the court in the original language; then the country where the case was heard; then the publication date; the number of the decision; and, if available, the name of the parties; if the court is located in the country of origin of the applicant, the country of origin of the applicant is added; if the court is located in a country where the decision can be accessed, the country of origin of the applicant is added.


6. The Construction of the Female Applicant in Jurisprudence


8. An example of this may be Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 25 July 1995, GV 18d-9 (Ukraine). In this case, the applicant stated that, inter alia, she had been sexually harassed; the Council of State in a general remark finds the experiences of the applicant insufficiently serious to amount to persecution.


10. Spijkerboer/Vermeulen 1995, 113-114. E.g. Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 5 December 1997, NAV 1997, 9 (p.15) (Yugoslavia): a Yugoslav Roma woman, who was in bad health, had no housing, no work, had been denied medical treatment in the past and would possibly be denied treatment again in the future was not considered a refugee. The facts were seen as insufficiently serious to amount to persecution. For some reason, however, these circumstances were seen as possible grounds for a humanitarian permit. Why they were insufficiently serious in one respect but sufficiently serious in the other remains unclear.


12. See, for a rare exception, the case of an Afghan woman who was forced to stop teaching and to close her hairdresser's shop; Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 10 August 1998, JuB 1998/15, p. 19 (Afghanistan).


15. In light of this case law, it is hardly surprising that some lawyers found forced sterilisation not a ground for refugee status but merely for a permit on humanitarian grounds. In the case of a Chinese man fearing sterilisation, the lawyer admitted that his/her client was not a refugee and demanded only a permit on humanitarian grounds; see President Rechtbank 's-Gravenhage (Netherlands) 27 April 1994, GV 18a-7 (China).

16. President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 15 December 1994, 94/1308 and 1309, JuB 1995/4, p. 7 (Slovakia); forced sterilisation not credible.

17 Afdeling bestuursrechtpraak van de Raad van State (Netherlands) 7 November 1996, RV 1996, 6, GV 160-21 (China). However, the applicant's fear was not been plausi-
ble, hence the case was dismissed. Compare the Canadian Supreme Court decision Supreme Court of Canada (Canada) 19 October 1995, Chan v Canada (Minister of Employment and Immigration), [1995] S.C.C. No. 53, S.C.R. 593 (Canada). Recently, a
Dutch court thought of another restriction, being the requirement that the applicant leaves China on account of the forced abortion she has undergone; in this case, the
applicant said she had fled on account of the fine accompanying this. The possibility of forced sterilisation and another forced abortion upon return was deemed to be a
violation of Article 3 ECHR, but apparently not related to the refugee definition,

that denial of higher education does not amount to persecution, Spijkerboer/Vermeulen 1995, 113-114.

19 Compare on this issue Marx 1995 § 76, 39.


21 In an American case, it was decided that "(t)here can be no doubt that a government that coerces a woman to marry against her will [with a disabled veteran, TS] has en-
gaged in persecution on account of imputed political opinion", U.S. Court of Appeals
for the Ninth Circuit (USA) 4 April 1994, Fatemeh Zokaeli-Alamdar v. INS, 1994 U.S. App. LEXIS 6939 (Iran). The fact that the Iranian government was imposing the marriage makes this case substantively different from the more familiar case in which
marriage is imposed by relatives.

22 UNHCR Division of International Protection 1997, 92-93. Regrettably, the countries
of origin are unclear.

23 President Rechtbank 's-Gravenhage, zp Haarlem (Netherlands) 19 January 1996, RN
1996, 577, JuB 1996/3, p. 15-16 (Iran). See on this decision and the ensuing affair
Spijkerboer 1998b.

24 Immigration and Refugee Board (Canada) 13 July 1994, CAS/CAN/026 (Somalia).

25 For example, UNHCR Handbook, § 65; Grabi-Hamden 1966, 189; Källin 1982, 150-
151; Fernhout 1990, 96; Hathaway 1991, 125; Marx 1991, 1323; Spijkerboer/Verme-
ulem 1995, 135; Goodwin-Gill 1996, 71-72. I do not address the issue of persecu-
tion in the absence of a government, see on this Vermeulen et al. 1998.

26 E.g. UNHCR Handbook, § 65; Fernhout 1990, 96-97; Hathaway 1991, 125-133; Spij-
kerboer/Vermeulen 1995, 139-142; Goodwin-Gill 1996, 70-73. For the diverging
German position, see Marx 1995, § 33. This restrictive view is also held in Switzer-

27 President Rechtbank 's-Gravenhage, zp 's-Hertogenbosch (Netherlands) 3 February
1995, NAV 1995, 26 (p. 305) (Armenia); comp. President Rechtbank 's-Gravenhage, zp Amsterdam (Netherlands) 9 March 1995, NAV 1995, 36 (p. 413) (Georgia). Com-
parable is the French appeals authority's decision in the case of an Afghan woman
from Azerbaïdjan, Commission des Recours des Réfugiés (France) 10 Decem-
ber 1992, CAS/FRA/073 (Azerbaïdjan); Commission des Recours des Réfugiés (France) 30 September 1992, case of Anna SLYPIK GABOROVA, CAS/FRA/073 (Czechoslovakia); Roma from Czecoslovakia not protected against persecution by skinheads and right wing militants; Commission des Recours des Réfugiés (France) 1
June 1994, case of Frantisek SLEPIK, CAS/FRA/127 (Slovakia); Roma from Slo-
vakia not protected against persecution by right wing militants. Differently Bundes-
verwaltungsgericht (Germany) 12 June 1990, CAS/DEU/076 (Turkey).

28 Afdeling bestuursrechtpraak van de Raad van State (Netherlands) 8 December 1995,
GV 18e-15 (Czechoslovakia); the applicant had not applied for asylum but for a hu-
manitarian permit, but the issue is identical. Compare a Chinese case of forced pros-
titution in which it was deemed unrealistic to expect protection from the Chinese au-
thorities President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 4 April 1996,
96/1279, JuB 1996/20, p. 18-19 (China). In another Chinese asylum case, a minor had
become the victim of trafficking; here, the debate concentrated entirely on the trauma-

29 President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 17 January 1991, NAV
1991, p. 73-75, RV 198 (Syria); the court referred to this decision in a later Syrian
marriage case (see the section on persecution grounds below) President Rechtbank
23-27 (Syria). Comp. President Rechtbank 's-Gravenhage, zp 's-Hertogenbosch
(Netherlands) 6 November 1996, NAV 1996, 50 (p. 973) (Iran): harassment by an ex-
husband who also works for the Security Service: no effective protection forthcoming.
Comp. President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 3 October 1996,
96/4998, 96/7870, JuB 1996/20, p. 16-17 (Iran), in which the ex-husband had told
the authorities that the applicant was active for the Mujaheddins. "Although her problems are primarily familial in nature, it is probable that the applicant will be unable
to defend herself against them, in light of the accusations leveled against her - possession of drugs and involvement in the Mujaheddins -, the measures already taken against her and in light of the weak position of single women in Iran." Comp. Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 27 May 1998, IV 1998, 197 (Somalia), concerning a
Somalian fleeing a forced and abusive marriage: her husband was held to be the
agent of persecution. Comp. Federal Court of Appeal (Canada) 5 November 1992,
Canada (Minister of Employment and Education) v Marcel Meyers, A-544-92 (Trini-
dad): domestic violence is persecution given the indifference of the Trinidadian
authorities. There is a German decision finding that abduction, including the possibil-
ity of forced marriage, of a Christian woman by a Muslim can constitute persecution.
It may be that the issue is not seen as one of persecution by relatives but as the mar-
riage is seen as not being a true one; Hessisches Verwaltungsgerichtshof (Germany)
20 March 1989, Streit 1989, p. 158-160 (Turkey); see generally Marx 1995, § 76, 38-
40. For more decisions holding that domestic violence can constitute persecution, see
UNHCR Division of International Protection 1997, 89-90.

30 House of Lords 25 March 1999, case of Islam (A.P.) v. Secretary of State for the Home
Department and Regini v. Immigration Appeal Tribunal and Another ex parte Shah (A.P.), not yet reported.

31 For example, in the case of a Pakistani widow who claimed she would be forced to
marry an Ahmadiya (like her husband had been) by the Ahmadiya community, the
court ruled that she had not established that she had done all she could in order to get
protection from the authorities, Rechtbank 's-Gravenhage, zp Haarlem (Netherlands)
7 August 1998, JuB 1998/19, p. 14 (Pakistan). Compare the ruling that the applicant
presented no evidence linking her husband's abuse to the government and that she had
not shown that she actually condoms his behaviour or was unwilling to provide
protection U.S. Court of Appeals for the Seventh Circuit (USA) 19 February
32 In the case of an Uzbeki woman of Russian origin who had been assaulted by (ethnic) Uzbeks, the court found it incomprehensible that the applicant had not invoked the protection of the authorities, but it nevertheless considered humanitarian permit a possibility. President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 30 March 1998, NAV 1998, p. 616-618 (Uzbekistan).


35 Rechtbank 's-Gravenhage, zp Amsterdam (Netherlands) 31 May 1996, 94/3575, JBu 1996/12, p. 14-16 (Turkey); the court based its findings on the report of a "linguistic and forensic Turologist." 36 36 President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 3 October 1996, JBu 1997/4, p. 14-16, RN 1998, 912 (USA). A comparable asylum case was reported in the Dutch newspaper De Volkskrant, 6 August 1996; here the American woman did not want her son to be raised by her Pakistani ex-husband.

37 The exceptions I know of are one sentence in Kállin 1982, 150; and one in Spíjker- boer/Vermeulen 1995, 135. Only Marx 1995, 5, pays extensive attention to the issue.


39 U.S. Court of Appeals for the Sixth Circuit (USA), 29 June 1992, Klawitter v INS, 970 F.2d 149; 1992 U.S. App. LEXIS 15946 (Poland). Although the decision was positive for the asylum seeker, the U.S. Court of Appeals for the Seventh Circuit also made the distinction between a Security Service official "abusing his power for personal edification, rather than carrying out an officially conditioned act of the Bulgarian government", U.S. Court of Appeals for the Seventh Circuit (USA) 11 February 1997, Angocheva v INS, 105 F.3d 781; 1997 U.S. App. LEXIS 2280, at 700 (Bulgaria).

40 Rechtbank 's-Gravenhage (Netherlands) 30 August 1995, RV 1995, 10, NAV 1996 4 (p. 129-130) (Iraq). Compare Bayerisches Verwaltungsgericht Aschbach (Germany) 19 February 1992, Streit 1993, p. 104-108, CAS:DEU/095 (Romania); Commission des Recours des Réfugiés (France) 11 September 1989, case of Théline Thérèse ROSE, CAS:FRA/008 (Seychelles); Commission des Recours des Réfugiés (France) 5 June 1991, case of Bissassa NDINGANI, CAS:FRA/082 (Congo); Commission des Recours des Réfugiés (France) 18 October 1991, case of Benedict VICTORIA VELL- CHORE, CAS:FRA/087 (St. Lanka). This body of case law is in keeping with the decision of the European Court of Human Rights 25 September 1997, case of Aydil v. Turkey, JV 1997, 13, Reports of Judgments and Decisions 1997-VI, no. 50 (Turkey), which holds that "(a) hope of a detainee by an official of the State must be considered to be an especially grave and adverse form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim,".

§ 83. The court here uses the vulnerability of the victim as an argument for concluding there is no State protection.


45 The landmark decision here was Afdeling rechtspraak van de Raad van State (Netherlands) 13 August 1981, RV 1981, 5, GV (oud) D12-51 (Poland); see more extensively Spíjkerboer 1998a.

46 Afdeling rechtspraak van de Raad van State (Netherlands) 2 February 1984 (2x), GV (oud) D12-93 (Romania) and GV (oud) D12-94 (Poland). This decision is followed, but probably unconsciously, in President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 17 January 1991, NAV 1991, p. 73-75, RVR 198 (Syria) and in Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 8 May 1997, NAV 1997, 100 (p. 529) (Azerbaijan).


49 Afdeling rechtspraak van de Raad van State (Netherlands) 31 January 1984, GV (oud) D12-96 (China). Comparable is Commission des Recours des Réfugiés (France) 11 July 1991, CAS:FRA/074 (People's Democratic Republic of Laos), which recognises the daughter of a Laotian army officer of the former regime as a refugee.


51 Hathaway 1991, 159.

52 For example, U.S. Court of Appeals for the Second Circuit (USA) 28 October 1991, Carmen Gomez v. INS, 947 F.2d 660; 1991 U.S. App. LEXIS 25697(El Salvador): no evidence that Salvadoran women who have been previously abused by the guerrillas possess common characteristics such that would be persecutors could identify them as members of the purported social group. A rare example of a Dutch decision in which the criteria for constituting a social group are discussed is Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 24 June 1998, JBu 1998/12, p. 53 (Ethiopia): single women in Ethiopia do not form a social group because they are not in an exceptional position.

53 Afdeling rechtspraak van de Raad van State (Netherlands) 20 October 1988, GV (oud) D12-158 (Eritrea), emphasis added.
54 President Rechtbank 's-Gravenhage (Netherlands) 29 June 1993, NAV 1993, 51 (p. 340) (Sri Lanka). Similarly, an Iranian woman who put her house at the disposal of a Monarchist party for meetings about once every three months, who discussed the party's aims with her colleagues and who, during sewing lessons, tried to persuade women to support the party financially, was not seen as a political opponent, Rechtbank 's-Gravenhage,zp 's-Hertogenbosch (Netherlands) 11 March 1997, Jfl 1997/16, p. 26-28 (Iran). In published Dutch case law, decisions on women who have taken steps after the death of a detained husband or son are absent; in a French case, a woman who has tried to elucidate the circumstances surrounding the death of her detained husband, a trade unionist, is recognised as a refugee, Commission des Recours des Réfugiés (France) 18 June 1991, case of Mayengo TIZOLANA, CAS/FRA/078 (Zaire).

55 Compare the official instruction for interview officials, which under the heading "Female asylum seekers" says: "In cases of female asylum seekers, do bear in mind typi
cally female activities of a political nature (odd jobs). The odd jobs referred here can possibly be seen as acts of resistance by the regime in question in the country of origin. Is also relevant for men!", Guidelines for the interview, NAV 1997, p. 716-722, p. 720.

56 Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 14 April 1994, GV 18a-4 (Iran). Compareable is the decision in an Iranian case where the State Secretary argued that the applicant had no well-founded fear on account of the arrest of her husband and brother but failed to address the question of whether the applicant had a
husband and brother but failed to address the question of whether the applicant had a


candidate is considered political activity in Commission des Recours des Réfugiés (France) 13 May 1991, CAS/FRA/075 (China); comp. Commission des Recours des Réfugiés (France) 22 July 1992, case of Maragret OFORI, CAS/FRA/080 (Angola); Réfugiés (France) 22 July 1992, case of Fatma YAGCIBULUT, CAS/FRA/09/ (Turkey); providing food and carrying messages.


60 Verwaltungsgericht Bayreuth (Germany) 28 April 1997, Streit 1997, p. 179 (Bangla
desh); Verwaltungsgericht Göttingen (Germany) 12 February 1997, Streit 1997, p. 179-180 (Afghanistan).

61 Commission des Recours des Réfugiés (France) 7 April 1992, case of Salamata Sidi BA, CAS/FRA/084 (Mauritania).

62 For example, U.S. Court of Appeals for the Third Circuit (USA) 20 December 1993, Parasoo Fatin v INS, 12 F.3d 1233; U.S. App. LEXIS 32014, CAS/USA/083 (Iran).

63 President Rechtbank Haarlem (Netherlands) 28 November 1985, KG 1986, 143, NAV 1986, p. 10, RVR 197 (Iran). In Afdeling rechtspraak van de Raad van State (Nether
lands) 26 June 1992, NAV 1992, p. 557-559 (Ethiopia), the Council of State found that the applicant had not established that she was persecuted on account of her sex: this may be read as an implicit acceptance of gender as a persecution ground. How
ever, like Bruin 1992, p. 513, I consider this one time wording a slip of the pen.

64 Examples of using political opinions to define a social group are provided by Hestis
er Wahlverwaltungsgerichtshof (Germany) 14 November 1988, 88/393, Streit 1989, p. 26-27 (Iran), which found an Iranian woman fearing persecution on account of her "unwillingness to conform to the Islamic dress codes for women" based on "her membership in a particular social group, namely the group of women who are un
willingly to abide by Islamic dress codes." Comparably, U.S. Court of Appeals for the Third Circuit (USA) 20 December 1993, Parasoo Fatin v INS, 12 F.3d 1233; U.S. App. LEXIS 32014, CAS/USA/083 (Iran), suggested that the social group could con
sist of women who would find complying with the Islamic dress codes so abhorrent that she was willing to run the risk of severe punishment: Fatin could not establish membership in that group, however. In contrast, an Algerian woman who went on bei
ning a secretary despite harassment by Islamists was not considered to be a member of a social group, Commission des Recours des Réfugiés (France) 22 July 1994, CAS/ FRA/115 (Algeria): she was nevertheless recognised as a refugee, but the exact persecu
tion ground remains unclear.

65 Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 29 March 1994, RV 1994, 2 (Iran): an Iranian woman resisted arrest for not complying with dress
codes. Equally implicit on the persecution ground: Commission des Recours des Ré
fugiés (France) 19 December 1989, case of Estella HESHMATI, CAS/FRA/039 (Iran)
in the case of a Christian Iranian woman who refused to wear the veil at work.

66 Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 1 July 1996, NAV 1996, p. 827-830 (Iran). The first comparable German decision I found concerned a woman: Bayerisches Verwaltungsgericht Ansbach (Germany) 14 December 1989,
CAS/DEI/060 (Iran): An Iranian kindergarten teacher refusing to enforce Islamic dress
codes was considered acting against the regime.

67 President Rechtbank 's-Gravenhage, zp Zwolle (Netherlands) 21 October 1996, NAV 1997, 16 (p. 22) (Iran). In a German decision, an application based on fear of flogging for extramarital pregnancy was dismissed as the expected punishment was directed at an
infringement of public morals; the parallel with punishment on account of homo
sexuality was denied as – according to the court – homosexuals are punished on ac
count of a personal characteristic, while the applicant's feared punishment tobe con
trary "is only connected to her not having behaved in accordance with Islamic con
cepts of morality, but not to a personal and relevant characteristic which forms her
personally and fatefully", Bayerischer Verwaltungsgerichtshof (Germany) 11 Novem
ber 1992, Streit 1994, p. 85-87 (Iran). Comp. Verwaltungsgericht Bayreuth (Ger
many) 28 April 1997, Streit 1997, p. 179 (Bangladesh): Bangladeshi Muslim woman married to a Christian man. Canadian decisions seem to opt for social group in these cases, for example Immigration and Refugee Board (Canada) 13 July 1994, CAS/
CAN/026 (Somalia); deprivation of custody after divorce.

68 Rechtbank 's-Gravenhage (Netherlands) 15 June 1995, Jfl 1995/12, p. 18-19 (Su
dan). Comp. Queen's Bench Division (United Kingdom) 11 November 1996, [1997] Imm AR 145 (Pakistan); battered Pakistani woman who may be accused of having committed murder or child out of wedlock possibly member of a particular social group. But see Court of Appeals (United Kingdom) 25 July 1997, [1997] Imm AR 584 (Pak
istan): Pakistani women falsely accused of adultery by violent husbands do not fear persecution for a convention reason, as the social group does not exist independently.
76 Board of Immigration Appeals (USA) 13 June 1996, in re Faviya Kasinga, 35 LL.M. 1145 (1996), also published in International Journal of Refugee Law Special Issue: UNHCR Symposium on Gender-Based Persecution, Autumn 1997, 213-234 (Togo).

77 Immigration and Refugee Board (Canada) 13 July 1994, CAS/CAN/026 (Somalia).

78 Commission des Rejours des Réfugiés (France) 18 September 1991, case of Aminata DIOP, CAS/FR/A079 (Mali).

79 Refugee Status Appeals Authority 5 April 1995, case 915/92, quoted in UNHCR Division of International Protection 1997, 111; emphasis added.

80 Cipriani 1993, 538.


82 Stipkerboer-Vermue 1995, 106.

83 The decision in his case is published at Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 20 December 1996, GV 18a-22 (Somalia).

84 Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 20 December 1996, GV 18a-29 (Somalia).

85 Rechtbank 's-Gravenhage, zp Haarlem (Netherlands) 11 April 1997, GV 18a-25 (Afghanistan). Doctrinally identical is Cassel d'Etat (France) 31 July 1992, case of Michèle DUVAILIER, CAS/FR/A066 (Haiti), although in this case the appeal was dismissed on the facts.

86 Afdeling rechtspraak van de Raad van State (Netherlands) 7 May 1992, RV 1992, 5, GV (oud) DI2-212, NAV 1992, p. 299-297 (Chile): comp. Afdeling rechtspraak van de Raad van State (Netherlands) 29 January 1991, RV 1991, 2 (Zaire). Compare Bundesverwaltungsgericht (Germany) 2 July 1985, Streit 1985, p. 144-146 (Turkey); Bayerisches Verwaltungsgericht Ansbach (Germany) 24 July 1986, Streit 1987, p. 48-51 (Iran); Oberverwaltungsgericht Nordrhein-Westfalen (Germany) 3 May 1988, CAS/DEU/0055 (Iran); Bayerisches Verwaltungsgericht Ansbach (Germany) 23 November 1989, CAS/DEU/030 (Iran); Commission des Recours des Réfugiés (France) 20 July 1989, CAS/FR/076 (Chile); Commission des Recours des Réfugiés (France) 11 January 1991, CAS/FR/A026 (Sri Lanka); Commission des Recours des Réfugiés (France) 18 April 1991, CAS/FR/A093 (Rumania); Commission des Recours des Réfugiés (France) 3 June 1991, CAS/FR/A090 (Turkey); Commission des Recours des Réfugiés (France) 5 November 1991, CAS/FR/A077 (Zaire); Immigration Appeal Tribunal (United Kingdom) 21 August 1987, CAS/GBR/003 (Iran); Queen's Bench Division (United Kingdom) 19 July 1996, [1997] Imm AR 43 (Brazil): membership in a family is membership in a particular group, also if the primary target of the persecutor is persecuted for a non-Convention reason.

87 Afdeling rechtspraak van de Raad van State (Netherlands) 28 July 1993, RV 1993, 13, GV (oud) DI2-236, NAV 1993, 46 (p. 335-336) (Iran). In the case of an Iranian woman who feared persecution on account of her deceased husband's activities, in contrast, the court argued that she would be able to convince the authorities that her husband had died and consequently no longer had well-founded fear of persecution; President Rechtbank 's-Gravenhage, zp 's-Hertogenbosch (Netherlands) 24 December 1996, JB 1997/4, p. 31-32 (Iran), comp. Rechtbank 's-Gravenhage, zp Amsterdam (Netherlands) 17 December 1997, JV 1997, 17 (Iraq).

88 For example, President Rechtbank 's-Gravenhage (Netherlands) 18 December 1992, NAV 1993, 11 (p. 21) (Turkey); President Rechtbank 's-Gravenhage, zp 's-Hertogen-
bosch (Netherlands) 23 September 1994, 94/3648, JU 1994/11, p. 12-14 (Tudjman-
stan)); Rechtbank 's-Gravenhage (Netherlands) 30 August 1995, RV 1995, 10, NAV 1996, 4 (p. 128-133) (Iraq); President Rechtbank 's-Gravenhage, zp Haarlem (Neth-
erlands) 10 January 1996, 95/3409, RN 1996, 577, JU 1996/3, p. 15-16 (Iraq); Presi-
dent Rechtbank 's-Gravenhage (Netherlands) 2 September 1996, NAV 1996, 32 (p. 1035-1038) (Angola); Compare Commission des Recours des Réfugiés (France) 14
KOLO, CAS/FRA/103 (Zaire); Commission des Recours des Réfugiés (France) 14
KOLO, CAS/FRA/103 (Zaire); Commission des Recours des Réfugiés (France) 7
KOLO, CAS/FRA/103 (Zaire); Commission des Recours des Réfugiés (France) 7
KOLO, CAS/FRA/103 (Zaire); Commission des Recours des Réfugiés (France) 7
KOLO, CAS/FRA/103 (Zaire); Commission des Recours des Réfugiés (France) 7

93 U.S. Court of Appeals for the Fifth Circuit (USA) 15 February 1995, Zeng v. INS, 44 F.3d 379; 1995 U.S. App. LEXIS 2699 (China); U.S. Court of Appeals for the Fourth Circuit (USA) 6 March 1995, Chai v. Carroll, 48 F.3d 1331, 1995 U.S. LEXIS 4338 (China); U.S. Court of Appeals for the Second Circuit (USA) 15 May 1996, Jia-Ging Dong v. Slattery, 84 F.3d 722; 1996 U.S. App. LEXIS 11456 (China); U.S. Court of Appeals for the Second Circuit (USA) 19 May 1995, Xin-Chang Zhang v. Slattery, 55 F.3d 732; 1995 U.S. App. LEXIS 12296 (China); U.S. Court of Appeals for the Ninth Circuit (USA) 6 September 1996, De You Chen v. INS, 95 F.3d 801, 1996 U.S. App. LEXIS 23324 (China); U.S. Court of Appeals for the Fourth Circuit (USA) 24 December 1997, Shammin Liu v. INS, 1997 U.S. App. LEXIS 36076 (China). It should be noted that these rulings are not the result of a full substantive test but of a marginal one, namely whether the administration’s interpretation of the refugee definition is unreasonable or inconsistent. Despite this marginal test, the Appeals Courts use full substantive rea-
sions to dismiss one child cases.


95 The best overview of this is given in U.S. District Court for the Southern District of New York (USA) 5 August 1994, Xiu-Chang Zhang v. Slattery, 85 F. Supp. 708, 1994 U.S. Dist. LEXIS 1015 (China), which was later reversed (see above). See also Brown 1995 and Lin 1995. A Bill introduced in Congress in 1995 which, among other things, provided for asylum for a limited number of Chinese nationals who had been subject to a coercive population control program got stuck in the Senate in September 1996; House Bill 2202, HR. 2202, 104th Cong. (Immigration in the National Interest Act of 1995).


99 U.S. Court of Appeals for the Ninth Circuit (USA) 2 April 1987, Lau-Majavno v. INS, 813 F.2d 1432; 1987 U.S. App. LEXIS 4152 (El Salvador). Differently U.S. Court of


112 Federal Court of Appeal (Canada) 5 November 1992, Canada (Minister of Employment and Education) v. Marcel Mayeret, A-544-92 (Trinidad).

113 Immigration Appeal Tribunal (United Kingdom) 28 June 1994, CAS/GBR/0956 (Iran).


121 Afdeling rechtspraak van de Raad van State (Netherlands) 8 December 1989, RV 1989, 8, GV (oud) D12-175, RVR 199 (Sri Lanka); Sri Lankan Tamil raped several times by soldier looking for her boyfriend; attention not directed at her but at the boyfriend; an almost identical reasoning is used in an Angolan case, President Rechbank 's-Gravenhage, zp 's-Hertogenbosch (Netherlands) 19 March 1996, 95/9290, JuB 1996/8, p. 2-3 (Angola); Afdeling rechtspraak van de Raad van State (Netherlands) 11 June 1993, RV 1993, 6, GV (oud) D12-234 (Turkey); rape of a Turkish Kurd pressed to disclose the hiding place of her husband: rape not an expression of persecution by the authorities; comparable is Afdeling rechtspraak van de Raad van State (Netherlands) 1 June 1991, NAV 1991, p. 500-502 (Chile), and President Rechbank 's-Gravenhage (Netherlands) 7 March 1995, 94/10025, JuB 1995/5, p. 18-19 (Georgia); rape not considered persecution but deportation prohibited on humanitarian grounds; Rechbank 's-Gravenhage (Netherlands) 27 March 1997, NAV 1997, 75 (c. 426), JuB 1997/7, p. 23-25 (Somalia); Somali woman raped several times, which is seen as a consequence of the general situation; Rechbank 's-Gravenhage, zp Amsterdam (Netherlands) 25 July 1997, JuB 1997/16, p. 31-32 (Somalia); Somali woman in whose case "it has not been established that the abduction and rapes of the applicant were inspired by political motives"; the applicant already had a humanitarian residence permit; Rechbank 's-Gravenhage, zp Zwolle (Netherlands) 9 February 1998, JuB 1998/5, 8, p. NAV 1998, p. 286-288 (Turkey); Turkish Kurd raped by the police; no singling out, as others were raped as well, and consequently not established that rape was connected to applicant's support for the PKK; applicant does qualify for a humanitarian permit. Comp. Queen's Bench Division (United Kingdom) 21 March 1995, [1995] Imm AR 425 (Sri Lanka); Sri Lankan woman detained by security forces, tortured and raped, but not attributable to a Convention reason.


123 Sijpkerboer/Vermeulen 1995, 146-151.


125 For example, see Meron 1993.

126 For example, Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 8 January 1997, RV 1997, 1 (Bonia-Herzegovina); fear of ethnic cleansing. See on German practice Marx 1995, § 76, 34.


128 Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 21 November 1996, NAV 1997, 2 (p. 5-6) (Sudan). Comp. the rejection of the singled out criterion in Immigration and Refugee Board (Canada) 24 December 1991, CAS/CAN/021 (Somalia); a female member of the Hua'iwa clan without male protection is differentially at risk in Somalia and has a well-founded fear of persecution based on membership in her social group; Commission des Recours des Réfugiés (France) 24 February 1992, case of Aissata TOURE, CAS/FRA/083 (Mauritania); black African woman from Mauritania persecuted by 'Mozeih'; Commission des Recours des Réfugiés (France) 6 December 1991, case of Vijayalakshmi KRISHNAPILLAI ROBIN NI- MALRAJ, CAS/FRA/088 (Sri Lanka); Sri Lankan Tamil raped by IPKF soldiers when she periodically reported herself.

129 Afdeling rechtspraak van de Raad van State (Netherlands) 6 August 1992, GV (oud) D12-217, NAV 1992, p. 553-556 (Chile). Comp. President Rechbank 's-Gravenhage, zp Amsterdam (Netherlands) 15 February 1994, NAV 1994, 40 (p. 406-407) (Zaire); "sufficiently established that rape of women is systematically used as a means of pressure in Zairian prisons." In US case law, the motivation criterion is applied as well: "a petitioner alleging persecution must present some evidence, direct or circumstantial, of the persecutor's motive since [the definition, TS] requires "persecution on account of various characteristics, such as political opinion"; a requirement which was met in this case of sexual violence by Nicarguan Sandinistas against a woman associated with the Somoza regime, U.S. Court of Appeals for the Ninth Circuit (USA) 8 November 1996, Lopez-Galazar and Hernandez-Lopez v. INS, 99 F.3d 954, 1996 U.S. App. LEXIS 20156, at 959 (Nicaragua).

130 E.g., Rechbank 's-Gravenhage, zp Amsterdam (Netherlands) 11 July 1997, JuB 1998/1, p. 23 (Somalia); Rechbank 's-Gravenhage (Netherlands) 7 April 1998, JuB 1998/8, p. 22 (Somalia); Rechbank 's-Gravenhage, zp Zwolle (Netherlands) 2 Sep-
The gender-specific definition of this case may be related to the fact that baby boys are routinely circumcised in the USA.


In light of the negative case law in the United States on Salvadoran asylum applicants, it may be significant that a positive decision concerned a woman persecuted on account of active participation in a Christian study group; according to the decision-maker, the persecution was not on account of religion or membership in a particular social group, but on the basis of political opinion, Board of Immigration Appeals (USA) 13 September 1983, CAS/USA/072 (El Salvador).

Where, in other countries, they did reach the courts, the decisions were mostly positive, e.g., Verwaltungsgericht Zürich (Switzerland) 16 March 1994, CAS/AUT/017 (Bonita Herzegovina); a Muslim from the Sandjak region in Yugoslavia Commission des Recours des Réfugiés (France) 4 March 1993, case of Nermina DERIVOVIĆ DOLOVAC, CAS/FRA/102 (Yugoslavia). But see Bayerisches Verwaltungsgericht Ansbach (Germany) 18 February 1993, CAS/DEU/111 (Bosnia-Herzegovina): Bosnian women were protected in Germany not on the basis of the Refugee Convention but on the basis of a domestic temporary protection system.

The leading decisions on clitoridectomy also define it in terms of a tribal, ethnic and/or religious practice.

For the dress code issue in Iran reduced to the issue of “the also for women severe Islamic order in Iran”, see Bayerisches Verwaltungsgerichtshof (Germany) 13 July 1989, Marx 1991, 909 (Iran).
5 Counter-Strategies and the Reactions of Governments

In the previous chapters, I presented an analysis of the dominant discourse on female asylum applicants in asylum policy, administrative practice and court decisions. Although some developments in case law were noted, the picture is rather static and no systematic attention has been paid to the ways in which people resist dominant discourse. In this chapter, the focus will therefore be on the ways in which applicants, lawyers and academics criticise decision-making practice and how governments have reacted to this. The thrust of my argument will be that refugee law discourse is so dominant that the counter-strategies of lawyers and academics tend to reproduce the fundamentals identified in the previous chapters: namely the opposition of the West to the Rest and the opposition of “normal” versus “women’s” cases.

5.1 Resistance to Ethnicisation by Bosnian Applicants

It is virtually impossible to determine the exact counter-strategies of the applicants, although it seems evident that they engage in strategic behaviour. Their input to the asylum procedure is mediated through others, namely the interview official and their lawyers (as well as people working for non-governmental organisations like the Dutch Refugee Council). The perspective of these mediators is so dominant that the interventions of asylum applicants themselves cannot be analysed separately. Interview reports certainly show irritation, lack of co-operation, exasperation and such on the side of applicants, but this is typically registered as obstruction which reflects the perspective of the interview official and does not allow us to discern the perspective of the applicant.

There is one exception to this pattern, although one may find my analysis to be an over-interpretation. My perspective on this point is inspired by what I know from the ex-Yugoslav circles which I frequented in the first half of the 1990s. Against the backdrop of the conflict in former Yugoslavia, self-designation became highly charged. Self-designation in ethnic
terms (Croat, Serb, Muslim) was seen as in some sense agreeing that the
conflict was ethnic and implicitly agreeing with the break up of former
Yugoslavia. To designate oneself as a Yugoslav, however, was seen as pro-
Serb because the war began when Serbia wanted to prevent the secession
of Slovenia and Croatia. The two most common ways of solving the prob-
lem were to refer to the former status of Yugoslavia (“I am an ex-Yugo-
slav” or “from former Yugoslavia”) or to refer to one’s place of origin (“I
am from Belgrade”). Another sensitive issue was the equation of ethnicity
and religion in the conflict. While, for example, the majority of Croats are
Catholic, some people see themselves as Catholic without further implica-
tions for their loyalty to, in this, example, Croatia.

It struck me that many of the Bosnian applicants showed signs of rejecting
the categories routinely used to classify them. One applicant gives her re-
ligion as Roman Catholic but not her ethnic group as Croat, as one would
expect, but “the population group of Bosnian Catholics.” In another case, a
correction to the interview report reads:

The applicant indicates with emphasis (as she has done during the inter-
view several times) that she belongs to the Catholic population group
but not to the Croat group.

In an omission which one can consider significant, this applicant does not
state that she is a Serb or Muslim instead of being a Croat, possibly be-
cause she had a Muslim boyfriend; they were both seriously harassed on
account of their “inter-ethnic” relationship.

Seven applicants say things which one may find ambiguous. For ex-
ample:

Ethnic group: Bosnian Muslim, not practising. Both my parents were
Muslim.
Religion: Muslim, not practising.

Some applicants say that they have the ex-Yugoslav nationality. This may
be taken as an expression of rejection of the whole conflict in former
Yugoslavia; it may also be a simple result of the fact that they never had a
Bosnian passport, which makes their ex-Yugoslav passport the last formal
indicator of their nationality. Nevertheless, in one of the cases in which the
applicant’s nationality is noted as “Ex-Yugoslav (Bosnia)” in the interview
report, more seems to be at stake. With regard to her ethnic background,
she says no more than indirect things (“I have a Catholic name,” “They
called me names and said I was an Ustasa”); she uses the word “Bosnian”
to refer to government soldiers; and she refers to private individuals (in-
cluding the friend who helped her to escape) as Muslim. One (“Muslim”) 
woman distorts our orderly picture of the Bosnian conflict because she fled
from the Bosnian (“Muslim”) government troops (because her father sup-
ported Abdić in the BiHac enclave):

I have no national or personal feelings of hate against any one. I don’t
see any future in Bosnia. Because of the hate between Muslims and
what the troops of Alija Izetbegovic have brought about, I cannot be
loyal to his government. I expect that we will never have a democratic
state.

This passage, as others in the interview report, suggests that the applicant is
a Muslim, but questions regarding ethnicity and religion were not asked
and the woman nowhere describes herself as a Muslim.

Only three applicants make the full connection between religion and
ethnicity:

I have the Bosnian nationality. I belong to the Bosnian Muslim popula-
tion group, my religion is Islam.

I think it was possible for at least some of these applicants to intervene in
this way in their own case because the interview officials were not aware
that self-designation could be a relevant issue. Furthermore, what the appli-
cants said about their experiences in Bosnia-Herzegovina hardly mattered
as they were admitted as refugees in principle. This means that the inter-
view officials were generally not listening for clues of persecution, politi-
cal activities or lying. In the other cases from the sample, the strategy of
the applicants could not be traced because of the dominant perspective of
the interview official. In other words, resistance to ethnicisation in the Bos-
nian cases was only possible because the interview officials simply did not
recognise the sensitivity of the self-designation issue or considered it irrele-
vant.

5.2 Lawyers: The Dissident and the Victim

For lawyers, there are two ready-made counter-strategies. One is to repre-
sent the applicant as a classical political or religious dissident, which fits
best with the construction of the refugee illustrated in the previous chap-
The other counter-strategy is to represent the applicant as a victim, which fits with "compelling reasons of a humanitarian nature" and constitutes a basis for a humanitarian residence permit in The Netherlands. Using one strategy makes it hard to pursue the other although the two strategies have a lot in common.

**Portrayal as a dissident**

One counter-strategy adopted by lawyers is to criticise the representation of their client as a passive victim of arbitrary violence and to argue instead that their clients were activists targeted for their opinions. We have seen examples of this, such as the Zairian woman working for an organisation of relatives involving disappeared people; her lawyer successfully transformed her from a "mater dolorosa" into a "crazy mother" (section 3.3). We also saw the example of the Sri Lankan woman (Anne) who was raped and saw her son shot. Both the interview report and the decision depict her as a victim of general violence while her lawyer argues that she was singled out on account of her efforts to resist the LTTE (section 3.1).

In the aforementioned manner, lawyers try to move the picture of their clients away from the passive victim in the direction of the stereotypical refugee or, in the words of Steendijk, "the critical intellectual, active and profiled in the illegal resistance, organised and ideologically well informed." Precisely because the dissident is often the paradigmatic refugee, it is surprising that lawyers regularly miss the opportunity to represent their clients as such.

A Sri Lankan woman heard that her son had been executed by the LTTE, and went to their main camp in Jaffna where she protested against it (see page 66 above). She was threatened with execution. The decision says that she has never been politically active and never personally experienced problems from the side of the Tamil Tigers. The request for review does stress that the applicant was afraid and furious, but does not suggest that her protest can be seen as a crazy-mother style of political activity that triggered the threat of execution.

In a Chinese case in which the applicant evades forced marriage, the lawyer stresses the seriousness of the applicant's objections to the selected boy.

The applicant does not want to marry Mr. * on account of his tyrannical attitude. Marriage to him would mean a prison for the applicant.

According to the interview report, the applicant herself has used more articulate arguments that may be seen as a basic feminist critique of marriage:

I didn't want to marry this boy because I found him stupid and backward. Because his father was the mayor, he thought he could do anything. He hit me regularly. He did this because he thought I was his and because I had been promised to him. I knew that I would not have any freedom if I married him. He also stuck to old traditions. He considered me as his possession. He didn't treat me as an equal.

**Portrayal as a victim**

One of the reasons why lawyers do not always seize the opportunity to portray their clients as victims is the availability of an alternative strategy, namely the depiction of their client as a victim. Victimisation implies persecution and in such a manner helps establish refugee status; victimisation may also help the applicant qualify for the so-called trauma policy. In the mid-eighties, a special policy for dealing with traumatised Tamil applicants was developed. The State Secretary of Justice initially wrote the following: "In Tamil cases, it has appeared that in a number of cases the granting of a residence permit on compelling humanitarian grounds is appropriate. This concerns notably the situation in which close relatives or friends have become the arbitrary victim of actions of the police or the military, or of Tamil extremists. In such a case, it is not required that the people concerned return to Sri Lanka, even if they, themselves, do not expect individually targeted treatment from the side of the authorities." In jurisprudence, it has also been established that situations in which the applicant herself has been the victim of arbitrary violence also fall under this "trauma policy." The policy was later generalised to other nationalities as well, in part as a result of the pressure of case law.

In the following, I will present two examples in which lawyers try to portray their clients as victims. They are both Iranian cases in which the lawyers try to reopen a case after the asylum procedure has ended negatively for the applicant. Reopening cases typically involves a new lawyer in part because it is often necessary to criticise the perspective of the lawyer who handled the case initially. The new lawyer looks for compelling and dramatic arguments, and it is informative to see how this is done.

In one case the Iranian applicant said she had kept a diary concerning human rights violations. Her application was dismissed on the ground that, in reality, she sought reunion with an old love.
The second lawyer argues that the facts of the applicant's case were never presented fully. He writes an extensive letter, after which the applicant is interviewed for a second time. These two documents, together with the corrections the lawyer later submitted, take up 26 pages. The interview is very detailed and suggests tactful questioning, as do the letters of the new lawyer. The story remains basically the same, but it is made clear how the applicant got the information on the human rights violations; there is considerable information on how, during her several detentions, she was sexually intimidated in a manner that has affected her deeply; also that she has recognised some of her persecutors in Dutch asylum camps. At the moment I saw the file, the Ministry of Foreign Affairs was conducting an investigation about the correctness of the applicant's statements.

What is striking about this second procedure is that the applicant's political activities are found to be of potential relevance (as clear from the Ministry of Foreign Affairs' investigation) once the applicant provides more details on both how she got her information and the sexual harassment she has undergone. The lawyer seems to adopt a double strategy: he presents her as both as a political activist and a (sexual) victim of the oppressive Islamic regime. In my analysis, it is the dramatic rendering of the sexual violence including the recognition of persecutors in The Netherlands (a classical film scene) which is used to break through the impasse. These stark images make it possible to reconsider the flight motives of the applicant and to wonder how the applicant got her human rights information (something that might have been looked at before).

In another Iranian case the applicant was an unmarried woman born in 1960, politically active and sentenced to one year in prison and 300 whip lashes. She resumed her activities at a low level a few years after her release. When, half a year later, she heard from her neighbours that she had looked for while she was not at home, she fled. The application was dismissed because the applicant's experiences do not amount to persecution ("The applicant was released after one year, which does not indicate paramount objections of the Iranian authorities to her" the decision argues) and because her claim that she is wanted again is based on speculation.

Three months after the final rejection of the claim, the case is reopened by a second lawyer. He argues that the applicant has never had a proper and full interview. He submits two documents, one is a letter from a Dutch Refugee Council worker to the new lawyer, a second a memo from a social worker. These documents contain gruesome details about what happened to the applicant during her detention. The details are predominantly sexual: she was forced to watch other women being raped, she was forced to have sex with other (female) prisoners, she had to whip small children while their mothers were watching, she had to walk around naked, and so on. These were the last documents in the file at the moment I saw it.

The strategy of the second lawyer (as far as one can tell on the basis of the two documents he submitted) is aimed at making the case spectacular more than at clarifying the central question of what indications the applicant has that she may be wanted again. The lawyer invokes stereotypic images of defenceless women at the clutches of barbarians and numerous graphic details.

In the first example above, the lawyer seeks to portray his client as a dissident by giving dirty details. In the second example, the lawyer focuses on the dirty details and thereby presents his client as a spectacular victim.

The dissident versus the victim

Although in the first example above we saw a case in which the victim strategy in applied within the framework of the dissident strategy, they are often in conflict. In the case of Diane (section 3.3), her lawyer portrays her as someone engaged in political activities and also as the victim of Muslim brutality. The lawyer mainly refers to the awful situation of Iranian women, mentions that women are treated like "dogs" and stipulates that women in Iran are persecuted "on account of the cultural diversity of norms and values and on account of religious, race and gender differences." This is a classical Orientalist strategy: the lawyer demonizes how Iranian society (i.e., Iranian men) treats women; it is the argued in syntactically ambiguous but clear terms that this treatment is the result of cultural difference. This focus on Diane as a victim of Iranian culture, however, makes it almost impossible to characterise her as a political activist.

The victim strategy is normally aimed at allowing the applicant to qualify for a humanitarian residence permit under the traumata policy. However, by arguing that the applicant has become the victim of arbitrary violence, which is the main criterion for a humanitarian residence permit, one makes it very hard to view the applicant as the victim of violence specifically targeted at her, which is one of the main criteria in practice for refugee status.

The traumata policy also requires, in practice, exceptional trauma. The traumatic experiences which many Sri Lankan and Zairian applicants relate
(sexual violence, the death of relatives) are routinely dismissed via standard text blocks. The traumatized policy appears to have an inflationary effect. In a great many of the Zairian cases, for example, the applicants themselves relate gruesome facts (detention, torture and sexual violence). It then becomes almost impossible for the Zairian applicants to distinguish themselves from the other Zairian applicants, and they are virtually all rejected as a result. When many applicants claim they have experienced awful things, decision makers tend to raise the standard of proof, require that the applicant departed on account of the event, become less sensitive and thereby encourage applicants to relate even worse things in order to qualify.

The victim strategy has the advantage of being consistent with the cultural stereotypes of Third World brutality but has the disadvantage of being too general ("we can't admit all victims of backward cultures"). The dissident strategy has the disadvantage of being consistent with those stereotypes (Third World women are often considered incapable of the things it takes to be a dissident); once the applicant has passed that hurdle, however, the dissident strategy has the advantage of making the case so exceptional that admitting her will not be a real problem.

What both strategies share is the requirement that the applicant be exceptional. She has to be the individual target of violence on account of high profile political activities (refugee status) or the victim of exceptionally traumatic events (humanitarian residence permit). Both strategies force the lawyer to argue that this applicant, as opposed to others, should be admitted. As a result, a lawyer doing a good job for one applicant is making it harder for others. In this way, lawyers are forced to reproduce restrictive immigration discourse in a very practical sense.

The case of the Jones family (Turkey)

Three Turkish cases of applicants from a family I will call the Joneses provide a very rare example of a lawyer seeking to argue for one applicant without arguing against the others. The facts given by the Joneses are typical of those of Kurdish applicants from eastern Turkey, be it that the facts are described in unusually great detail by the lawyer. The three applicants from the Jones family have flight motives in which their family background plays a dominant role. In the following, I will sketch their position in the family along with that of three other relatives (one other woman and two men) who play a role in their stories.

Apart from Germaine, Hanna and Ingrid, ten Joneses reside (or resided until they died) in The Netherlands. The majority of them have a refugee status or a humanitarian residence permit (or subsequent Dutch nationality). Yet another Jones has a refugee status in Germany. I will first describe the way in which the extended family used to live in Turkey; the facts for this were gathered from interview reports and documents submitted by the lawyer during their procedures.

The Jones family tree

<table>
<thead>
<tr>
<th>Grandfather Jones †</th>
<th>Son 1 †</th>
<th>Son 2 †</th>
<th>Son 3 †</th>
</tr>
</thead>
<tbody>
<tr>
<td>John (1960) &amp; 5 other children from 1st marriage; Germaine (1969) + 3 other children; one is Jack (1971)</td>
<td>8 children; third son has 6 children, the oldest is Hanna (1973)</td>
<td>8 children; oldest son has 3 daughters, one is Ingrid (1972); 4th son has daughter from 2nd marriage, called Joanne</td>
<td></td>
</tr>
</tbody>
</table>

The Joneses lived in a group of houses constituting a compound which is part of a village in eastern Turkey, in Kurdistan. The applicants remember harassment from their infancy on. In 1975 or 1976, John got in trouble. He was accused of leading a political action at his high school. He went underground. The police and soldiers regularly visited the compound in order to look for terrorists. They forced the family members they found to walk between themselves and the parts of the compound they wanted to search; in this way, they served as a human shield. They searched the houses thoroughly, making a big mess and beating up the family; some of the young men received severe beatings. Other people were also asked about the whereabouts of John.

Germaine remembers young men being around well before the 1980 coup. At the time, she did not understand what they were doing and where they were staying. She was sent to bring them food in the fields of the Joneses, and only learned about their hiding places much later. During raids, soldiers would ask where the men were staying; as Germaine did not know at the time, she could not tell. Ingrid also remembers young men being around. It later became impossible to shelter these Kurdish fighters, because the Jones compound was under such strict supervision.
John was captured in 1981. Ingrid relates that a few days after his arrest, he was brought to the compound in a car. He was shackled and covered with blood. The entire family had to watch John at gunpoint, so as to make him into an example. Ingrid cried all the time, and a full sister of John fainted. Germaine, her mother, a half brother and a full brother were arrested around that time. Germaine was released close to the village and her mother in a town nearby while the two brothers were detained for a month and only released after having been tortured.

After John’s arrest, the compound was raided regularly. The Joneses were insulted, maltreated and detained; during detention, they were seriously maltreated. Germaine regularly visited John during his prison sentence. This was very difficult. Often the visits were not allowed and, after a visit, Germaine was often interrogated about what John had said and possible messages from him. John became one of the leaders of prisoner protests. There were regular hunger strikes against detention circumstances, and Germaine participated in some of these. Germaine also went on a hunger strike in front of the prison in order to be allowed to visit John.

Hanna’s family left the compound for a nearby town in 1981 because the family couldn’t handle all the trouble. Later Hanna began working as a primary school teacher in yet another village. The police station was close to her school; she was constantly supervised, and her pupils were interrogated about the political topics of her lessons. She has witnessed terrible things. Once, on her way from Jonestown to the village where she worked, eleven fighters were shot. All of the traffic had to ride over the corpses, and those drivers who refused were beaten. Hanna recognised the body of a man from the village where she worked; his ears had been cut off and his eyes cut out. On another occasion, eight men were hung from an armoured car and driven around Jonestown. The corpse of a man from a nearby village was also placed at the door of the family house in Jonestown. Hanna was also harassed and intimidated together with her colleagues since 1991 because of unspecified suspicions of terrorism.

Hanna’s father applied for asylum in The Netherlands in 1991 and was recognised as a refugee. John was released in 1991, came home to the compound for about three weeks and then went to Istanbul. Shortly after he left, the police came looking for him. Germaine and her mother were called in by the police for an interview. As they did not dare to go, the muhtar (village headman) went and confirmed that the police wanted information on John. Whenever “something happened” in the surroundings, soldiers would come to the compound, search the place, intimidate the Joneses, beat people up and so forth. Germaine and her mother were once taken to the nearby town for interrogation. Her mother had a photograph of John with some friends in her clothes, and the photograph was discovered. They were then interrogated about the other men in the photograph.

In the early 1990s, Ingrid was detained for about eight hours. She had bought a book about Kurdish history which was not forbidden but nevertheless interrogated about it, beaten and warned “not to become like all those other terrorists.”

In the fall of 19*, Joanne was injured in Jonestown. The three Jones applicants give different versions. Ingrid’s family lived in the compound in the village in the summer and in Jonestown (where the children went to school) in winter. She says:

On * 19*, Joanne and her brother came for a visit [to the Jonestown house, T5]. At about 8pm they left. Shortly thereafter, we heard an explosion on the street. We ran outside and saw my niece lying on the ground. She was brought to a clinic by a military car. From there, she was brought to a hospital by car. There they determined that her leg had to be amputated. After this incident my father thought it better that I leave.

The police said it was all a misunderstanding and have apologised.

But we knew it was no misunderstanding, but purely on purpose. The military do this purely because of the JONES family.

This whole incident was described shortly afterwards in the newspaper *

The newspaper is forbidden now, the journalist who wrote this has been arrested as well. [...] I guess we have the newspaper clipping somewhere.

The journalist said in that article that it was the responsibility of the special squad and that they have apologised for the incident afterwards.

He said that that wasn’t necessary at all, as this kind of thing happens every day.

In the interview report, Hanna says:

At a certain moment, I don’t know the date, I got a message that a special squad would kill me on * 19*. In my place, they shot my niece Jones. Joanne. The occurrence was reported extensively in the newspaper *

The shoot out was about 60 meters from our house. I saw the crowd, but I didn’t know they had shot Joanne. I was at home together with my entire family except my father and my brother *, who were already living in The Netherlands.
I went to the place of the occurrence. I saw the soldiers take the living body of Joanne in an armoured car. In the car, soldiers removed her left leg. She has been treated in several hospitals for her wounds. That same night, the perpetrators called my uncle. He is a brother of my grandmother. The perpetrators told him that they had killed me. Uncle went to the hospital and found not me but my niece. Upon his return, I was informed by uncle.

After this occurrence, my mother decided to send me and my sister to Istanbul. She was worried about our lives. We had reached a grown-up age. The other brothers and sisters still were children. It was also impossible for the whole family to go to Istanbul.

The report of the ACV interview makes clear that Joanne had just left the house where Hanna lived. This means that Hanna and Ingrid lived in the same house. Hanna also says that the armoured car was around because there was a curfew; people were not allowed to go outside after 6pm. Joanna was shot between 7 and 8pm.

Hanna leaves for the Netherlands. Her mother, sister and three brothers already live in the Netherlands when Hanna arrives. For them, the incident with Joanne was a reason to ask for and receive admission to the Netherlands as dependent family members of Hanna’s father who was living as a refugee in the Netherlands. Hanna was older than 18 at the time and therefore not eligible for this, like one other sister. At the time of the initial interview, that sister was still in Turkey and lived in a major Turkish city outside Kurdistan; the travel agent was not prepared to take two sisters at once.

Germaine, who says nothing about living in the nearby town and presumably lived in the compound permanently, says in the interview report:

The problems which we had were because of my brother (John, TS). Because he was a member of the PKK, we were constantly supervised. My niece lost her legs because of my brother. Her leg had to be amputated, because Turkish soldiers were shooting with a tank.
Remark interview official: How do you know she was being aimed at?
They just do that intentionally.

After Germaine and Ingrid went to Istanbul together, one of the houses in the compound was raided several times. Ingrid’s father was shortly detained and questioned about John.

In 1994, a granddaughter of Son 2 (from his oldest son) was prosecuted on account of activities for the PKK in the Netherlands and given a prison sentence of a few months. Later the lawyer informs the Immigration and Naturalisation Service that Ingrid has a relationship with Jack (see family tree). Still later, she informs the Service that Hanna gave birth to a child a month before; she does not say whether Hanna is married or has a relationship, or who the father of the child is.

In the cases of Ingrid and Hanna, it is clear from the interview report that the incident with Joanne was the reason for them to leave Turkey. In Germaine’s case, the concrete reason to leave Turkey is not clear; only by putting the occurrences she relates into chronological order can one conclude that the incident with Joanne also must have been the reason, as her lawyer later confirms. The decisions in all three cases are negative and based on comparable grounds. The decision in Ingrid’s case argues:

The applicant has stated that in 1995, she was arrested on account of reading the book Kurb Tahir by professor Ismail Besikci. Whatever may be, the applicant was released after 8 hours and has never experienced further problems from the Turkish authorities on account of this occurrence.

The applicant is of Kurdish descent. The applicant has stated that her cousin John is a member of the PKK. Her cousin was arrested in 1981 and in prison for 9 years. Several family members purportedly have experienced problems with the Turkish authorities on account of the activities of this cousin.

The single fact that the applicant belongs to the Kurdish minority in Turkey does not in itself lead to the conclusion that she has to fear persecution in the sense of the aforementioned Convention. Although those who belong to the Kurdish minority in Turkey may fear discrimination on occasion, the position of this minority is in general not such that persecution can be assumed.

The single fact that a family member of the applicant purportedly has undertaken activities directed at the Turkish authorities in itself is insufficient ground to conclude that the applicant is a refugee. It has not been established that the negative attention of the Turkish authorities is directed at the person of the applicant on account of the mentioned activities. Also, the incident with her niece does not lead to any other conclusion. It has not been proven nor established that this occurrence bears a direct connection to the activities of the cousin.

It is noteworthy that the decision begins with Ingrid’s arrest. In her flight motives, this arrest is only one of the many examples of persecution (and not the most problematic one) but it is highlighted in the interview report because “arrest/detention” is a separate heading. Also, the arrest seems to
be that part of the flight motives which is grasped easiest; the rest of the story is more complex.

The picture that one gets from the files of the Joneses is that the target of the Turkish army in Kurdistan is not only the armed PKK fighters but also the PKK infrastructure. In the case of the Joneses, they have succeeded; since the early 1980s, no young men have stayed at the compound. Despite this and despite John’s imprisonment, it seems that the Joneses are still seen as part of the PKK infrastructure, which may be correct: Hanna’s father was recognised as a refugee in the Netherlands and may have been active for the PKK, the Dutch prison sentence for a niece on account of PKK activities similarly indicates that some of the Joneses have indeed worked for the PKK. The three applicants dealt with here deny having worked for the PKK, but their denial may have been inspired by their knowing that PKK activists are hardly welcome in Western Europe or a wish to be active in the Netherlands without the authorities knowing this. The position of the Jones family is best captured by the image of them having to walk between soldiers and possible hiding places for PKK fighters during raids on the compound. In such a manner they were used as a human shield and to incapacitate fighters: if they wanted to shoot at the soldiers, they would have to shoot the Joneses first. The applicants were in the line of fire.

The decisions nevertheless find insufficient singling out: the applicants are not targeted personally. The main argument in the decisions has two layers. First, a lack of singling out can mean insufficient risk of repetition and therefore a fear which is not well-founded. If an applicant has only been detained incidentally and on one occasion, this in no way suggests repetition. Second, the argument that the applicant was not targeted personally can mean that the purpose of maltreatment is not to specifically torture her but to gain information on someone else or intimidate someone else.

It is remarkable that, in the documents and interventions for all three cases, the Jones lawyer does not do two things which are almost standard practice among lawyers in the field. First, she is unusually dry in describing any maltreatment. Although she provides unpleasant details at times, she does not dramatise them and uses understatements instead. She nowhere suggests that the maltreatment was of a sexual nature while this is quite probable. Second, she ignores the requirement that the applicant be singled out by the authorities, although the decisions consistently show the perceived lack of singling out to be problematic. Instead, the lawyer stresses the fact that the entire family was at risk and that what happened to Joanne might just as well have happened to any of the others.

Both of the preceding elements suggest the adoption of a long-term strategy. Spectacularisation and singling out are both inflationary: if you apply such a strategy in all cases, a lack of spectacle and singling out returns but then at a higher level. If a lawyer signals a high level of urgency in all cases, she can never characterise a particular case as an acute emergency. The strategy of the Jones lawyer suggests someone who attempts to let her clientele profit from her position as an experienced repeat player. In the case of the Joneses, one cannot play one family member off against the other. It seems clear that more Joneses will apply for asylum in the Netherlands, as in the case of Hanna’s sister who remained in Turkey because the travel agent refused to take both of the women. For this reason, the lawyer concentrates on a detailed account of the life of the Joneses since the 1970s, makes extended appeals to the equality principle and refers to a host of other files which she has handled on the Joneses and other Turkish Kurds.

5.3 The Feminist Critique of Refugee Law

Over the past two decades, a feminist critique of refugee law has been formulated. As will be seen, I distinguish the early critics, whose aim was to get the issue on the agenda; the human rights approach, which is aimed at legal reform; and the anti-essentialist critique, which opposes both the early critics and the human rights approach. The anti-essentialist critique also provides the basis for this book.

The early critics

The first criticisms, most notably by Meijer in The Netherlands and Indra in Canada, were aimed at getting the issue of women and refugee status on the agenda. In short, it was argued that the experiences of female asylum applicants are different from those of men and that refugee law practice does not acknowledge this. The critics see themselves as engaging in a struggle alongside refugee women against patriarchy and implicitly consider this struggle a universal one.

In 1980, the UN Conference on the Decade of Women and the UNHCR devoted attention to refugee women. In 1985, the Dutch Refugee Council (in the person of Marijke Meijer) organised the first international confer-
once entirely dedicated to the subject. Considerable emphasis was placed on the specificity of refugee women’s experiences. Indra wrote that “gender may play a major role in how refugees are created, and how distinct the refugee situation may be for women and men.” The position of women and men in the countries of origin is seen as “enormously different” and therefore “the assumption seems justified that male and female refugees have had a totally different experience of the problems they were confronted with in the country of origin.” The specifically female refugee experience is caused by two factors. First, women and men have “divergent relationships to the state and the public sphere (...) in source countries.” Women, as opposed to men, are forced to live primarily in what is considered the private sphere. Second, women are oppressed simply because they are women. This may happen because they have infringed on the moral or ethical values of their society (through non-compliance with dress codes, loss of virginity outside marriage, refusal of contracted marriages), they have failed in their function of wife or mother or they are politically active.

The first critics argued that refugee law does not address these specific experiences. “The overall discourse, practice, and research concerning refugees today remains primarily a male paradigm, even if in a superficial way it appears to be a universal and general one. (...) Far from a politically neutral concept, the current image of ‘the refugee’ is therefore deeply political.” Specifically female experiences go unaddressed. Private sphere activities which are characteristically women’s activities are denied the quality of “political.” Similarly, the oppression of women is seen as occurring in the private sphere. As Indra has pointed out: “State oppression of a religious minority is political, while gender oppression at home is not.” Sexual violence is consistently seen as a personal act unconnected to the victim’s political opinion.

The efforts of the early critics were aimed at two things. First, women’s political activities in the private sphere should come to be recognised as political. Second, in order to cover the oppression of women, gender should be added as a persecution ground. The persecution ground “membership in a particular social group” already provided the basis for recognising the victims of women’s oppression as refugees.

The tone of the early critics is radical and overtly political. Success simply cannot be achieved by providing superior legal arguments; a “fight” will be needed. The fight is one against a policy which treats women as appendages to their husbands, where “oppression of women and resistance by women remain invisible and are not made into a ‘political’ issue.” Meijer notes that the fight also has to be fought within non-governmental organisations (in her case, the Dutch Refugee Council), because the issue “involves strong repressive mechanisms that are also found in our own culture.” Meijer sees her work as part of a broader strategy and hopes that recognising gender as a persecution ground will “contribute to the awareness and acknowledgement of women’s oppression and women’s resistance.” The early critics engaged in an attack on the pretended neutrality of the law. Their claim was that law will solve the problem when properly applied but that the law is the problem. As Mulligan writes, “Inequalities in the law do not exist because of a mistake in a legal process sense;” legal rules to disengage sexism are only helpful if sexism is a legal error, which it is not; sexism is a system of domination.

The human rights approach

Meijer and Indra have been sharply criticised by Greathbach, who argues that it is better to try to achieve change by exploiting the internal flexibility of existing legal rules and concepts rather than challenging those rules and concepts. Indra and Meijer, she argues, posit a bifurcated version of social reality: there is a male-dominated public sphere and women are relegated to the private sphere. This private sphere is presumed to be the site of gender oppression. Greathbach summarises her criticism of what she calls the “radical feminist” approach as follows:

This analysis founders on its ahistoric, acultural approach to women’s oppression, in addition to its inattention to key aspects of the Convention definition and its overarching limitations. The bifurcated version of society itself ignores the realities of women’s lives outside domesticity, and creates a rhetorical and theoretical wall between domestic and social culture. It roots women’s oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the interconnections of the public and private spheres.

In such a manner, Greathbach added two important issues to the ongoing debate. First, she opposed the totalising tendencies of Meijer and Indra by calling for an analysis which does not erase the specific contexts from which the women seeking asylum come. Second, she criticised the implicit assumption that the law is a monolithic entity by emphasising that legal reasoning is flexible and can accommodate more than just the dominant view of gender.

In the wake of Greathbach’s article, many authors applied the developing feminist critique of human rights to the debate on women in refu-
gee law. In analysing the experiences of refugee women, the authors from what I have termed the human rights approach do not apply the internationalist tropes of the early feminist critics. Instead, they locate women's problems in culture. Refugee women flee "institutionalized misogyny" the "reflect(s) cultural or religious traditions that outsiders often cannot understand." They come from "countries with strong cultural or religious propensities for discrimination against women (...) While the third world is not alone in failing to accord women sufficient protection, the social relations of many third world nations are still dominated by religious, tribal or societal customs which accommodate, if not sanction, the persecution of women (...) Abuses within Islam, though obviously not unique, are perhaps the most conspicuous in contemporary times." In such countries, "violence against women is entrenched in the culture, legitimized in the laws, and sanctioned or tolerated by the authorities." Authors call for attention to the specificity of the experiences of refugee women. For example, "(f)emicide is a very complicated practice, one that must be understood in the context of culture, religion, and tradition." From such a perspective, refugee women suffer from tradition or, conversely, a lack of progress and modernity with emancipation and human rights as an important part.

As a result of the attention devoted to the context of the human rights violations women suffer, numerous detailed references to the violations and traditional, cultural and religious practices and legislation affecting women in various countries of origin have been made. In fact, the authors from the human rights approach have developed a precise taxonomy of women's flight motives. First, there are women who face persecution on the same grounds as men. These "gender-neutral" claims can be pursued for the women's safety. "The authors refer to various types of sexual violence as an example of this." Third, there are women fleeing gender-based persecution (i.e., women on account of their gender). The authors from the human rights approach subdivide gender-based persecution into four categories. Some women transgress social mores and are persecuted on account of this. All countries named as examples of this are Muslim countries. A second form of gender-based persecution is serious sex discrimination in, most notably, China, Africa and Middle Eastern countries. A third form is women persecuted because of a relation to politically active relatives under a dictatorship. The last category is that of women who face battery or abuse by non-governmental agents and are unable to obtain the protection of their government. Examples of this type of situation come from countries in Africa, Asia and Central America.

The proponents of the human rights approach argue that the problem which women with these experiences confront is twofold. First, gender-specific forms of persecution — sexual violence — are typically ascribed to the personal motivations of the persecutor. "The sexual nature of the harm often serves to personalize the event in the eyes of the adjudicator. Because rape is frequently viewed as a sexual act rather than an act of violence, the rapist, even when a governmental official or member of an anti-government fighting force, is perceived as acting from personal motivation." The other problem for women fleeing gender-based persecution is that gender is not recognized as the basis for constituting a social group. In both instances, the source of the problem lies in the fact that developments in human rights law (state accountability, prohibition of discrimination) have not been sufficiently incorporated into refugee law practice.

The solution which these authors sketch is the adoption of a gender-sensitive human rights paradigm, "a reconceptualization of the presentation of women's cases, including an examination of the political nature of seemingly private acts and the ways in which many states fail to accord protection to their female populations." Sexual violence, it is argued, should be considered persecution when the country of origin fails to provide protection and redress to victims. All four categories of gender-based persecution can, according to these authors, be addressed by considering (categories of) women as a social group. While considerable attention is given to the doctrinal issues surrounding the social group category, just why the social group category is used and not, for example, the political opinion category, is not addressed. Kelly, for instance, simply states that "the gender-related claims of women will largely be formulated within the particular social group category of the refugee definition." Two authors depart from this line when they argue that women who are the victim of intimate violence or female genital mutilation can be considered to express a political opinion by fleeing the country; they simply refuse to resign themselves to male domination and this would be the persecution ground. Others consider this a contravention of the law, or outright mistaken because "a woman's refusal to abide by the traditions of her country is not based on any political opinion or religious belief she may hold. Rather, it is based on her personal distaste for that particular tradition." However, the discussion of the appropriateness of the social group category is limited to this issue.
The notion that the cases of some women constitute normal cases while others call for a gender-specific analysis is often associated with the assignment of political opinion versus social group as a persecution ground. The distinctness of women’s experiences, it is argued, must be acknowledged by assigning particular social group as the persecution ground. A succinct summary of this view was provided in a New Zealand decision:

An approach to refugee determination which unjustifiably favours the political opinion ground to the exclusion of the social group ground will tend to reinforce the male gender bias often complained of by female asylum seekers, and inhibit the development of a refugee jurisprudence which properly recognises and accommodates gender issues within the legitimate bounds of the Refugee Convention.57

Because of this, the decision considered “women who, as a result of their deeply held values, beliefs and convictions, reject or oppose the way in which they are treated in Iran” (emphasis added) as members of a particular social group.67

The style of the human rights proponents is rather different from that of the early critics. The aim of the former is “recognition of the harm women experience”, an “accurate reflection of women’s reality,” providing women with “a meaningful opportunity to present their cases,”34 bringing about “proper adjudication,”55 bringing refugee practice into line with the fundamental principles of international law. Far from arguing that law is part of the problem, these authors argue that the solution can be expected from the law. Not considering gender-based violence as a basis for asylum is “limited and erroneous,”51 not considering women as a social group is an incorrect application of the law.52 The positive developments which most authors see, moreover, signal a “beginning awareness of the rightness in recognizing gender-specific persecution as a ground for granting asylum.”53

This display of faith in the legal system is consistent with the tactics deployed by many of these authors who argue for the adoption of very concrete rules.54 Kelly, the author of the most comprehensive article, has been a central figure in the campaign for the adoption of gender guidelines in the United States. The guidelines drafted for the campaign55 emphasise the role of culture in women’s oppression, distinguish gender-neutral persecution of women from asylum claims which are gender-related, give priority to social group as a persecution ground,56 and are cast in strictly legal terms.

The anti-essentialist critique

In recent years, the human rights approach has been subject to a three-pronged critique,3 which is an elaboration of the critique of gender and ethnic essentialism in both general social and legal theory.54

First, it is argued that the human rights approach relies on stereotypes which locate gender oppression in the indigenous cultures of the Third World and represent the Western countries of refuge as emancipated. In such a manner, the human rights approach is an extension of legal practice in which “women’s claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states. Hence the applicant must be cast as a cultural other.”55 The “imperial tropes”56 on which the human rights approach relies are argued to be part of the problem and not the solution. Crawford also argues that, when women’s oppression is culturalised in such a manner, “states are able to dismiss suggestions that they should provide asylum to women on the basis that ‘culture’ is private to sovereign states and does not fall within the remit of international human rights or refugee law.”57 The importance of analysing women’s experiences contextually is thus stressed, while the tendency to emphasise the cultural context of the applicants as well as the tendency to describe it in terms of the West’s monolithic Other is opposed.

Second, the anti-essentialist critique is quite sceptical about membership in a particular social group as a persecution ground. The human rights approach tends to frame any and all persecution of women as persecution because of gender. This tendency is criticised as reinforcing the image of only men as “real” refugees. “[I]t can reinforce women’s marginalization by implying that only men have political opinions, only men are activated by religion, only men have racial presence, etc. In other words, it may create and sustain the stereotype that men ‘own’ the categories of oppression that are not explicitly ‘gendered’.”58 This simply reinforces existing patterns of decision making. It may be both more appropriate and more effective to frame women’s claims in terms of political opinions when, for example, women refuse to conform to social mores.59 Conversely, however, the similarities in the social positions of women may be missed when this is done.60

The third critique concerns the instrumentalist concept of law adopted in the human rights approach. In an echo of Greatbatch’s argument, the anti-essentialist critics argue that legal discourse is flexible enough to accommodate the asylum claims of women. However, in an echo of the authors whom Greatbatch labelled “radical feminists,” whether legal reasoning in and of itself can bring about the solution, as the human rights ap-
approach suggests, is questioned. Law is seen as a vehicle for arguments both for and against women, and legal reasoning is therefore considered inconclusive. The real issue concerns the ideas about gender and ethnicity communicated through legal reasoning. Razack argues that an analysis of women in refugee determination procedures “suggests that we work with the manner in which immigration decisions are made rather than the matter of law, that is, its specific content. In the case of the Canadian Guidelines on gender persecution, the matter of the law has changed, at least at the level of guidelines, but this change does not appear to have greatly interrupted the traditional lens through which refugees are viewed”65. To change this requires, I would suggest, an unmasking of the trope of pity and compassion and a move towards a more political understanding of why women flee and what our responsibilities are to them.66

The anti-essentialist critique as the basis for a campaign on female asylum applications is exemplified by the campaign of the Refugee Women’s Legal Group (RWLG) in the United Kingdom. The central texts in this campaign, a handbook for practitioners66 and guidelines, have a form comparable to that of the guidelines propagated by the human rights proponents. However, the departures are significant. Both the RWLG handbook and its guidelines seek to avoid references to culture as the dominant explanatory concept. In so far as culture is mentioned, this is done in conjunction with other contextual factors (e.g., “the cultural and social context in which the woman lives”).67 Second, although in some places a distinction is made between gender-specific and non-gender-specific persecution,68 in other places gender is used as a comprehensive concept to analyse asylum claims. Thus, gender is not treated as equivalent to biological sex as seen as something characteristic of women only; instead, it is defined as referring to “the social construction of power relations between women and men”69 and explicitly seen as socially constructed. The gender-specific aspects of men’s claims are referred to in passing.70 Third, gendered persecution is not equated to persecution because of being a woman. Instead, the emphasis is on gender to “inform [the] assessment under race, religion, nationality, political opinion or membership in a particular social group.”71 The persecution ground which is foregrounded is political opinion.72 And finally, considerable emphasis is placed on the ideas informing particular legal arguments. An example of this is the rather political definition of gender cited above. Comparable is the remark that the approach advocated in the campaign will meet with resistance as it challenges traditional gender roles, and the emphasis on the Guidelines as only one step in a broader campaign.73 This indicates a conceptualisation of law as not so much an instrument which can yield particular results but as a site for the articulation of ideas in opposition to existing decision-making practice.

Conclusion

We can now briefly characterise the three groups of authors. The early critics engaged in a politicised attack on refugee law, which was seen as an institution reflecting male domination. The human rights approach depoliticised the issue with the argument that the problems of refugee women can be solved in law via an interpretation based on the legal concept of equality. In this way, it expressed loyalty to law. Also, by framing its arguments in terms of decision-making practice, the human rights approach paid a price for what it sought to achieve: It adopted the essentialism which actually characterises refugee law discourse on the points of gender and ethnicity.

The anti-essentialist critics argue that the human rights approach has incorporated the concepts of gender which are central to present day practice and detrimental to female asylum claimants. In addition, the anti-essentialists have criticised the continuity between the human rights arguments and the Western hegemony over a demonised Third World. In practical terms, the anti-essentialist critics argue that law itself is not monolithic; the law in itself is not patriarchal and it also does not bring the solution. These critics argue for politicisation of the issue through legal argumentation, which stands in opposition to politicisation against patriarchal law called for by the early critics, and to depoliticisation through legal argumentation called for by the human rights approach. Only in such a manner, argue the anti-essentialist critics, is it possible to attack the essentialist concepts of gender and ethnicity on which current decision-making practice, case law and legal doctrine rely. Such an attack can be formulated in terms of liberal rights discourse, but it would differ from the human rights approach by its explicit politicisation.

5.4 The Governmental Reaction: Gender Guidelines

In recent years, many Western governments have issued some sort of gender guidelines for decision making in asylum cases.70 The position taken by the British government in 1996, which stated that it “has not so far encountered any particular difficulties in the consideration of claims of female asylum seekers”71 has become rare. Nevertheless, at a 1996 UNHCR conference on gender-based persecution, the French position paper72 indi-
cated that the French authorities did not issue gender guidelines and did not intend to. The paper defensively notes that this “may be thought somewhat inadequate by comparison with what is done in certain countries and the requirements set by UNHCR,” but “a process of modernisation” is underway and it is recognised that “this modernisation would be incomplete if we did not include a reflection on the situation of women refugees.” In fact, only the German and Swedish papers rather bluntly reject the idea of addressing the issue in specific terms and note that a humanitarian residence permit is available for such situations. In 1997, Swedish legislation was amended to provide a humanitarian residence permit for asylum applicants who have to fear persecution on account of their gender or homosexuality. The new German government announced a possible change in its position in 1998, and the coalition agreement between the Social Democrats and the Greens states that administrative rules will be reviewed acknowledging gender-specific persecution grounds. In 1998, the Swiss Asylum Act was also amended to stipulate that those “serious disadvantages” which can be considered persecution are most notably physical danger, threats to life or liberty and measures leading to unbearable psychic pressure. It is further stated that “gender-specific flight motives must be taken into account.” Just what “gender-specific flight motives” may be and what the obligation to “take them into account” implies has yet to be elaborated, however.

The impetus to develop guidelines came from the 1991 UNHCR Guidelines on the Protection of Refugee Women. In the part of the Guidelines addressing the refugee definition, the fact that the persecution grounds do not include gender is identified as a substantive problem. The Guidelines address some specific issues: women fearing persecution or severe discrimination on account of their gender; transgression of social mores; sexual violence (also the topic of specific guidelines); and lack of government protection against abuse on account of transgression of social mores.

The impulse to issue guidelines has produced comprehensive documents in Canada (1993, updated 1996), the United States (1995) and Australia (1996), while the Dutch authorities have issued a short non-comprehensive document (1997). I will consider the Canadian and Australian guidelines, which are both humanitarian oriented, together. The US guidelines openly reflect certain political concerns; they are explicitly anti-franjan and “pro-life” (the Chinese one child policy). The Dutch document contains traces of the critique of essentialism.

Both the Canadian and Australian guidelines take a human rights perspective as their starting point. The question whether or not an act of which an applicant has become a victim should be considered persecution, is addressed by using international human rights law as a standard. The examples provided include sexual violence, genital mutilation, forced abortion, gender-specific social mores, forced marriage and restrictions on women’s behaviour. Non-state agents, the guidelines state, may be the source of persecution when the state is unwilling or unable to grant protection. In both of the guidelines it is argued that many of the claims of women fall under conventional persecution grounds. For example, challenging social conventions may lead to persecution on account of one’s (imputed) political opinion. Greater attention is nevertheless paid to membership in a particular social group as a persecution ground. In the Canadian guidelines, moreover, the persecution ground is subdivided into “grounds other than membership in a particular social group” and “membership in a particular group.”

Both the Canadian and the Australian guidelines argue that women may form a particular social group under certain circumstances.

The Australian guidelines do not refer to culture as the defining aspect of the situation refugee women are fleeing. In the 1996 update of the Canadian guidelines, an effort was made to make the text less culture specific than in the 1993 version. Thus, “an Asian woman in an African society” has been replaced by “a woman from a minority race in her country,” and “an Islamic society” is replaced by “a theocracy.” Both guidelines make a distinction between “normal” claims and “gender-specific” claims. The Australian guidelines try to counter this distinction by mentioning that men also make gender-based claims at times, and that “officers must carefully consider all general claims of persecution before turning to consider gender-related claims, otherwise there is the possibility that a woman’s claims of persecution unrelated to gender will be ignored.” In such a manner, the distinction is softened but obviously kept firmly in place. Both of the guidelines also focus on social group as a persecution ground. It is nevertheless noteworthy that this is done less exclusively than the authors within the human rights approach did and that the Australian document is again more subtle. Finally, both documents consider the guidelines as a technical-legal instrument for a better application of the refugee definition. They indicate a willingness to politicise, to some extent and different degrees, the situation of women in particular of origin. That our own conceptions of gender might be at stake, however, is not an issue.
The US guidelines have a different character than the Canadian and Australian guidelines. On the issue of what constitutes persecution, the text is much less compelling than the Canadian and Australian texts. The examples of things women may suffer include sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence and forced abortion. Instead of indicating that these are examples of persecution, however, the guidelines state that decision makers should assess whether these instances of harm amount to persecution. In this section, the guidelines contradict the idea that sexual violence is always purely personal harm.

The clearest examples of persecution given in the relevant sections concern Iranian cases. The guidelines point out that compulsorybehaviour which is not physically painful or harmful but abhorrent to the applicant’s deepest beliefs (the example is “an Iranian woman faced with having to wear the traditional Islamic veil and to comply with other harsh rules imposed on women in Iran”) can constitute persecution, provided that the abhorrence is of a degree that a reasonable person in the circumstances of the applicant: could share it.

The substantive part of the US guidelines is largely dedicated to the issue of what constitutes a persecution ground. Referring to Iranian cases, the guidelines state that beliefs about the role and status of women in society constitute a political opinion. In connection with a controversial Salvadoran case which was dismissed, the guidelines note that imputed political opinion may be a relevant persecution ground. Most of the attention is directed at the social group category. The guidelines approvingly quote the Sixth decision (see section 4.4 and 4.6 above). Similarly, the decision that women previously battered and raped by Salvadoran guerrillas do not form a particular social group is quoted with consent. The guidelines do not address the question of what the persecution ground could be in cases of, for example, forced marriage, domestic violence or forced abortion. In a section entitled “Public versus Private Acts,” the guidelines deal with the issue of agents of persecution and extensively argue that when public officials commit private acts (the examples all concern sexual violence), this does not constitute persecution.

The US guidelines portray (in particular Islamic, Iranian) culture as the dominant issue in women’s asylum claims. It notes that “often, of course, the asylum claim of a female applicant will have nothing to do with her gender. In other cases, though, the applicant’s gender may bear on the claim in significant ways”. In this way, the distinction between “normal cases” and “women’s cases” is once again confirmed. Social group is also the central focus of the document, while its style is one of a dispassionate overview of US case law.

The Dutch document is short and not comprehensive. It is one of many “working instructions” for the guidance of decision-makers. The document takes the concept of gender (defined as “the social meaning of masculinity and femininity”) as its point of departure. It is argued that the scope of the public sphere is different from country to country. This implies that acts which are commonly performed by women and usually seen as private may have political relevance in specific settings (cooking for resistance fighters is presented as an example). It is also emphasised that sexual violence inflicted by public officials during the exercise of their function in relation to a persecution ground is not a private act but an act of persecution. In a section on persecution grounds, all emphasis is placed on (attributed) political opinion in cases of, for example, transgression of social mores or opposition to genital mutilation. The idea that gender can be the only criterion to delineate a social group is rejected, as “(w)omen in general” in emphasis of original, TS (…) are too diverse a group to constitute a particular social group. In order to establish membership in a social group one should occupy an exceptional position compared to those in an otherwise similar situation.” Discrimination of women is seen as relevant if it seriously limits the possibilities of existence. A humanitarian permit is indicated in cases of discriminatory practices, “human rights violations in the private sphere” and for women who fear they will have to undergo genital mutilation. The guidelines do not address the issue of persecution by non-state agents.

I have considered the Dutch document separately as it was drafted in part as a response to a text I included in the anti-essentialist group (namely, my own 1994 publication). The document does not refer to any particular country of origin or religion. Where it does refer to a particular setting, it does so in terms reminiscent of the Refugee Women’s Legal Group document (e.g., “discriminatory social habits, religious prescriptions or cultural norms”). The distinction between “normal cases” and “women’s cases” is not mentioned explicitly, although it is implicit at some points. Political opinion is considered as the most relevant persecution ground; women as a social group are even dismissed (although the italicised passage may indicate that more narrowly defined social groups are acceptable to the administration). Finally, like other working instructions the document is technical and rather pragmatic.

An evaluation

Only a few evaluations of the existing guidelines can be found on this point. In an article on the Canadian Guidelines, Oosterveld characterises them as “a model for other countries to consider when crafting their own
criteria for women fleeing gender persecution. The Canadian guidelines "provide a very progressive method of approaching gendered refugee claims", have proven invaluable for women claiming gendered persecution" and "have proven to be extremely useful as a framework of analysis of women’s refugee claims". Most other authors are equally enthusiastic, although it must be said that some of them work for the institutions which issued the guidelines. Anker has even wondered whether women are no longer the forgotten majority as a result of the adoption of gender guidelines in Canada and the US.

Despite this enthusiasm, even the authors who are very positive have identified some weaknesses. In particular, four implementation issues have been raised. First, the fact that the guidelines are not binding is considered problematic. Second, the internal flight alternative was not addressed in the 1993 version of the Canadian guidelines; the 1996 update contains a short reference to the issue. Third, a change of circumstances which can lead to the cessation of an individual’s refugee status according to Article 1C of the Refugee Convention has not been addressed. Finally, spouses are interviewed together; Macklin and Oosterveld propose that this should only happen with the woman's consent. Oosterveld also pleads for a more informal hearing, along with more female interpreters and interviewers. Two additional issues of scope have also been raised. First, the guidelines are not applicable to the selection of refugees outside Canada and the USA, nor to asylum claims submitted outside Canada and the USA. Second, the guidelines do not apply to decisions on deportation after refugee status has been denied (such as the Canadian post-determination review). Finally, Oosterveld argues for regular revision of the guidelines in order to keep them up-to-date in light of new case law; this has happened in the 1996 update. With regard to the US guidelines, Anker notes that they "generally are more cautious than those of the Canadians".

Although most authors have some critical remarks to make on the guidelines, a positive attitude predominates and the assessments generally end on a cheerful note. I am more sceptical than most authors about the guidelines. To start with, I would like to mention three positive aspects of the guidelines. First, the campaigns for the introduction of the guidelines have mobilised people and organisations and thereby succeeded in getting the issue of refugee women on the agenda. The guidelines proposed by American activists were drafted by over 30 individuals and endorsed by 36 organisations. The guidelines proposed by the British Refugee Women’s Legal Group were drafted in a time-consuming, “inefficient” manner which, however, thereby mobilised numerous individuals and organisa-

tions; the guidelines were endorsed by some 300 individuals and organisations, while the initiative was explicitly welcomed by over 130 Members of Parliament. It is the concreteness of the drafted guidelines which makes it possible to organise around them; the potential of guidelines to mobilise people and thereby form coalitions on the issue of gender in refugee law may well be the most important contributions of the guidelines.

A second positive aspect of the guidelines is that adoption by the authorities legitimates the issue. Up to a decade ago, refugees’ women were basically not a legitimate issue to raise during the asylum procedure or with administrative bodies. The fact that decision-making bodies, themselves, have now issued policy documents acknowledging the topic and underscoring the importance of gender represents a lasting advantage. When lawyers, civil servants or judges want to raise gender issues in litigation or with their colleagues, they can now refer to the existence of guidelines to support their placement of the issue on the agenda. With such official support, it is easier to raise the issue. Guidelines can also help consolidate the position gained by the preceding mobilisation. Of course, the authorities may also decide that they are “done” with the issue of gender and simply return to business as usual. And, indeed, an indication that the Canadian Immigration and Refugee Board is diminishing its attention to gender issues is that it seems to have stopped recording its decision according to gender (see page 41, fn. 19) and the fact that the gender-oriented working groups and internal reports on gendered flight motives have been terminated. Anker also notes that the American Immigration and Naturalization Service has not engaged in serious or explicit implementation efforts since the issuance of the Guidelines.

A third positive aspect of the guidelines is that they suggest ways of incorporating domestic violence into the refugee definition, which is obviously relevant for a number of claimants. Regrettably, the issue of domestic violence is only addressed unambiguously in connection with the agents of persecution, where the doctrinal issues are relatively simple; the issue of the persecution ground is not, however, addressed in this connection. The Canadian guidelines mention domestic violence as a possible example of persecution but also emphasise the requirement of a persecution ground without, however, indicating what the persecution ground may be in such cases. The American guidelines also do not solve the problem, which is a real shortcoming as the persecution ground is a considerable doctrinal hurdle in cases of domestic violence. The effects of the American guidelines are also reported as not entirely clear on this point. Nevertheless, the guidelines provide a starting point here.
As already mentioned, the guidelines also have some problematic aspects. First, the guidelines have not substantively changed the interpretation of the refugee definition, which most authors find necessary. The guidelines point to some possibilities and certain possibilities may become more acceptable to decision makers when sanctioned in such a manner, but they do not appear to have a substantive effect in Canada where the recognition rates for women versus men have not changed visibly (see Table 2.2). If the guidelines have indeed “remove(d) the blinkers that too often caused us to approach refugee claims by women according to the more familiar situation of men refugees,” and thus “have had a major impact,” some quantitative effect should be visible. Unfortunately, the issue is more or less circumvented by saying that “the impact of the Guidelines can be seen in the quality of refugee-status decisions, not in their quantity.” The contradictory position of authors promoting the Canadian guidelines is illustrated by one author, who observes that the guidelines “officially expand the basic requirements for refugee determination (...) have not changed.” While guidelines have been promoted and issued because of the outcomes and not the quality of decisions, there are still no indications that the outcomes actually changed.

A second problem is that all of the guidelines reinforce a distinction which I found crucial for dismissing women’s applications, namely the distinction between “normal” versus “women’s” cases. If the analysis presented in the earlier chapters is correct, this opposition is a real obstacle to the asylum claims of women. While the manner in which the guidelines rely on the distinction between “normal” and “women’s” cases has been already indicated, texts produced by Canadian and American civil servants suggest that the distinction may even be promoted by the guidelines. Not only is the distinction still made in their texts, it is even suggested that the number of gendered applications may very low. One author sets the percentage of “gender-related claims” in Canada at 1% of all claims; another says that between May 1995 and February 1996, less than 50 “explicitly gender-based asylum claims” were submitted in the USA. Referring to these percentages, the UNHCR calls the number of gender-related claims “far from significant.” Hallbrunner has seized this opportunity to argue that gender-related claims are rare because they are not usually covered by the Refugee Convention.

The third problem is that some of the guidelines contain passages which are restrictive when compared to refugee law doctrine. The most conspicuous example of this is the passage in the US guidelines arguing that sexual violence committed by public officials may well be a private act – a view that, as we saw, is particularly negative for female claimants. Several restrictive elements can be detected in the Dutch guidelines. First, for membership in a particular social group it is required that the group somehow occupy an exceptional position with respect to others in the same position. This is semantically impossible, and also appears to introduce a kind of singled-out criterion into the persecution grounds. Second, in enumerating when persecution may amount to persecution, an important rule which is part and parcel of Dutch case law is omitted, namely that prosecution on account of the legitimate exercise of a fundamental right may lead to refugee status. Third, discrimination amounts to persecution in Dutch case law when the discrimination results in a serious limitation on the conditions of existence; in the Dutch guidelines, the word “serious” is preceded by “(very)”, an explicit restriction. It should be noted that this third point of critique may not hold for all guidelines and has not, to my knowledge, been raised with respect to the Canadian or Australian guidelines.

Yet another problem is the slight but nevertheless telling differences between the documents across countries. The US guidelines refer predominantly to the situation in Iran. Taken together with legislation bringing the Chinese one-child policy into the scope of the refugee definition, this suggests that the US asylum policies with regard to women are dominated by direct political interests (anti-Iran, “pro-life”). They are used as a way of exposing the faults of strategic opponents of the USA. The other guidelines reviewed here do not show such open political influence although it is significant that all references to specific countries of origin have been omitted from the 1996 update of the Canadian guidelines (possibly as a reaction to the critique articulated by Macklin and Razack who both publish in Canada). As Macklin nevertheless argues, however, Western countries are still posed as a place where women will be safe from discrimination, which inevitably characterises them as a place of progress, secularism and emancipation. In other words, the precise formulation of the feelings of superiority may be specific to a particular country but the guidelines nevertheless symbolise Western and even national superiority. According to the chairperson of the Canadian Immigration and Refugee Board, for example: “Through the Guidelines, Canada led the world in acknowledging that women suffer serious human rights violations because of their gender and that the fear of such violations may constitute grounds for refugee status.” The Australian guidelines emphasise Australia’s apparently exemplary human rights record. Kobayashi has pointed out that if women seeking asylum are admitted on the basis of Western superiority, they will
actually be the victim of that same phenomenon once they have been admitted: “her otherwise becomes both her legitimation [i.e., the basis for her recognition as a refugee, TS] and a form of stigma that will condition her future whether in Canada or elsewhere.”

Finally, it should be noted that the guidelines have organised feminist support for Western refugee policies precisely because of their purported gender sensitivity.130 The enthusiasm of several authors and appeals to other countries to follow suit leave little room for a sustained critique of asylum practice. It seems plausible, as Kobayashi put it with respect to the Canadian guidelines, that they “create a progressive image and win international kudos but, because of limitations in their application, they ensure that a relatively small number of women are affected.”131 In other words, there exists a risk that feminism is co-opted into a restrictive discourse on immigration and asylum.

5.5 Conclusion

In opposing dominant discourse on refugee women, the applicants themselves have no voice (at least in the asylum procedure). Their views are only part of the discussion viewed through the lens of other participants. Lawyers tend to adopt the terms of the debate as given. They rarely address issues pertaining to the interpretation of the refugee definition. Lawyers normally try to fit their client to one of two stereotypes: that of the classical disdissent, or that of the victim in need of protection. Examples show lawyers to be quite inventive, and some succeed in letting their client fit both stereotypes while the stereotypes tend to be mutually exclusive. Nevertheless, the lawyers always face a dilemma. For either strategy to work, they have to argue that this particular applicant is exceptional: either because she has attracted the attention of the authorities in her home country because of her dissidence or because she is a spectacular victim.

Both academics and those working for non-governmental organisations have tried to change the terms of the debate. The aim of the early critics was to get the issue of refugee women on the agenda. This was done using rather cross identity politics at times, but no one denies that they were successful. The moment at which their efforts met with success (namely after 1989) is an issue to which I will return in the next chapter. The advocates of the human rights approach have attempted to translate attention to the issue of refugee women into tangible and enduring reforms. In doing this, they have striven to consolidate their position, if not in black letter law, then at least in printed rules. The anti-essentialist critics, to which I reckon myself, do not deny that concrete rules and guidelines may carry certain advantages. However, they carry some disadvantages as well. Decision-making bodies have issued these rules out of not only out of concern for refugee women but also for their own goals and these goals may be at cross purposes with those of the feminist critics.

The point at which in my analysis the human rights approach was not successful is that their own arguments and the guidelines based on them reproduce the main distinctions underlying current practice: the distinction between “normal” versus “women’s” cases and the opposition of the West to the Rest. While some progress has been made on the behalf of refugee women, the current situation is one in which many former feminist critics now staunchly defend existing refugee law including the normal/ women distinction and West/Rest opposition on which it is so firmly based. In doing so, law has been conceptualised as an instrument for social change. They have examined the things you can do “with law”, but not the question whether law is a neutral instrument.132 The human rights approach has sought to bring refugee law in line with a limited conception of non-discrimination.133

An approach less susceptible to co-option by existing refugee law practice should articulate and contest the basic distinctions identified above. These distinctions determine the structure of argumentation in refugee law. Of course, the strategic dilemma that the feminist critics face is having to engage in a fundamental critique of refugee law in order to achieve fundamental change, while at the same time women are dependent on existing refugee law. It is problematic to both invoke refugee law and to contest its presuppositions. As Engle wrote: “On the one hand, we want to acknowledge that women have been excluded from much of international law. On the other hand, we want to maintain that the exclusion is not essential to international law.”134 In any case, giving up more far-reaching aspirations for change to defend the significant, but still rather limited compromises obtained in some countries does not appear to be the answer.

Notes

1 The self-designation of the major ex-Yugoslav writer Dubravka Ugrešić was one con-veying “the feeling of being lost, identity-less”, here with the tensions I refer to here, she refused to describe herself in ethnic terms and defined herself as “as-national”, in the category “others”, quoted in Todorova 1997, 51-52.
29 Kelly 1993, 642; Bower 1993, 175.
31 Kelly 1993, 643; Bower 1993, 174. Examples concern Bosnia-Herzegovina (Kelly 1993, 644), sexual violence by government officials (e.g., during detention) or members of an anti-government fighting force in such countries as Peru, Iraq and Sri Lanka (Kelly 1993, 646; Bower 1993, 184-185).
33 Kelly 1993, 642-643.
34 Examples are living single in a country where that is considered improper for women (Kelly 1993, 660-661); refusing to conform to dress codes such as the obligation to wear a veil (Neil 1988, 217-222; Kronenberger 1992, 67; Cipriani 1993, 517, 518); and women who are perceived as no longer conforming to the strict moral codes imposed upon them after having been raped or sexually abused (Kelly 1993, 662-663).
36 Kelly 1993, 668.
40 Kelly 1993, 642.
43 Kelly 1993, 634, emphasis added.
45 Bower 1993, 192.
46 Cipriani 1993, 538.
47 Refugee Status Appeals Authority 5 April 1995, case 915/92, quoted in UNCHR Division of International Protection 1997, 105.
48 Refugee Status Appeals Authority 5 April 1995, case 915/92, quoted in UNHCR Division of International Protection 1997, 111.

49 Kelly 1993, 674

50 Kelly 1993, 647.

51 Bower 1993, 183.


53 Warren 1994, 312.

54 Cipriani is sceptic about the possibilities of using the social group category and suggests that (semi-)legislative acts will be necessary, Cipriani 1993, 538; cf. Love 1994. Comparable on the Chinese one-child policy is Lazarus 1995.


56 Four and a half pages are spent on the social group category, and one and a half on the other persecution grounds together, Kelly 1994, 524-530

57 Spijkerboer 1994, Macklin 1995, Razack 1995 (reprinted without substantial changes in Razack 1998, 88-129), Crawley 1996. Interestingly, three of these articles were written independently from each other. Razack mentions that she saw Macklin’s article only when her own text went to press; Crawley is the only one who was aware of the other texts. Comparable positions, not described extensively here, are taken by Kobayashi 1995 and Van Baalen 1997.


60 Razack 1995, 57.

61 Crawley 1996, 10, footnote omitted, emphasis in original; cf. Spijkerboer 1994, 34.

62 Macklin 1995, 259-260


66 Crawley 1997.


70 Refugee Women’s Legal Group 1998, 3.


73 Which in Refugee Women’s Legal Group 1998, 15-17 gets twice as much space as membership in a particular social group. Crawley 1997 devotes 34 pages to the social group category as opposed to only 15 to political opinion, but in these 34 pages she articulates a critique of the overall use of that persecution ground and for every example stresses that political opinion (or religion) may be a more appropriate persecution ground, p. 142-171.

74 Crawley 1997, 5.

75 Refugee Women’s Legal Group 1998, 29.

76 From the country presentations at the 1996 UNHCR Symposium on Gender-Based Persecution (published in International Journal of Refugee Law, Special Issue, Autumn 1997), it appears that apart from the well-known guidelines in Canada, the USA and Australia, there are some specific policy instruments in Austria. The Danish and Norwegian asylum authorities intend to elaborate guidelines; in Switzerland, internal guidelines were to be issued in 1997. The Netherlands has issued a summary policy instrument in 1997, see below.

77 Cited in Crawley 1997, 4.

78 Published in International Journal of Refugee Law, Special Issue, Autumn 1997, 49-52.

79 O.c., 51-52.

80 Published in International Journal of Refugee Law, Special Issue, Autumn 1997, 53-56 and 66-67 respectively.

81 Comp. the position of the German administration, Ellinger 1998.

82 Folkehus and Noll 1999. This granting of a status falling short of a full refugee status is sometimes mistaken for recognition as a refugee, Anker/Gilbert/Kelly 1997, 710.

83 Aufbruch und Erneuerung, p. 33.


85 UNHCR 1995.


In the Canadian guidelines, social group gets twice as much space as political opinion; in the Australian guidelines, the difference is not big.

The Chairperson of the Canadian Immigration and Refugee Board in the text of a speech on the Guidelines speaks exclusively about social group as a persecution ground, Mawani 1996.

U.S. Court of Appeal for the Fifth Circuit (USA) 10 February 1987, Campos-Guardado v. INS, 809 F.2d 285 (Guatemala).

The social group issue is discussed in 4.5 page, while political opinion is treated in a little more than one page. Other persecution grounds are not discussed.

U.S. Court of Appeals for the Third Circuit (USA) 20 December 1993, Parastoo Futini v. INS, 12 F.3d 1233 (3rd Cir.).


For example, one of the aims of the working instruction is “to highlight specific aspects of the flight motives of female asylum seekers which are related to their gender.”

Oosterveld 1996, 571.

Oosterveld 1996, 579.

Oosterveld 1996, 595.


Anker 1997a.


Anker 1997c, 611.

Kelly 1994, 517.

Refugee Women’s Legal Group News, Volume 1, Issue 1, April 1999.

Anker 1997b, 482, Macklin 1998, 34.

Anker 1997c, 609, 614, 616.

Anker/Gilbert/Kelly 1997, 710.

See extensively Macklin 1998.

The Australian guidelines say so explicitly in section 1.5 and 4.4, the Dutch in section 1.1.

Berntier 1997, 168-169; see, for a comparable claim, Wallace 1996, 707; UNHCR Division of International Protection 1997, 81 speaks of the promise of “significant advances” while Anker/Gilbert/Kelly 1997, 710 refer to “many asylum officers, immigration judges and Immigration and Naturalization Service (INS) trial attorneys [who] have shown greater sensitivity in addressing gender-related claims.”

Anker 1997b, 476, Anker 1997c, 614.

Berntier 1997, 168.

Fox 1994, 135.

Fox 1994, 138.

Berntier 1997, 168; Ellegaard 1997, 13 (following a speech by Mawani, published in the report she edited) mentions a percentage of 1.4% for Canada for 1996. Another author put the number of “gender-related” claims in Canada in 1994 at 328, Wallace 1996, 709. For a comparable approach, see Anker/Gilbert/Kelly 1997, 716.

UNHCR Division of International Protection 1997, 80. Anker/Gilbert/Kelly 1997, 716 speak of “small actual and potential numbers.”

Hallbrønner 1998. His argument is not convincing, however, if only because Hallbrønner acts as if the (restrictive) German doctrine on non-state agents of persecution is the universally correct interpretation of the refugee definition.

This passage is further endorsed in Scialabba 1997. It is remarkable that articles on sexual violence in refugee law do not identify this restrictive passage in the American guidelines as such, Anker 1997b, Anker 1997c, Anker/Gilbert/Kelly 1997.

See also Heijnenmann 1998.

Section 4.1.

Section 4.2.


Section 4.2.


Mawani 1996, 81; comp. Mawani on “Canada’s leading role and exceptional progress”, 1993, 10, and Oosterveld 1996, 595 on the Canadian guidelines serving “as a model for other States.” Some Americans have tried to jump on the bandwagon, e.g. “The Canadian and subsequent United States lead in issuing guidelines that has now been followed by Australia”, Asken/Olbert/Kelly 1997, 717 (emphasis added).

See § 2.8 of the Australian guidelines.

Kobayashi 1995, 70.

For example, Pell 1995.

Kobayashi 1995, 70.

There is a broad tradition of scepticism with regard to law as an instrument of social change, for example, Klaré 1988, Smart 1998.

Compare the critique of the liberal concept of non-discrimination in critical race theory, Crenshaw et al. 1995, Crenshaw 1995b.

Engle 1993, 145.
6 Conclusion

In this concluding chapter, I will first provide a summary of my findings. I argue that female asylum applicants are constructed by legal experts in the country where they apply. Central to this construction are the distinctions between “normal” versus “women’s” cases, and the West versus the Rest. These two distinctions are concentrated on the family and regulation of sexuality and reproduction. The construction of the female applicant is unstable, but this instability is productive in more than one way. Next, I will address the question of how the qualitative analysis in this study can lead to a different result than the quantitative analysis. How can it be that refugee law discourse is thoroughly gendered while women do not appear to suffer negative treatment when the outcomes of the asylum procedures are examined? The central idea will be that gender is not necessarily negative for women, and that gender is not to be equated to female. In a third section, the question of why refugee women emerged as an issue at the moment they did, namely over the last decade, will be addressed. Why do the authors of the main textbooks on refugee law presently find women an inescapable topic? Why are Western governments willing to issue “liberal” guidelines on refugee women while the general asylum policies are becoming ever more restrictive? I will argue that refugee law is taking on a new role since the end of the Cold War, namely an ideological role in the West-South conflict. Women play an important symbolic role in this conflict. Finally, the practical conclusions which can be drawn from this study will be addressed. My analysis of the issue of women in refugee law turns on issues which are contested in Western societies. What in fact I advocate is that these contested topics be clearly articulated instead of glossed over in legal terms. Therefore, what I suggest is not a “solution” in a static sense but constant contestation of dominant discourse and a strategy with mobilisation of people as its goal. The adoption of governments measures may be part of such a strategy, but is not considered an aim in itself.
6.1 Gender and Ethnicity in the Family, Sexuality and Reproduction

We have seen that the female asylum applicant in refugee law discourse is the product of a Western practice; that the applicants hardly have a say in their own representation; and that the erasure of the applicants’ agency reflects the difference in power between the applicants and the legal experts. It is appropriate to assign responsibility for the construction of the female applicant to the experts. Both decision makers and their critics often implicitly refer to the “real experiences” of female applicants to justify their constructions, but such references should be considered questionable argumentative moves as we, legal experts, actually have free play in how we represent asylum applicants.

The construction of female applicants in refugee law discourse is quite coherent. The central dichotomies between the West and the Rest and “normal” versus “women’s” cases are concentrated on two larger issues: the family and the regulation of sexuality and reproduction.

It was possible to trace normative concepts of the family and women’s place in the family at all levels of the analyses in Chapter 3 and 4. Behaving as an appropriate mother and wife is clearly set as a standard of credibility. Appropriate behaviour (e.g., mourning male relatives) is seen as apolitical; inappropriate behaviour (e.g., insomnia to family law) is seen as equally apolitical. Violence in the family is seen as a priori private and unrelated to the social or political context. These tendencies are aggravated by the fact that female applicants are primarily considered as wives and mothers. In interviews, considerable attention is paid to the experiences of their male relatives and women are often portrayed as being inspired by “private” motives (e.g., supporting a husband or an unhappy marriage).

The family is represented as the natural habitat for women and is considered a priori apolitical. As “the natural and fundamental group unit of society”, in the words of Article 23 of the International Covenant on Civil and Political Rights, the family is constructed as prior to politics and the State. The family is seen as “a natural human formation, not created but merely recognized (or not recognized) by the state.” However, the family is also seen as a culturally specific institution. A backward and oppressive family is seen as a phenomenon characteristic of Islam and as part of “the general situation” in Iran. When women oppose the Iranian rules on the family, they are seen as being dissatisfied with the general situation and not engaging in politics. The peculiarities of the non-Western family are often explicated in relation to Islam/Iran although less developed versions of the non-Western family can be discerned as well: the all-encompassing claustrophobic Asian family (sati); the dysfunctional Black family; and the Chinese family with its teeming multitudes. In other words, the concept of the family is very specific and one of the ways in which racialisation occurs. Whatever the differences, moreover, the family is the place where women live and this idea is so dominant that the normative idea of women “belonging” in the family is never made explicit.

The second main theme running through the construction of the female asylum applicant is the control of sexuality and reproduction. The issue is similarly fraught with internal tensions, as illustrated by one child cases. Demographic policies (immigration policy among them) are important to Western countries, and even according to the liberal line in asylum law population policies in themselves are not persecutory. State intervention in reproduction is not problematic per se. Restrictive jurisdictions hold that, while forcible demographic policies may be harsh or wrong, they are not discriminatory (i.e., there is no persecution ground). Forcible demographic policies are simply part of the “general situation” in a country even if it is a reprehensible situation. This line of argument represents the one child policy as a general and normal form of State intervention. More liberal jurisdictions maintain the legitimacy of State intervention in reproduction by excusing forced abortion and forced sterilisation; other measures are within the legitimate scope of State action.

Similarly, dress codes for women appearing in public places are seen as part of the “general situation” and therefore not as persecutory in themselves. While the control of female sexuality is thus considered normal, the perceived lack of control of men over their own sexuality (e.g., their prominence to sexual violence) is seen as quite natural. Like the family, reproduction (in the sense of having children and raising them) is seen as something particularly feminine, as a woman’s thing outside the realm of politics. Arguments holding that forcibly aborted or sterilised women should be recognised as refugees mostly do not argue that the issue is a political one or that the women are taking a stand by wanting to control their own fertility; social group reasoning goes a long way in obscuring the politically aspects of women disobeying the one child policy or dress codes. Illustrative of this ambiguity is the American Fatim decision in which it is recognised that not complying with a dress code may imply a political opinion, but social group reasoning is used to set the requirements for the applicant higher than political opinion reasoning would. In such a manner, dress codes in force in Western countries and elsewhere are construed as apolitical, regardless of their effects on the distribution of power. Whether it recognises conflicts over sexuality and reproduction as relevant or not, refugee law discourse distinguishes a limited number of “bad” types of regulation from
"good" regulation and thereby legitimises the regulation of sexuality and reproduction as such. The countries of origin of asylum applicants are depicted as cruel, backward, unenlightened and fundamentally different from the countries of asylum.

It should be added that, to my surprise, the suspicion that asylum seekers may be driven by economic motives was not restricted to men. Any aspect of a flight story relating to the economy and ranging from protests against monetary policy to economic persecution is seized to dismiss the case.

As we have seen, there are differences not only between but also within Western countries when it comes to women and refugee law. This shows that gender and ethnicity are not part of a coherent refugee law discourse with a compelling inner logic. The fact that there is an identifiable discourse relating to female asylum applicants does not compel particular decisions. The construction of the female applicant is thus unstable: there is a mater dolorosa and a crazy mother; credible and an incredible display of emotions; and the victim of rape during a war may be either the victim of ethnic cleansing or the victim of random violence. This instability of refugee law discourse is, however, productive. As we have seen, both gender and ethnicity are vested with double and often contradictory meanings. In a particular context, it is then possible to control these instabilities and present them as having a semblance of coherence. That is, instability makes it possible to adapt the mechanism of exclusion and inclusion provided by refugee law to the necessities of the day.

The first manner in which the instability of the construction of the female applicant is productive is to distinguish deserving from undeserving applicants. The construction of Zairian applicants makes clear why they are not deserving: they are unreliable and driven by a (comprehensible) wish to escape the cruel and chaotic African reality. Bosnians, however, are deserving; they are patently reliable and fleeing genocide. A combination of notions of gender and ethnicity constructs the difference between the African victims of frequent sexual excess and the European victims of sexual persecution. These constructions also make it possible to distinguish between applicants with the same nationality: to tell the difference between the mater dolorosa and the crazy mother, the bad mother and the good mother, and the credible woman who has mastered her emotions and the incredible woman who is simply acting.

The second manner in which the instability of the construction of the female asylum applicant is productive is that it enables change. Both the liberal and the restrictive jurisdictions with respect to Chinese one-child policy attribute forced abortion and sterilisation to a bad version of a good rule, and the instability of the discourse regulating reproduction enables a change of position. The fact that this discourse can accommodate changes in concrete rules limits the effects of changes in the concrete rules. Demands for change may be – and have been – dealt with in this way.

In the analysis of the individual files in Chapter 3, a detailed but static picture of refugee law discourse built on the West/Rest and normal/women dichotomies was obtained. The analysis of published case law undertaken in Chapter 4 showed refugee law discourse not to be as stable and unitary as this static picture suggested. The picture became more complex with the inclusion of other countries than just The Netherlands: the changes over time; and judicial corrections of the positions taken by the administration. While identifiable as a single entity, refugee law discourse is flexible enough to enable the Canadian decision-making authorities to take on the profile of the most progressive on earth; the American authorities as tough on Islam and China but also responsive to feminism; and the Dutch authorities as tough on irregular asylum seekers, yet enlightened. Although these different profiles required at times such thorough changes as the adoption of gender guidelines, it is illustrative of the flexibility of refugee law discourse that this seems not to have affected the outcomes of administrative practice. It appears that many critics of the role of gender in refugee law have underestimated the capacity of refugee law discourse to accommodate concessions. There has been so much emphasis on the importance of concrete demands for a change of the rules that it remains to be seen whether the feminist critique can survive the acceding to these demands by governments. The analysis presented in this book makes clear that gender and ethnicity are dominant in almost all cases of female asylum applicants. Feminist critics have, to the contrary, often argued that some cases of women are like those of men while others (in recent estimations about 1%, see section 5.4) may be gender specific. This suggests that these authors have a completely different conception of what gender is about than the conception used in the present study.

6.2 Gender in the Absence of Discrimination

It is puzzling that the qualitative part of this study yields different results than the quantitative part. In refugee law discourse, gender is a dominant issue and the manner in which women are relegated to the family and reproduction can hardly be called beneficial. Yet women do better in terms
of recognition rates than men. It should, of course, be noted that this advantage of women occurs against the background of substantial prior discrimination: In the West, only about a third of the asylum applicants is female which shows women to be excluded from access to the West. A second point to note is that part of the advantage of women over men is caused by the unequal distribution of women across different countries of origin. Women partly have a higher recognition rate than men because they disproportionately come from countries with high recognition rates. This also suggests that the policies of the countries of refuge with regard to particular nationalities affect the outcomes of the asylum procedure much more than the gender of the applicants. Having said this, women still do a bit better when one examines male and female applicants of the same nationality. The question is how this fits with the picture produced by an analysis of files, case law and legal doctrine.

The first thing to be noted is that a “gendered” phenomenon is often presumed to be negative for women. This is incorrect, and the outcomes of the asylum procedure demonstrate this. Comparably, in child custody cases women have a much better chance of getting custody than men as a result of stereotypes about women being caregivers, but this works to the benefit of women. I can think of two explanations why gender may work to the benefit of women in refugee law. First, the perception of women as vulnerable and dependent may have a positive effect. Perceived vulnerability may encourage decision makers to judge situations confronted by female applicants as more threatening than situations confronted by males; this kind of ungraspable assessment is crucial in determining refugee status. Similarly, women may more easily be granted a dependent refugee status or a refugee status on account of activities of male relatives. In other words, gender stereotypes may have positive effects for women and lead to higher recognition rates for women than for men. A second way in which gender may work to the benefit of women is via the perception of women as less adventurous than men. As we saw, civil servants actually hold such a view which may influence their decisions.

It should also be noted that gender is not a female phenomenon although this seems to be a common idea. Articles on gender and persecution, gender-sensitivity in asylum law and so forth are exclusively about women. While a tendency to confute gender and biological sex can be observed, gender and women are also often conflated. One example is the phenomenon noted in Chapter 2, where refugee statistics involving “women” and “women and children” tend to be confused. This implies that what is not male is seen as other; if one divides the world into male and non-male, it is normal to equate women and children. But this construction of the (sexless) norm and the (sexed, non-male) deviation disregards that the male standard of the classical refugee is just as constructed as the female asylum applicant. While the female applicant is probably constructed in a different way, gender plays just as important a role in the construction of the male applicant as the female applicant. This means that concepts of masculinity may be used to dismiss claims of men because, like female applicants, they are perceived as deviating from the male norm of the classical refugee. There are theories of masculinity and ethnicity which fit well with this idea. Among others, the Indian sociologist Nandy has argued that colonised men are represented as not being real men; they are childish, feminine, cowardly and half-hearted. This indeed fits well with my memory of Tamil men as boyish in appearance, fast speaking and having high pitched voices. According to the American author hooks, black men are represented as emasculated and defined by their bodies in white culture. This stereotype can work against black male asylum applicants because it portrays them as not having the intellectual characteristics needed to have political ideas (parallel to the phenomena described in section 3.3). The ideas of both Nandy and hooks would help to explain the ways in which male asylum seekers are treated negatively in reference to their gender. In the context of refugee law, gender stereotypes about men may have a more negative net effect than gender stereotypes about women, in part because the male stereotypes employed in refugee law discourse have fewer positive (side-)effects than the female stereotypes.

Thus, the ideas of Nandy and hooks may help to understand how ethnicity and gender may lead to exclusion of (non-white) men from refugee status. One can also relate the problematic status of conscientious objection and (male) homosexuality in refugee law doctrine to the fact that, although clearly about men (hence legitimate, “non gender-specific” topics), the men concerned do not behave like real men and do not meet the male standard of the refugee.

The preceding are tentative explanations for the relative advantage of women over men in the presence of the gendered nature of refugee law. Dominant concepts of gender and ethnicity appear to work to the benefit of women in the asylum procedure and to the detriment of men. That the explanations have to be sought in this direction seems convincing to me. This makes me even more sceptical about the use of the equality principle than I was at the outset of my research (see section 1.2). Legal reasons based on the equality principle return again and again to the question of whether
women and men should be treated the same or differently. Women are either seen as just like men (which calls for gender-blind treatment) or as different (which calls for different, gender-conscious treatment). Many of the gender critiques of refugee law posit different experiences for men and women and therefore argue for gender sensitivity. This approach is implausible when one considers the legal construction of women as women and the legal construction of men as men as critical. For example, the question of whether or not the putatively female experience of being persecuted on account of the activities of male relatives should lead to recognition as a refugee involves the equality principle but seems misguided to me. Women are often presented as being persecuted on account of the activities of male relatives while they might just as well have been presented as being persecuted on account of their own activities, but these own activities tend to be ignored. The difference (or sameness) of women is constructed in legal discourse, and is not prior to it; a discussion about the consequences of sameness or difference then seems futile to me. “Men should be neither a model nor a contrast. Women should not have to claim to be just like men to get decent treatment, nor should they have to focus on their differences from men.” The emphasis on the need for gender-blindness (equal treatment) or gender-sensitivity (special treatment) misfocuses attention; “(the particular context and meaning of policies are always more important than whether the policies specifically take gender into account.” In analysing the construction of masculinity and femininity, equality/difference it is not a fruitful concept. A next step in understanding the role of gender in refugee law is not, in my view, to compare the decision making process in “comparable” cases of female and male asylum seekers, but to further analyse the role of women in refugee legal discourse, and to investigate the construction of masculinity within the asylum procedure. In this book, men have been studied partly by implication (the construction of the female applicant suggests that the prototypical refugee is male) and partly by analysing mainstream legal doctrine; but the topic certainly merits further study.

6.3 The Uses of Women in Present Day Refugee Law

In response to the question of why have refugee women have become so popular in academic refugee law and as the object of Western government policies, one might simply suggest that refugee law is improving: The law is better in tune with its humanitarian aims and human rights foundation. Many of the reactions to the recent gender guidelines suggest such an optimistic view. However, this suggestion begs yet another question, namely why such positive developments are possible here while in other areas of refugee law restrictive tendencies predominate.

I submit this may have to do with the changing role of refugee law. Post-war refugee law was part of the Cold War as indicated by the refugee definition, which covers people whose civil and political rights are threatened in particular and thereby passes over what Hathaway calls “socialist” economic rights. The character of post-war refugee law is also indicated by the list of States which participated in the drafting of the Refugee Convention in 1951: the only non-Western country was Yugoslavia which had left the Soviet Bloc in 1948. The Soviet reaction to the Convention was that it protected people associated with “fascist and anti-democratic régimes,” namely people who left Eastern European countries after the communist take overs in the late 1940s. The anti-communist thrust of refugee law was clearly visible well into the 1980s. According to a high ranking American official in 1958, “(e)ach refugee from the Soviet orbit presents a failure of the Communist system.” Of all refugees admitted to the USA until the mid-1980s, 90% came from communist countries. In 1984, the US recognition rate for applicants from Guatemala was less than 0.5%; from El Salvador less than 2.5%; but 52% for Bulgarians, 51% for Russians, and 28% for Hungarians. Loescher and Scanlan conclude that America’s willingness to admit refugees was limited “(when the United States has perceived that no vital interests will be served by welcoming refugees, or no propaganda points made.” In a much shorter study, Hathaway concludes that Canada’s refugee policy has been driven by strategic aims reflecting Canada’s position as an internationalist middle power. In short, “(t)he reception of refugees opposed to Communist regimes (…) reinforced the ideological and strategic objectives of the capitalist world.”

A common idea at present is that refugee law is one of the places where the exclusion of people from the Third World is legitimated. Given that refugee law is not necessary in the conflict with the Soviet Bloc any more, its main purpose would be to legitimate the construction of “fortress Europe.” Hathaway states that there is no ideological or strategic value in the admission of refugees from the South. Therefore, at present Western governments want to prevent refugee flows from reaching their borders; refugee law is meant to give a semblance of legitimacy to the intended exclusion. This idea seems plausible to the extent that it helps explain the rejection of asylum applications and the policies aimed at preventing asylum seekers from reaching the Western world (the politics of non-entrée in Hathaway’s terms).
However, the idea that refugee law at present serves an exclusionary purpose leaves just why Western countries recognise substantial numbers of people as refugees unexplained, recognition rates have not dropped dramatically since the end of the Cold War. Hathaway correctly argues that Western States try to prevent the influx of asylum seekers from the South, but the asylum statistics for the past 25 years suggest that they are not successful at this. The statistics also show that once asylum seekers have gained entry to the West, the percentage of admissions (see section 2.2 and 2.4) is so high that the claim that the admission of refugees is not in the interest of Western States any more seems unconvincing. In fact, recognition rates in The Netherlands were higher in the 1990s than in the previous two decades (Table 6.1).

<table>
<thead>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugees</td>
<td>42</td>
<td>252</td>
<td>677</td>
<td>4,389</td>
<td>10,053</td>
<td>6,650</td>
<td>8,645</td>
</tr>
<tr>
<td>Status</td>
<td>6.0%</td>
<td>15.5%</td>
<td>2.6%</td>
<td>10.6%</td>
<td>27.2%</td>
<td>11.3%</td>
<td>14.9%</td>
</tr>
<tr>
<td>Humanit.</td>
<td>71</td>
<td>252</td>
<td>1,331</td>
<td>6,474</td>
<td>4,041</td>
<td>8,770</td>
<td>6,181</td>
</tr>
<tr>
<td>Residence</td>
<td>1.1%</td>
<td>1.5%</td>
<td>5.0%</td>
<td>15.7%</td>
<td>10.9%</td>
<td>14.9%</td>
<td>10.7%</td>
</tr>
<tr>
<td>Temporary</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>4,366</td>
<td>4,292</td>
</tr>
<tr>
<td>Protection</td>
<td>0.0%</td>
<td>0.0%</td>
<td>7.4%</td>
<td>7.4%</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

The claim that "(r)efugee law serves fewer and fewer people" seems incorrect. Put differently: If Western countries only want to get rid of refugees, why do they admit so many of them?

Of course, refugee law has always functioned in the context of international relations, and it seems plausible that, like during the Cold War, national interests of Western States can be served by the admission of refugees. Whereas refugees from the Soviet Bloc were admitted in part for pur-

poses of anti-Soviet propaganda, my thesis is that nowadays "each refugee from an underdeveloped country presents a failure of the Third World." The Western world in the form of, for example, the World Bank, the International Monetary Fund, or military actions (based on a United Nations mandate, or not) exert considerable power over the South. If no efforts were made to legitimise this situation, this would seem to be the exercise of purely economic or military force. The West needs a general story for why the developing world cannot help itself and why it needs our guidance on its way towards a better future. Refugee law can be one of the places for the creation of such a legitimating story. Just as refugee law was one of the places where the enmity towards the Soviet Bloc was legitimatized, it is now one of the places where the evil nature of the regimes in Iran or China can be underscored. Also, the powerlessness of Third World countries to help themselves and their incapacity for progress can be illustrated. In this context, inspection of the Dutch recognition rates for Iraqi asylum applicants is informative. Until its invasion of Kuwait in August 1990, Iraq was an ally of sorts in the conflict with the primary enemy in the region, Iran. Within a period of six months, Iraq became the main opponent of the West. The most plausible explanation for the sudden increase in the recognition rates for Iraqi applicants is not improved flight motives but the shift of Iraq's role within the international politics of Western countries.

<table>
<thead>
<tr>
<th>Year</th>
<th>n</th>
<th>Recognition Rate</th>
</tr>
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<tbody>
<tr>
<td>1989</td>
<td>108</td>
<td>5.5%</td>
</tr>
<tr>
<td>1990</td>
<td>247</td>
<td>17.0%</td>
</tr>
<tr>
<td>1991</td>
<td>481</td>
<td>59.0%</td>
</tr>
<tr>
<td>1992</td>
<td>1,651</td>
<td>60.0%</td>
</tr>
<tr>
<td>1993</td>
<td>1,850</td>
<td>59.5%</td>
</tr>
<tr>
<td>1994</td>
<td>4,222</td>
<td>57.7%</td>
</tr>
<tr>
<td>1995</td>
<td>4,370</td>
<td>66.4%</td>
</tr>
</tbody>
</table>

In this new context of refugee law, the fate of women can provide a compelling illustration of the brutal nature of the Third World, and it may well elicit the chivalrous impulse to save them by granting asylum. In other words: Women can be used as an indicator of progress, they can illustrate the Huntingtonian "clash of civilisations." The evilness of Iran and Afghanistan is graphically illustrated by the contrast between how they treat...
in the West seem superfluous. Macklin has pointed out that this anti-feminist effect of the discourse on gender and refugee law may ironically hinder a feminist approach to refugee law practice: "Gender persecution will be most visible and identifiable as such when it is committed by a cultural other. This strategy will enable so-called refugee-acceptors to neutralize and assimilate feminist insights about the relationship between patriarchy and the state into a refugee determination system that desires, above all, to sustain its self-understanding as a non-refugee-producing country."25

The above view does not imply that refugee law is not inspired by humanitarian motives; it does imply that States will only act on humanitarian motives when this is perceived as serving a national interest as well. The West-South conflict is a relevant context in this respect, and women have a particular role to play. I do not mean to say that refugee law is only ideologically influenced. People who are recognised as refugees certainly come from countries where human rights are violated, but so do people whose applications are rejected. Analyses investigating the relationship between the human rights situation in various countries of origin and recognition rates fail to identify a meaningful relation.26 The situation of women in many countries is bad, but this does not explain why some of them are considered as refugees and others are not. Refugee law is clearly inspired by humanitarian impulses, but this does not explain why some profit from this while others do not. I am trying to understand why Sri Lankan Anne (from section 3.1) is not a refugee while Bosnian Laurie (from section 3.4) is; what they experienced is pretty similar. I am trying to understand why authors constantly refer to Islam when discussing Iran, while when discussing Latin America they direct their attention to ... not Christianity or Catholicism, but Latin machismo.27 In other words: The way in which States, decision-makers, lawyers and academics use their capacity to be moved by the fates of women and just how they direct their efforts can only be understood in a feminist analysis of refugee law against the backdrop of international politics.

6.4 Guidelines and Beyond

On the basis of the foregoing, some more practical conclusions can be drawn. To begin with, it is important that States and such international organisations as the UNHCR and IGC systematically break their asylum statistics down by gender when reporting the number of applicants and the outcomes of asylum procedures. Only then can the position of female ap-
Applicants in Western asylum procedures be more carefully analysed. It may also be useful to the governments themselves. The demographic compositions of particular refugee groups may help identify the type of influx and thus have consequences for the policies to be applied.

The construction of the female applicant occurs first and foremost in the interview report. In Dutch legal practice, the interview report is a free reproduction by a civil servant of the words of the applicant. The perspective of the civil servant predominates and although the applicant or her lawyer may contest this perspective, this is rarely successful and may even work against the applicant. This is not an acceptable situation, as it gives the civil servant an unchecked power to decide what the flight motives are. It is of utmost importance that this situation come to an end. One way of improving the applicant’s position is to make the interview report a typed version of the taped interview. As the Dutch ombudsman has repeatedly stated, tape-recording the interview should be introduced in order to check the quality of the interview, the role of the interview official and the role of translators. Tape-recording the interview report does not solve all of the problems, however; as it does not do away with the power inequalities. Tape-recording may nevertheless allow the applicant to point out inaccuracies or problematic aspects of the interview by enabling her to contest the version of the civil servant.

A frequent proposal is that interview officials should be more well-trained in culture- and gender-sensitive communication. Of course, I do not oppose training, especially if it is to be cultural- and gender-sensitive. My fear, however, is that interview officials may become overly confident. The communication between asylum applicants and interview officials will always take place against the backdrop of a considerable difference in power, which is an obstacle to good communication. This is illustrated by the case of Anne (section 3.1); the civil servant in her case was certainly good at communicating with the applicant; yet he or she missed important aspects of her story. In this context, it may be more helpful for interview officials to be aware of the limitations imposed by the particular setting in which the communication with the applicant occurs. Training interview officials should not promote a feeling of now “knowing how to do it” but, rather, a feeling of uneasiness on account of the situation in which the interview takes place. The same is true, of course, for other people in direct contact with the applicants, such as their counsels.

Apart from the preceding procedural issues (which are relevant for men as well), what is left to be desired? The data suggesting that asylum procedures do not discriminate against women. If the analysis presented here is correct, however, refugee legal practice reproduces the dependency of non-Western women. As refugee law has material effects on the applicants, this is not merely an ideological issue. Applicants are made to be dependent on “their” men and often on “ours” as well. Refugee legal practice is one of the places where conflicts over gender and ethnicity are waged. These conflicts are about much more than the outcome of the asylum procedure alone.

As before, I am not convinced of the necessity of gender guidelines. Some good things have happened as a result of the adoption of guidelines – but good things have also happened without their adoption. Some bad things happened as a result of the adoption of guidelines – but bad things have also happened without their adoption. If the analysis presented in this study is correct, the crucial issue is the construction of the applicant; the application of the rules of refugee law seems to follow from this construction. The applicant is constructed in every case, at every level of the procedure and in every text (academic, administrative, judicial, etc.). This implies that dominant discourse on refugee women can and must be contested at all these levels. It is therefore insufficient to have an expert lobby for a change of rules. Many different people should be mobilised: not only lawyers, but also civil servants, local volunteers, judges, court secretaries, academics, people working for non-governmental organisations and so forth.

Of course, a broad coalition for the adoption of guidelines may serve exactly that purpose, as illustrated by the Refugee Women Legal Group in Great Britain. As an unsolved problem, however, is how such a coalition can survive the granting of the demand for guidelines and the subsequent demobilisation. It may be useful to imagine other forms of mobilisation, alongside mobilisation around guidelines. One may think of support networks for female applicants, for instance, with the support ranging from shelter to campaigning and legal advice; to networks focusing on individual cases published in the form of a “black book.” The essential aspect of such networks is their potential to mobilise people at many levels.

Regardless of whether gender guidelines have been promulgated or not, it is important that the general guidelines for determining asylum claims (including the EU Joint Position on the refugee definition) be “emasculated.” Taking The Netherlands as an example, we have seen in section 2.5 that the “general” working instructions for dealing with the asylum claims of applicants from particular countries predominantly address flight motives considered characteristic for men, while “women’s cases” were referred to in specific paragraphs about humanitarian grounds if they
were mentioned at all. It seems important that such general instructions for civil servants are analysed, sentence by sentence, as to their implicit or explicit presumptions about gender. Non-governmental organisations can play a crucial role here. In this respect, equal attention should be paid to country information, including the country information provided by non-governmental organisations themselves.

Another policy instrument that seems useful is the so-called gender impact assessment. This policy instrument requires that, before policy plans or programs are implemented, their effects on gender relations are analysed. A gender assessment study consists of five steps. First, current gender relations in a particular field are analysed; second, the probable developments without a new policy are described; third, the new policy plan is described; fourth, its potential effects on gender relations is analysed; and finally, the positive and negative potential effects of the new policy are evaluated. Such an assessment should be made before new policies are actually determined, and is particularly useful when general policy proposals (e.g., a legalisation measure, major amendments to the Immigration Act) are to be submitted. Gender impact assessments may be useful substantively, but a standard policy to undertake them also ensures that the issue of gender is on the agenda regularly, and provides an opportunity for public debate.

In terms of legal reasoning, a demystified version of the human rights approach can be effective. The human rights framework enables a critical analysis of refugee law discourse, and articulation of previously excluded claims. The almost exclusive focus on social group as a persecution ground is a characteristic, but not an essential part of the human rights approach. If the emphasis is shifted away from social group to political opinion, a new human rights approach can enable us to analyse and critique refugee law discourse without necessarily reproducing it. However, the proponents of the human rights approach tend to believe in the transcendental nature of law; they write as if proper application of the law will bring justice. If the analysis presented here is correct, this is a chimera. The position in women in refugee law turns on the family and control of sexuality and reproduction, which are clearly contested in Western countries. Liberal legal terms may be used to articulate claims and criticise dominant discourse, but these terms cannot be expected to resolve these conflicts to the benefit of Third World women. Law is one of the vocabularies for contesting the representation of refugee women and it can be viewed as an arena in which this contest may take place. But vocabularies and arenas do not decide the outcomes of the conflicts waged within them.

An important consequence of the analysis presented here is that there is no privileged site for the contest over refugee women. The possibility of meaningful politics is not restricted to people on the “good side” (i.e., refugee lawyers and activists), to people working on “test cases” or lobbyists. Civil servants discussing hard cases in the office may do important things to change the perspectives of their colleagues. A court secretary may provide an important opening for a discussion. A volunteer working for a local refugee group may change the attitude of her organisation. For this, some broader sort of mobilisation seems essential. In Great Britain, mobilisation has been brought around gender guidelines. In contrast, in The Netherlands the Dutch Refugee Council was the first to appoint a specialist on refugee women but recently “mainstreamed” gender; gender has hardly been heard of since. As a result, much smaller Dutch organisations and most notably the self-organisation of refugees have taken up the issue. The situation in Canada and the USA is difficult for me to assess but the fact that the people who were important for getting gender onto the agenda are praising the guidelines as an example for the world is worrisome.

At first sight, the rather critical analysis of refugee law put forward here may seem to be problematic because refugee women are so dependent on refugee law. Doesn’t such a strategy endanger exactly the phenomenon which refugees need? I do not imagine that refugee law will wither away under my (or anybody else’s) critique. The risk that Western States will suddenly admit that, yes, refugee law has an ideological function and will abolish it seems imaginary. The effects of a sustained critique of refugee law may be twofold. First, it may provide a focus for the mobilisation of people. Second, it may help a coalition contest the legitimacy of refugee law practice and thereby change the terms of the debate. However, this strategy may strike some as not very cheerful, because it does not include an imagined end or solution to the problem. Female asylum applicants in the West are faced with opportunities as well as impossibilities because they are caught in both external conflicts (West-South) and internal conflicts (over the family, sexuality and reproduction) involving the societies to which they turn for protection. This creates the possibility of alliances between refugee women and people in Western countries. But governments are parties to these conflicts, and not impartial arbiters of whom refugee women, whose strategic position is particularly weak, can expect a “solution.”
ANNEX I: DATA ON THE LARGEST COUNTRIES OF ORIGIN

In the tables below, the data on these countries of origin representing more than 2% of the total number of decisions of the State Secretary of Justice over the years 1989-1995 are presented. Initial decisions and after review are considered together. The twelve largest countries represent 69% of all decisions in this period. In order not to skip the data on the remaining 147 countries (from Nigeria in the 13th place to Vatican City in the 169th place), I have added the data on these countries together (see Table A.13); the sum of the other nationalities represents 31% of the decisions. Information on those years in which the number of positive decisions for either men or women was 5 or less is not presented.

Table A.1 Percentage positive decisions on men and women 1989-1995, Somalia (n=33,124)

<table>
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<th>% pos men (n=*)</th>
<th>% pos women (n=*)</th>
<th>difference</th>
</tr>
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<td>1991</td>
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<td>1992</td>
<td>60.0 (2613)</td>
<td>61.0 (1704)</td>
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<td>47.1 (2292)</td>
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<td>28.0 (1146)</td>
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<td>1989-1995</td>
<td>35.6 (7189)</td>
<td>37.1 (4790)</td>
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Table A.2 Percentage positive decisions on men and women 1989-1995, Bosnia-Herzegovina (n=25,259)

<table>
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<td></td>
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<td>86.5 (2321)</td>
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<tr>
<td>1994</td>
<td>78.4 (3568)</td>
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<tr>
<td>1995</td>
<td>74.5 (4217)</td>
<td>78.5 (3715)</td>
<td>-4.0</td>
</tr>
<tr>
<td>1989-1995</td>
<td>75.7 (10109)</td>
<td>78.7 (9367)</td>
<td>-3.0</td>
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</table>
### Table A.3  Percentage positive decisions on men and women 1989-1995, Iran (n=20,165)

<table>
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</tr>
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<td>1989-1995</td>
<td>28.3 (3736)</td>
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<td>-2.2</td>
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### Table A.4  Percentage positive decisions on men and women 1989-1995, Yugoslavia (n=19,114)

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</thead>
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<tr>
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<td>1994</td>
<td>16.6 (497)</td>
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<td>1995</td>
<td>13.4 (304)</td>
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<td>-4.8</td>
</tr>
<tr>
<td>1989-1995</td>
<td>24.0 (2824)</td>
<td>32.6 (2400)</td>
<td>8.6</td>
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### Table A.5  Percentage positive decisions on men and women 1989-1995, Sri Lanka (n=12,904)

<table>
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<th>% pos women (n=*)</th>
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</tr>
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<td>1990</td>
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<td>1991</td>
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<td>1992</td>
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<td>1989-1995</td>
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### Table A.6  Percentage positive decisions on men and women 1989-1995, Iraq (n=12,929)

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</tr>
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<td>1993</td>
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### Table A.7  Percentage positive decisions on men and women 1989-1995, Rumania (n=12,266)

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<td>1993</td>
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### Table A.9 Percentage positive decisions on men and women 1989-1995, Zaire (n=6,708)

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<th>difference</th>
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### Table A.10 Percentage positive decisions on men and women 1989-1995, Ethiopia (n=6,612)

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<th>% pos women (n=*)</th>
<th>difference</th>
</tr>
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### Table A.11 Percentage positive decisions on men and women 1989-1995, Turkey (n=6,205)

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</tr>
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<td>12.1 (14)</td>
<td>-3.6</td>
</tr>
<tr>
<td>1991</td>
<td>15.5 (117)</td>
<td>33.9 (116)</td>
<td>-18.4</td>
</tr>
<tr>
<td>1992</td>
<td>21.7 (265)</td>
<td>29.2 (174)</td>
<td>-7.5</td>
</tr>
<tr>
<td>1993</td>
<td>17.9 (129)</td>
<td>24.3 (83)</td>
<td>-6.4</td>
</tr>
<tr>
<td>1994</td>
<td>9.5 (47)</td>
<td>16.7 (37)</td>
<td>-7.2</td>
</tr>
<tr>
<td>1995</td>
<td>16.2 (96)</td>
<td>22.4 (60)</td>
<td>-6.2</td>
</tr>
<tr>
<td>1989-1995</td>
<td>16.6 (684)</td>
<td>25.1 (485)</td>
<td>-9.1</td>
</tr>
</tbody>
</table>

### Table A.12 Percentage positive decisions on men and women 1989-1995, China (n=6,182)

<table>
<thead>
<tr>
<th>Year</th>
<th>% pos men (n=*)</th>
<th>% pos women (n=*)</th>
<th>difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>0 (0)</td>
<td>0 (0)</td>
<td>0</td>
</tr>
<tr>
<td>1990</td>
<td>3.3 (1)</td>
<td>11.1 (1)</td>
<td>-7.8</td>
</tr>
<tr>
<td>1991</td>
<td>0.9 (7)</td>
<td>4.2 (10)</td>
<td>-3.3</td>
</tr>
<tr>
<td>1992</td>
<td>11.6 (144)</td>
<td>16.3 (67)</td>
<td>-4.7</td>
</tr>
<tr>
<td>1993</td>
<td>17.3 (130)</td>
<td>33.5 (66)</td>
<td>-16.2</td>
</tr>
<tr>
<td>1994</td>
<td>13.5 (134)</td>
<td>16.8 (54)</td>
<td>-3.3</td>
</tr>
<tr>
<td>1995</td>
<td>13.7 (123)</td>
<td>20.2 (67)</td>
<td>-6.5</td>
</tr>
<tr>
<td>1989-1995</td>
<td>11.5 (539)</td>
<td>17.5 (263)</td>
<td>-6.0</td>
</tr>
</tbody>
</table>

### Table A.13 Percentage positive decisions on men and women 1989-1995, All other countries together (n=74,600)

<table>
<thead>
<tr>
<th>Year</th>
<th>% pos men (n=*)</th>
<th>% pos women (n=*)</th>
<th>difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>0.8 (22)</td>
<td>0.8 (7)</td>
<td>0</td>
</tr>
<tr>
<td>1990</td>
<td>1.9 (133)</td>
<td>3.2 (63)</td>
<td>-1.3</td>
</tr>
<tr>
<td>1991</td>
<td>4.9 (390)</td>
<td>11.3 (286)</td>
<td>-6.4</td>
</tr>
<tr>
<td>1992</td>
<td>10.0 (1011)</td>
<td>20.5 (692)</td>
<td>-10.5</td>
</tr>
<tr>
<td>1993</td>
<td>10.3 (713)</td>
<td>19.5 (464)</td>
<td>-9.2</td>
</tr>
<tr>
<td>1994</td>
<td>11.1 (1208)</td>
<td>12.1 (498)</td>
<td>-1.0</td>
</tr>
<tr>
<td>1995</td>
<td>12.2 (1328)</td>
<td>14.5 (615)</td>
<td>-2.3</td>
</tr>
<tr>
<td>1989-1995</td>
<td>8.7 (4785)</td>
<td>13.5 (2625)</td>
<td>-4.8</td>
</tr>
</tbody>
</table>
ANNEX 2: REPRESENTATIVITY OF THE SAMPLE

As argued in section 2.5, the information in the following Tables shows the sample is representative. The first column gives the initial decisions for the whole population; the second column gives the initial decisions for the sample of independent female applicants. Comparison of Table 2.6 and Tables A.14-A.19 below shows the absolute number of decisions per country to often be lower than the number of files I saw. This is because some of the files I saw did not belong in the sample (e.g., the applicant turned out to be about a man) or because the case was selected twice by the computer (e.g., both a mother and her 8 year old daughter who actually have a single file). These files were included in Table 2.6, as that Table concerns non-response; they are not included in the Tables below, which concern representativeness.

### Table A.14 Bosnia-Herzegovina, women: initial decisions 1994 population and sample

<table>
<thead>
<tr>
<th></th>
<th>population</th>
<th>sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>1765 (45%)</td>
<td>15 (48%)</td>
</tr>
<tr>
<td>humanitarian residence perm.</td>
<td>85 (2%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td>temporary protection permit</td>
<td>1344 (34%)</td>
<td>10 (32%)</td>
</tr>
<tr>
<td>negative</td>
<td>509 (13%)</td>
<td>5 (16%)</td>
</tr>
<tr>
<td>other</td>
<td>214 (6%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>total</td>
<td>3917 (100%)</td>
<td>31 (99%)</td>
</tr>
</tbody>
</table>

### Table A.15 China, women: initial decisions 1994 population and sample

<table>
<thead>
<tr>
<th></th>
<th>population</th>
<th>sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>1 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>humanitarian residence perm.</td>
<td>36 (15%)</td>
<td>29 (38%)</td>
</tr>
<tr>
<td>temporary protection permit</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>negative</td>
<td>200 (82%)</td>
<td>46 (61%)</td>
</tr>
<tr>
<td>other</td>
<td>7 (3%)</td>
<td>1 (1%)</td>
</tr>
<tr>
<td>total</td>
<td>244 (100%)</td>
<td>76 (100%)</td>
</tr>
</tbody>
</table>

### Table A.16 Iran, women: initial decisions 1994 population and sample

<table>
<thead>
<tr>
<th></th>
<th>population</th>
<th>sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>85 (6%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td>humanitarian residence perm.</td>
<td>288 (19%)</td>
<td>6 (17%)</td>
</tr>
<tr>
<td>temporary protection permit</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>negative</td>
<td>1081 (71%)</td>
<td>28 (78%)</td>
</tr>
<tr>
<td>other</td>
<td>67 (4%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td>total</td>
<td>1521 (100%)</td>
<td>36 (101%)</td>
</tr>
</tbody>
</table>

### Table A.17 Sri Lanka, women: initial decisions 1994 population and sample

<table>
<thead>
<tr>
<th></th>
<th>population</th>
<th>sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>5 (1%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>humanitarian residence perm.</td>
<td>31 (5%)</td>
<td>2 (4%)</td>
</tr>
<tr>
<td>temporary protection permit</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>negative</td>
<td>539 (84%)</td>
<td>46 (92%)</td>
</tr>
<tr>
<td>other</td>
<td>70 (11%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>total</td>
<td>645 (101%)</td>
<td>50 (100%)</td>
</tr>
</tbody>
</table>

### Table A.18 Turkey, women: initial decisions 1994 population and sample

<table>
<thead>
<tr>
<th></th>
<th>population</th>
<th>sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>7 (5%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>humanitarian residence perm.</td>
<td>13 (9%)</td>
<td>3 (14%)</td>
</tr>
<tr>
<td>temporary protection permit</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>negative</td>
<td>124 (83%)</td>
<td>19 (86%)</td>
</tr>
<tr>
<td>other</td>
<td>5 (3%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>total</td>
<td>149 (100%)</td>
<td>22 (100%)</td>
</tr>
</tbody>
</table>

### Table A.19 Zaire, women: initial decisions 1994 population and sample

<table>
<thead>
<tr>
<th></th>
<th>population</th>
<th>sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee status</td>
<td>4 (1%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>humanitarian residence perm.</td>
<td>22 (4%)</td>
<td>4 (11%)</td>
</tr>
<tr>
<td>temporary protection permit</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>negative</td>
<td>551 (94%)</td>
<td>32 (86%)</td>
</tr>
<tr>
<td>other</td>
<td>12 (2%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td>total</td>
<td>589 (101%)</td>
<td>37 (100%)</td>
</tr>
</tbody>
</table>

**Table A.20 Bosnian applications 1989-1994**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>m</td>
<td>0</td>
<td>0</td>
<td>111</td>
<td>1191</td>
<td>2768</td>
<td>4429</td>
</tr>
<tr>
<td>f</td>
<td>0</td>
<td>0</td>
<td>61</td>
<td>1252</td>
<td>2579</td>
<td>3747</td>
</tr>
<tr>
<td>?</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>27</td>
<td>18</td>
</tr>
<tr>
<td>total</td>
<td>1</td>
<td>0</td>
<td>173</td>
<td>2446</td>
<td>5374</td>
<td>8194</td>
</tr>
<tr>
<td>% of all appl.</td>
<td>0%</td>
<td>0.8%</td>
<td>12.3%</td>
<td>15%</td>
<td>16.3%</td>
<td></td>
</tr>
</tbody>
</table>

**Table A.21 Chinese applications 1989-1994**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>m</td>
<td>76</td>
<td>487</td>
<td>998</td>
<td>130</td>
<td>779</td>
<td>606</td>
</tr>
<tr>
<td>f</td>
<td>37</td>
<td>176</td>
<td>327</td>
<td>39</td>
<td>137</td>
<td>246</td>
</tr>
<tr>
<td>?</td>
<td>6</td>
<td>11</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>total</td>
<td>119</td>
<td>674</td>
<td>1329</td>
<td>169</td>
<td>917</td>
<td>856</td>
</tr>
<tr>
<td>% of all appl.</td>
<td>1.2%</td>
<td>3.1%</td>
<td>6.2%</td>
<td>0.1%</td>
<td>2.6%</td>
<td>1.7%</td>
</tr>
</tbody>
</table>

**Table A.22 Iranian applications 1989-1994**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>m</td>
<td>366</td>
<td>1157</td>
<td>1054</td>
<td>793</td>
<td>1790</td>
<td>3659</td>
</tr>
<tr>
<td>f</td>
<td>168</td>
<td>607</td>
<td>583</td>
<td>441</td>
<td>850</td>
<td>2154</td>
</tr>
<tr>
<td>?</td>
<td>13</td>
<td>21</td>
<td>33</td>
<td>10</td>
<td>4</td>
<td>28</td>
</tr>
<tr>
<td>total</td>
<td>547</td>
<td>1785</td>
<td>1670</td>
<td>1244</td>
<td>2644</td>
<td>5841</td>
</tr>
<tr>
<td>% of all appl.</td>
<td>5.5%</td>
<td>8.2%</td>
<td>7.8%</td>
<td>6.2%</td>
<td>7.4%</td>
<td>11.6%</td>
</tr>
</tbody>
</table>

**Table A.23 Sri Lankan applications 1989-1994**

<table>
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<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>m</td>
<td>522</td>
<td>2273</td>
<td>1217</td>
<td>690</td>
<td>1292</td>
<td>1145</td>
</tr>
<tr>
<td>f</td>
<td>119</td>
<td>773</td>
<td>542</td>
<td>294</td>
<td>624</td>
<td>602</td>
</tr>
<tr>
<td>?</td>
<td>29</td>
<td>20</td>
<td>8</td>
<td>3</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>total</td>
<td>670</td>
<td>3066</td>
<td>1767</td>
<td>987</td>
<td>1919</td>
<td>1751</td>
</tr>
<tr>
<td>% of all appl.</td>
<td>6.5%</td>
<td>14.0%</td>
<td>8.2%</td>
<td>4.9%</td>
<td>5.4%</td>
<td>3.5%</td>
</tr>
</tbody>
</table>

**Table A.24 Turkish applications 1989-1994**

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>m</td>
<td>254</td>
<td>586</td>
<td>604</td>
<td>436</td>
<td>415</td>
<td>420</td>
</tr>
<tr>
<td>f</td>
<td>98</td>
<td>257</td>
<td>292</td>
<td>216</td>
<td>197</td>
<td>178</td>
</tr>
<tr>
<td>?</td>
<td>17</td>
<td>16</td>
<td>16</td>
<td>13</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>total</td>
<td>369</td>
<td>859</td>
<td>912</td>
<td>665</td>
<td>617</td>
<td>610</td>
</tr>
<tr>
<td>% of all appl.</td>
<td>3.6%</td>
<td>3.9%</td>
<td>4.2%</td>
<td>3.3%</td>
<td>1.7%</td>
<td>1.2%</td>
</tr>
</tbody>
</table>

**Table A.25 Zairian applications 1989-1994**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>m</td>
<td>202</td>
<td>155</td>
<td>212</td>
<td>334</td>
<td>912</td>
<td>1397</td>
</tr>
<tr>
<td>f</td>
<td>67</td>
<td>53</td>
<td>85</td>
<td>122</td>
<td>438</td>
<td>674</td>
</tr>
<tr>
<td>?</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>7</td>
<td>16</td>
</tr>
<tr>
<td>total</td>
<td>269</td>
<td>209</td>
<td>298</td>
<td>460</td>
<td>1357</td>
<td>2087</td>
</tr>
<tr>
<td>% of all appl.</td>
<td>2.6%</td>
<td>1.0%</td>
<td>1.4%</td>
<td>2.3%</td>
<td>3.8%</td>
<td>4.2%</td>
</tr>
</tbody>
</table>
ANNEX 4: CASES FROM SAMPLE BY CATEGORY AND OUTCOME

In the following tables, I present the outcome of the cases in the sample of independent female applicants as it was at the moment I saw the file. This outcome is often different from the initial decision, as comparison with Tables A.14-A.19 shows. The final outcome may also be different from the outcome presented here as some cases were still pending when I saw them in the second half of 1996.

Table A.26  Bosnian cases by category and outcome: interview

<table>
<thead>
<tr>
<th>Refugee status</th>
<th>interview</th>
<th>no interview</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee st.</td>
<td>9</td>
<td>13</td>
<td>22</td>
</tr>
<tr>
<td>hum. r.p.</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>cond. r.p.</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>negative</td>
<td>4</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>total</td>
<td>15</td>
<td>16</td>
<td>31</td>
</tr>
</tbody>
</table>

Table A.27  Bosnian cases by category and outcome: ethnicity

<table>
<thead>
<tr>
<th>Refugee status</th>
<th>Muslim</th>
<th>Croat</th>
<th>Serb</th>
<th>Unknown</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refugee st.</td>
<td>12</td>
<td>6</td>
<td>2</td>
<td>2</td>
<td>22</td>
</tr>
<tr>
<td>hum. r.p.</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>cond. r.p.</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Negative</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>17</td>
<td>7</td>
<td>2</td>
<td>5</td>
<td>31</td>
</tr>
</tbody>
</table>

Table A.28: Chinese cases by category and outcome

<table>
<thead>
<tr>
<th>Ref. st.</th>
<th>UMA</th>
<th>child</th>
<th>family</th>
<th>spouse</th>
<th>activit's</th>
<th>financ</th>
<th>porn</th>
<th>other</th>
<th>total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>hum</td>
<td>31</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>cond</td>
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<td>0</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>neg</td>
<td>3</td>
<td>14</td>
<td>6</td>
<td>4</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>7</td>
<td>43</td>
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<td>0</td>
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<td>4</td>
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<td>3</td>
<td>3</td>
<td>7</td>
<td>76</td>
</tr>
</tbody>
</table>

Table A.29: Iranian cases by category and outcome

<table>
<thead>
<tr>
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<th>relatives</th>
<th>impr</th>
<th>behav'r</th>
<th>family law</th>
<th>mommies</th>
<th>total</th>
</tr>
</thead>
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<tr>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
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</tr>
<tr>
<td>hum. r.p.</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>5</td>
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<tr>
<td>cond r.p.</td>
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<td>0</td>
<td>0</td>
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<tr>
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<td>4</td>
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<td>2</td>
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<td>8</td>
<td>6</td>
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<td>36</td>
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Table A.30: Sri lankan cases by category and outcome

<table>
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<tr>
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<th>forced recruitm</th>
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<th>total</th>
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</thead>
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<td>2</td>
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<td>34</td>
<td>9</td>
<td>5</td>
<td>2</td>
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Table A.31: Turkish cases by category and outcome

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</tr>
<tr>
<td>negative</td>
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<td>5</td>
<td>1</td>
</tr>
<tr>
<td>other</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>total</td>
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<td>8</td>
<td>3</td>
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</tbody>
</table>

Table A.32: Zairian cases by category and outcome

<table>
<thead>
<tr>
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<th>activities</th>
<th>vendors</th>
<th>rel dispapp</th>
<th>dom viol</th>
<th>other</th>
<th>total</th>
</tr>
</thead>
<tbody>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>hum. r.p.</td>
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<td>1</td>
<td>1</td>
<td>0</td>
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<td>cond r.p.</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
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<tr>
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<td>26</td>
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<td>1</td>
<td>1</td>
</tr>
<tr>
<td>total</td>
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<td>12</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>37</td>
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ANNEX 5: REDUCTION OF DATA FOR COMPUTATION OF CORRELATIONS

The computations for the results presented in section 2.4 were based on the total number of asylum decisions by the State Secretary of Justice across the years 1989-1995. The 247,449 decisions were subdivided into data per year and country. To detect any relations between the “recognition rates” (i.e. percentage positive decisions) for men and women respectively with other variables, a total of 1183 country/year combinations had to be considered.

I was particularly interested in the differences in the recognition rates for men and women in themselves. The easiest way of analysing them was to take the differences in recognition rates (i.e. the recognition rate of men minus that of women) as a starting point. Nevertheless, this raises a number of problems which I will sketch briefly below. In order to calculate the difference in the recognition rates for men and women, decisions on both men and women had to have occurred for a particular country/year combination. Combinations with no decisions on men or no decisions on women were thus excluded. Some positive decisions also had to be made for a particular country/year combination. If no positive decisions were made, the difference between the men and the women would be a meaningless zero. Country/year combinations with no positive decision were thus excluded as well. This reduced the number of country/year combinations to 350 and the number of decisions to 237,772 decisions (96.1% of the total).

Yet another problem is that country/year combinations with small absolute numbers produce unreliable proportions. For example: Only two decisions in a particular country/year combination, one male positive and one female negative, produces a difference of 100% which looks spectacular but is very uninteresting. The minimum number of cases was set at 40; that is, a country/year combination was only selected when it had at least 40 decisions on men and at least 40 decisions on women. This reduced the number of combinations to 174 and the number of decisions to 225,002 decisions (being 90.9% of the total).

The minimum number of decisions was set at 40 for the following reason. The median recognition rate was 10% (i.e., half of the combinations had a rate higher than 10% and half had a rate lower than 10%). When a sample of 40 decisions is selected and the recognition rate is found to be 10%, for this sample there is 95% confidence that the recognition rate for the entire population will be between 5% and 24%. This range of variability makes the reliability of the 10% recognition rate s pretty low, but selection of a higher threshold (i.e., minimum number of decisions) would mean exclusion of too many country/year combinations.

In the end, the picture of the differences between men and women (the variable of interest) appeared to be distorted by one country/year combination (concerning the Netherlands as the country of origin of the applicants), which was then excluded (see section 2.3). This reduced the number of combinations to 173 and the number of decisions to 224,455 decisions (being 90.7% of the total).
ANNEX 6: COMPARING DATA ON DIFFERENT COUNTRIES OF REFUGE

In section 2.3 I stated that the overrepresentation of negative decisions in the Dutch statistical data makes it problematic to compare the decisions on men and women with those from other countries. I promised an example.

500 women and 1000 men ask for asylum. In country A, only first instance decisions are counted. Positive decisions are given in first instance. 200 women receive a positive decision, and 300 men. The others receive a negative decision. This leads to the percentages positive decisions given in Table A.33.

In country B, the authorities try to discourage asylum applicants by always giving a negative decision in first instance. All applicants therefore appeal. In second instance, they give the same decisions as the authorities in country A. As Table A.34 shows, there are still 200 positive decisions about women and 300 about men. However, the 300 rejected women have produced 600 negative decisions (namely the first and second instances); the 200 women receiving a positive decision in second instance also received a negative decision in first instance. Therefore, in Table A.34, we see 200 positive decisions and 800 negative decisions for women. In the cases of men, the same process is at work.

Table A.33 Decisions country A

<table>
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<th>negative decisions</th>
<th>percentage of positive decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>men</td>
<td>300</td>
<td>700</td>
<td>30%</td>
</tr>
<tr>
<td>women</td>
<td>200</td>
<td>300</td>
<td>40%</td>
</tr>
</tbody>
</table>

Table A.34 Decisions country B

<table>
<thead>
<tr>
<th></th>
<th>positive decisions</th>
<th>negative decisions</th>
<th>percentage of positive decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>men</td>
<td>300</td>
<td>1,700</td>
<td>15%</td>
</tr>
<tr>
<td>women</td>
<td>200</td>
<td>800</td>
<td>20%</td>
</tr>
</tbody>
</table>

As we see, the decision-making processes in countries A and B have the same outcome for the applicants in the end. However, in country B, the percentage of positive decisions is lower and the difference between the men and women is smaller. Both differences are caused by a combination of differences in registration and procedural differences. It is therefore in-
ANNEX 7: TRANSLATION, PREPARED BY UNHCR, OF DUTCH IMMIGRATION AND NATURALISATION SERVICE (IND) WORK INSTRUCTION NO. 148: WOMEN IN THE ASYLUM PROCEDURE

Introduction

Upon request of the State Secretary of Justice, the Emancipation Council issued an opinion in autumn 1996 “Expertise advancement at IND: towards a gender-inclusive approach” (“Deskundigheidsbevordering bij IND: naar een genderinclusieve benadering”). I have adopted the following work instructions (practioners' guidance), based inter alia on this opinion.

Neither the 1951 Convention nor the Dutch Aliens Act makes an explicit distinction according to gender (man/woman). In order to guarantee that these rules effectively do justice to the asylum applications of both men and women, this work instruction formulates a number of premises. Therefore, this work instruction does not contain a policy change, but is meant to draw attention to specific aspects of the asylum applications of women asylum-seekers relative to their gender and which may be important in assessing whether or not the grant of refugee status or a residence permit is warranted.

Gender as a premise

An asylum application is to be assessed especially in view of the position of men and women in the country of origin. In summary, this means an assessment taking into account the “gender” issue. This can be promoted by determining whether the activities claimed by an asylum seeker took place in the private sphere or in the public domain.

In each country of origin the scope of the public domain is different, i.e. the influence of public authorities on civil society. This implies among other things, that activities which in some countries are mainly assigned to women and are normally considered as private acts (such as cooking), may be considered by the authorities in the country of origin as “political” acts (cooking for resistance fighters). Another example showing the importance of the distinction between public and private acts is sexual harassment committed by government officials during the execution of their functions and related to one of the persecution grounds. This is not to be considered a personal (private) act of the government official concerned.

This distinction between private and public is meant to clarify the position of men and women in the country of origin. Processing of an asylum application therefore is to be undertaken from this perspective.

Interviewing women asylum seekers

In addition to the above-mentioned general considerations, the following more specific premises need to be taken into account when interviewing women asylum seekers:

a) During the introduction of the hearing, the woman should be informed of the possibility to have a female hearing officer;

b) In cases where women claim a fear of persecution on the basis of the activities of their partner of members of their family, attention should also be given to their own experiences;

c) In case women claim to have been discriminated against or persecuted by third parties, attention should also be given to the question why they have not asked or been offered protection by the authorities in the home country. If they did ask protection, yet did not repeat such a request with another public authority in case of a first refusal, special attention should be given to the question why only one attempt was made;

d) If one claims sexual harassment in private circumstances, attention should be given to the possibilities of an internal flight alternative. In these cases, the consideration listed under c, above, apply.

Refugee status

In order to determine whether a woman asylum seeker qualifies for refugee status in the sense of the 1951 Convention, the question needs to be answered whether there exists a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Sex cannot serve as an independent ground of persecution. It is important to distinguish public from private circumstances, because activities of women should be related correctly to one of the persecution grounds as mentioned in the 1951 Convention.

4.1. Grounds of persecution

When determining whether one of the persecution grounds is present, consideration should be given primarily to persecution for reasons of political opinion.
N.B.: Persecution can also exist if a political opinion is *attributed* by the government to the person concerned. A political opinion can be attributed to a citizen for reasons of infringement of national norms or because the person's attitude is considered to be hostile to the regime.

Infringement of gender discriminatory social customs, religious prescriptions or cultural norms *may be* interpreted as the expression of a political opinion by women if:
- she originates from a society where women fulfil a strictly defined and often subordinate role, and
- the government stimulates or maintains these gender-based relations (e.g. by not wanting to interfere in cases of human rights violations committed by fellow-citizens).

If a well-founded fear of persecution for reasons of a particular political opinion is not present, the possible existence of other persecution grounds should be verified within the framework of the general considerations listed in paragraph 2.

N.B.: Sex cannot be the sole ground to determine membership of a "particular social group". *Women in general* are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually.

4.2. Criminal prosecution and discrimination

Prosecution in view of a prescription specifically applicable to women may constitute persecution in the sense of the 1951 Convention if it can be argued that:

a) the punishment is disproportionately heavy and related to one of the persecution grounds, or
b) in addition to normal punishment, a discriminatory prosecution is meted out, on the basis of one of these grounds.

Discrimination is a relevant consideration in asylum cases if (very) serious restrictions on the possibility of earning one's livelihood can be brought forward for which the government is directly responsible, or against which the authorities do not want to offer protection. If the asylum seeker claims that the discrimination is specifically directed towards women, the applicability of one of the persecution grounds remains a requirement for granting refugee status. Naturally the persecution should also be individually targeted if one claims discrimination in the sense of persecution. Thus, the mere existence of dress codes for women is, as such, not a form of discrimination amounting to persecution.

*Residence permit for serious humanitarian reasons (viv)*

If the asylum motives advanced do not give reason to grant refugee status, it should be considered whether there is a basis for granting a residence permit for serious humanitarian reasons. Such a permit may be granted if for instance the requirements of the usual "trauma" policy are met or if the asylum seeker has advanced plausible arguments that expulsion would entail a "real risk" of being subjected to torture or inhuman or degrading treatment or punishment in the sense of article 3 of the European Convention on Human Rights.

In assessing the requirements for granting a residence permit for humanitarian reasons, the existence of an internal flight alternative should be examined (unless the usual "trauma" policy applies). This is the more important if the asylum grounds relate to:
- gender discrimination on the basis of local or regional customs, or
- gender discrimination resulting from customs which are adhered to in specific parts of the country only (e.g. rural versus urban areas), or
- human rights violations, committed in the private sphere.

*Female genital mutilation*

(Political) opposition against female genital mutilation may, in certain circumstances, as referred to in paragraph 3, be considered as a ground for refugee status. If a woman has not yet been subjected to female genital mutilation, but cannot avoid such treatment in her home country, there can be a "real risk" of a violation of article 3 of the European Convention of Human Rights. It should be demonstrated that she, by no means, wants to be subjected to this tradition. In addition, the following conditions need to be fulfilled:
- she cannot avoid the female genital mutilation (there is no internal flight alternative, see above in paragraph 5), or
in avoiding the female genital mutilation, the woman would be considered as social outcast.

In most countries where there is a widespread practice of female genital mutilation, this is practiced at an early age. Where a claim is made on the basis of fear of female genital mutilation, the national customs should be considered carefully in order to assess, in the individual case, the credibility of the application. In case of doubt, contact should be sought with the Ministry of Foreign Affairs (work instruction No. 4).

A parent who fears genital mutilation of his or her daughter, as well as the concerned girl, may qualify for a residence permit for serious humanitarian reasons (vrtv), in case the above-mentioned criteria are fulfilled.

ANNEX 8: OUTLINE OF THE DUTCH ASYLUM PROCEDURE AND TERMINOLOGY

1. BASIC PROCEDURE

APPLICATION

intake

interview

possibility for corrections/additions

INITIAL DECISION (State Secretary of Justice)

APPLICATION FOR (ADMINISTRATIVE) REVIEW

optional: hearing by ACV or official commission

REVIEW DECISION (State Secretary of Justice)

APPEAL

court hearing

COURT DECISION (District Court = Arrondissementsrechtbank = Rb.; until 1 Jan 1994 Judicial Dept. Council of State = Afdeling rechtspraak van de Raad van State = ARRvS; appeals filed before 1 Jan. 1994 but decided afterwards are decided by the successor of ARRvS, Afdeling bestuursrechtspraak van de Raad van State = ABRvS)

2. INTERIM INJUNCTION PROCEDURE

The symbol ➔ indicates that at these moments the State Secretary of Justice can decide whether to grant suspensive effect. If suspensive effect is granted, the applicant can stay in the country during the next phase of the procedure. If not, she can ask for an interim injunction to grant suspensive effect, which is decided by the President of the County Court. If the President grants suspensive effect, the applicant can stay in the country during the next phase of the procedure. If not, the
applicant can be deported. When deciding about suspensive effect, the President may also decide about the application for review or the appeal from the basic procedure. The decision of the President cannot be appealed.

Before 1 Jan. 1994, the President could not dismiss the application for review or the appeal. Also, the decision of the President was subject to appeal to the Appeals Court. Against the Decision of Appeals Court, a cassation appeal (not about the facts, only about the law) could be filed with the Supreme Court.

**DENIAL OF SUSPENSIVE EFFECT**

**REQUEST FOR AN INTERIM INJUNCTION**

court hearing

**COURT DECISION** (President District Court = President Arrondissementsrechtbank = Pres. Rh.), consisting of
- decision about suspensive effect
- and, if the President finds this feasible, a decision about the request for review or the appeal

before 1 Jan. 1994 this could be followed by:

**APPEAL**

court hearing

**COURT DECISION** (Appeals Court = Gerechtshof = Hof)

**CASSATION APPEAL**

court hearing

**COURT DECISION** (Supreme Court = Hoge Raad = HR)

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Samenvatting

Sinds de jaren tachtig is een kritiek op het vluchtelingenrecht geformuleerd waarin gesteld wordt dat bij de interpretatie en toepassing van de vluchtelingsdefinitie onvoldoende rekening wordt gehouden met de ervaringen van vrouwelijke asielzoekers. Deze kritiek heeft gehoor gevonden bij de UNHCR en een aantal Westerse landen. Dit boek biedt een overzicht van het juridische debat dat in de afgelopen twee decennia over vrouwen en het vluchtelingenrecht is gevoerd, en toetst een aantal feitelijke vooronderstellingen die in dat debat een rol spelen aan de hand van statistische gegevens, een steekproef van 252 dossiers van alleenkomende vrouwen die in Nederland om asiel vroegen, en gepubliceerde jurisprudentie uit met name Nederland, de Verenigde Staten, Frankrijk, Canada, Duitsland en het Verenigd Koninkrijk.

In Hoofdstuk 2 wordt eerst ingegaan op de vaak gehoorde stelling dat van alle vluchtelingen op de wereld twee derde vrouw, c.q. vrouw of kind is. Bestudering van de beschikbare gegevens leert dat ongeveer de helft van alle vluchtelingen vrouw is, en dat ook de helft van alle vluchtelingen jonger dan vijftien jaar oud is. Dat betekent dat ongeveer drie kwart van alle vluchtelingen vrouw of kind is. Het percentage vrouwen dat in Westerse landen om asiel vraagt is echter lager. In Nederland ligt het percentage vrouwen onder asielzoekers op van een kwart begin jaren tachtig tot een derde nu. Vervolgens wordt onderzocht of, zoals vaak gesteld of gesuggereerd wordt, vrouwen minder kans hebben om asiel te krijgen dan mannen. Op grond van gegevens over de uitkomst van de asielprocedure in Canada en Nederland wordt deze suggestie voorschts verworpen. Vrouwen krijgen iets vaker asiel dan mannen. Deels wordt dit verklaard doordat vrouwelijke asielzoekers vaker dan mannen afkomstig zijn uit landen waarvoor het inwilligingspercentage hoog is. De conclusie is dus dat, terwijl vrouwen kennelijk minder gelegenheid krijgen om asiel te vragen in Westerse landen, zij een iets betere kans hebben dan mannen om asiel te krijgen als zij in een Westers land asiel vragen.

De rest van Hoofdstuk 2 bevat een inleiding op de steekproef van 252 dossiers van vrouwelijke asielzoekers. Er wordt een algemeen overzicht gegeven van de dossiers, de achtergrond van de instroom van asielzoekers uit de zes geselecteerde landen wordt kort geschat, en het beleid inzake
De betreffende landen wordt weergegeven. De analyse van het landenbeleid ondersteunt de kritiek op het vluchtelingenrecht. In beleidsstukken worden de vluchtmotieven van vrouwen over het algemeen genegeerd; als vrouwen al aan de orde komen, dan pleegt dat te gebeuren in het kader van zgn. klemmende redenen van humanitaire aard, en niet van erkenning als vluchteling.

In Hoofdstuk 3 wordt, op basis van de steekproef van 252 dossiers, geanalyseerd hoe in de beslissingspraktijk wordt aangekomen tegen vrouwelijke asielzoekers. Allereerst wordt betoogd dat de manier waarop het vluchtrelaas wordt weergegeven veel informatie bevat over het perspectief van de gene die het relaas op papier heeft gezet (de contactambtenaar of de rechts hulpverlener). Dat is niet alleen een kwestie van kwaliteit; aan de hand van een kwalitatief goed verslag van gehoor wordt getoond hoe een asielzoekster wordt geconstrueerd. Ook wordt betoogd dat deze constructie een afspiegeling is van het heersende discours over etniciteit en sekse. In de daaropvolgende paragrafen wordt dit nader onderzocht aan de hand van een aantal concrete thema’s.

De geloofwaardigheid van een asielzoekster wordt mede beoordeeld aan de hand van ideeën over hoe een goede moeder of echtgenote zich gedraagt (vrouwen die hun kinderen achterlaten in het land van herkomst worden ongelooftelijk geacht). Bij de beoordeling van de geloofwaardigheid speelt het tonen van emoties een rol (vrouwen moeten emoties tonen als zij over traumatische ervaringen vertellen, maar niet te veel). Ten slotte zijn er aanwijzingen dat etniciteit een rechtstreekse rol speelt; veel Zairese asielzoeksters uit de steekproef werden nauwelijks serieus genomen, terwijl de vluchtmotieven van Bosniërs evident werden geacht.

De meest omvangrijke paragraaf van Hoofdstuk 3 gaat over de manier waarop handelingen van vrouwen in het land van herkomst als politiek of als niet politiek worden geconstrueerd. Een vierde categorie vlucht motieven wordt onderscheiden. Vrouwen die geacht worden te hebben gehandeld op grond van hun emoties hebben geen "politieke" handelingen verricht, maar hebben gehandeld in de "persoonlijke sfeer." Zo worden vrouwen die prosteren tegen de verdwijning of executie van zoons of echtgenoten meestal opgevat als vrouwen die verdriet uiten, en niet als politieke activistes in de traditie van de Argentijnse dwaze moeders. Ook worden problemen die zich binnen de familie af hebben gespeeld beschouwd als per definitie niet politiek; in een geval is het bijvoorbeeld goed denkbaar dat als het geweld dat de asielzoekster had ondervonden buiten, in plaats van binnen het huwelijk had plaats gevonden, betrokken asiel was verleend. Het niet volgen van kledingsvoorschriften wordt beschouwd als een niet politieke kwestie. Een uitgebreide zaakbeschrijving betreft een slachtoffer van het Chinese een kind-beleid. De betrokken asielzoekster werd in de achtste maand gedwongen geabordeerd en gesteriliseerd; de zwangerschap van deze vrouw wordt afgeschilderd als een dommingheid, waarvan zij had kunnen en moeten weten wat de mogelijke consequenties waren. Een tweede categorie betreft vrouwen die geacht worden uit te zijn op het verbeteren van de eigen levensomstandigheden. Zo wordt de verweiging van Srilankanse vrouwen om dwangarbeid voor de Tamil rebellengroep LTTE te verrichten niet beschouwd als een handeling die geïnspireerd zou kunnen zijn door opvattingen over de LTTE, maar als een poging om onder iets vervelends uit te komen. Meer in het algemeen wordt elk verband met de economie aangegeven om vluchtmotieven als economisch aan te merken. Opvallend zijn in dat verband zaken waarin de mogelijke vervolging bestond uit uitsluiting van huisvesting en werk, en zaken waarin openbare protesten zich richtten tegen economische maatregelen. In beide gevallen is het economische aspect van de vluchtmotieven op zichzelf onvoldoende om te kunnen concluderen dat betrokken geen vluchteling is, maar dat is wel de conclusie die in de beslissingspraktijk wordt getrokken. Een derde categorie betreft vrouwen die ofwel geheel vrijwillig hebben gehandeld (zwangerschap wordt in de Chinese een kind-zaken beschouwd als een vrijwillige handeling), ofwel die onvrijwillig hebben gehandeld (dwangarbeid voor de LTTE wordt niet als politieke activiteit aangemerkt). Ten slotte worden activiteiten van ongedeugdheid of onwenselijk onvoldoende geacht. Dat lijkt op het eerste gezicht vanzelfsprekend, maar een uitgebreide zaakbeschrijving laat zien hoe een Iraanse vrouw die stelt meedogenloos onderwerp van een vrouwengroep te zijn wordt neergezet als lid van "een soort clubje."

Het verdient opmerking dat het met enige regelmaat voorkomt dat aan asielzoeksters als asielmotieven worden toegedacht terwijl dat op gespannen voet lijkt te staan met hun eigen verklaringen. Niet alleen worden vrouwen snel geacht te hebben gehandeld op grond van motieven in de persoonlijke sfeer of van economische motieven. Ook wordt veel aandacht besteed aan de ervaringen van de echtgenoten en broers van asielzoeksters, hetgeen vaak ten koste gaat van de ervaringen van de betrokkenen zelf. Dat is opvallend, omdat de steekproef bestond uit vrouwen die alleen naar Nederland waren gekomen. Verder wordt opgemerkt dat vrouwen vaak geacht worden te zijn gevleurd uit onvrede met de "algemene situatie" in het land van herkomst. Deze constructie van de vluchtmotieven wordt ook gehanteerd bij, bijvoorbeeld, een Iraanse vrouw die stelt ter dood te zijn vervoer deeld omdat zij 's avonds laat samen met een mannelijke collega overwerkte, of in het geval van een Zairese vrouw die stelt anderhalve maand te
zijn gedetermineerd naar aanleiding van deelname aan een politieke manifestatie.

Een ander groot onderwerp in dit hoofdstuk is het concept van "normaal" geweld, dat niet als vervolging wordt beschouwd. Zo wordt willekeurig geweld beschouwd als onvoldoende voor erkenning als vluchteling; omdat, zoals eerder werd getoond, aan de handelingen van vrouwen vaak een lage politieke status wordt toegekend wordt geweld gauw als willekeurig beschouwd. Ook rationeel geweld (in het kader van het Chinese kind-beleid, of ter handhaving van de gedragsregels voor vrouwen in Iran) wordt als onderdeel van de normale situatie beschouwd. Geweld dat binnen het huwelijk plaats vindt wordt steeds als gewoon aangemerkt, terwijl er een opmerkelijke tendens bestaat om seksueel geweld, ook indien begaan door ondervragers e.d., aan te merken als geweld in de privé-sfeer.

In de beslissingspraktijk wordt er van uit gegaan dat een vluchteling iemand is die vanwege een politieke overtuiging het slachtoffer is geworden van buitengewoon geweld. De eerste conclusie van dit hoofdstuk is dat in de beslissingspraktijk een bepaalde constructie van het concept politiek wordt gehanteerd, die seksueel is. Een politieke overtuiging wordt uit vrije wil aangenomen, en is dus vrijwillig. Maar het is niet eenvoudigweg een voorkeur; een politieke overtuiging wordt ingegeven door diepgewortelde overtuigingen, en is dus in zekere zin niet vrijwillig. Een politieke overtuiging voortdurend van rationele (en niet: emotionele) overwegingen, en betreft de uitoefening van staatsmacht (en niet uitoefening van macht door echtgenoten en vaders). Een politieke overtuiging wordt geuit in de publieke sfeer, en meer in het bijzonder in het kader van een politieke partij of beweging; wat binnen een huwelijk of binnen een vrouwengroep gebeurt wordt, sa het als relevant wordt beschouwd, als ondergeschikt aangemerkt. Tenslotte wordt iemand van een politieke overtuiging niet beter; bij voorkeur heeft zij er zelfs iets voor over. Deze constructie van het concept politieke overtuiging is seksueel specifiek omdat vrouwen, zoals hierboven werd aangegeven, in de beslissingspraktijk geacht worden emotioneel te zijn, primair als moeder en echtgenote worden opgevat, zij vaak niet geacht worden het soort wil te hebben dat bij een echte politieke overtuiging hoort, handelingen buiten de publieke sfeer (in de ene zin des woords) geacht worden niet politiek te zijn, en opvattingen over de positie van vrouwen hoogstens worden beschouwd als een blijk van ongenoegen met de algemene situatie in het land van herkomst. De tweede conclusie van dit hoofdstuk is dat ook het gehanteerde concept van buitengewoon geweld seksueel is. Geweld dat als relevant vervolging wordt beschouwd moet fysiek zijn (daarom tellen uitsluiting van onderwijs, arbeid of huisvesting niet); maar het moet gericht zijn op het politieke bewustzijn van betrokkene (seksueel geweld telt niet omdat het is ingegeven door de lusten van de dader). Ook handelingen die worden aangemerkt als onderdeel van de algemene situatie in een land van herkomst (burgeroorlog, vrouwendonderdrukking) zijn niet gericht op het politieke bewustzijn van betrokkene. Tenslotte moet het geweld in de publieke sfeer plaatsvinden; met name seksueel geweld wordt geacht zich in de privé-sfeer af te spelen, ook al vindt het plaats tijdens een detentie.

Het is opvallend dat de manier waarop deze constructie wordt gehanteerd sterk samenhangt met de etniciteit van de asielzoekers. Zo wordt seksueel geweld dat plaatsvond in het conflict in Bosnië-Herzegovina steeds als relevant vervolging aangemerkt, terwijl seksueel geweld in de context van het conflict in het noorden van Sri Lanka steeds als niet relevant wordt aangemerkt.

Hoofdstuk 4 geeft een overzicht van gepubliceerde jurisprudentie in Nederland, de Verenigde Staten, Frankrijk, Canada, Duitsland en het Verenigd Koninkrijk. In deze jurisprudentie wordt steeds een onderscheid gemaakt tussen "gewone zaken" (die ook best over vrouwen kunnen gaan) en "typische vrouwenzaken." Op het punt van welke handelingen als een daad van vervolging kunnen worden beschouwd, worden schendingen van sociale en economische rechten, en seksueel specifieke ervaringen als gedwongen huwelijk en gedwongen abortus als "typisch vrouwelijk" apart gezien. Bij het leesstuk van de daders van vervolging wordt het steeds mogelijk geacht dat vrouwen effectieve overheidsbescherming kunnen krijgen tegen geweld binnen de familie, zelfs als elders in de zelfde uitspraak wordt onderkend dat effectieve bescherming onberekend. Ook wordt vaak geaccepteerd dat seksueel geweld begaan door overheidsdienaren tijdens detentie van het slachtoffer geweld in de privé-sfeer is, waartegen het slachtoffer bescherming van de overheid kan inroepen. In een paar gevallen wordt echter wel aangenomen dat familieleden daders van vervolging kunnen zijn, of wordt de stelling dat seksueel geweld tijdens detentie privé-geweld is verworpen. Veel jurisprudentie is gewezen over de vervolgingsgronden. De neiging in administratieve beslissingen om voorbij te gaan aan de politieke activiteiten van vrouwen wordt in een aantal rechterlijke uitspraken gecorrigeerd. In de Nederlandse rechtspraat wordt het overtreden van sociale voorschriften (in zekere kleding, huwelijkszwangerschap) wel aangemerkt als vervolging wanneer een metterdaad geuwe, c.q. een toegedachte politieke overtuiging. In andere landen worden vrouwen die weigeren zich te houden aan sociale voorschriften onder de categorie sociale groep gebracht. Er zijn echter ook legio beslissingen waarin het overtreden van sociale voorschriften wordt beschouwd als een uiting van een persoonlijke smaak, en dus niet van een
politiëke overtuiging. Vervolgd familieleden van politiek activisten worden soms wel, soms niet als vluchteling beschouwd. Zij worden wel als vluchteling aangemerkt, dan worden zij neergezet als personen die banden hebben (of geacht worden te hebben) met de oppositie; worden zij niet als vluchteling beschouwd, dan wordt benadrukt dat de vervolging niet op hen was gericht, maar op het politiek actieve familieled. Over de relevantie van het Chinese een kind-belicid is uiteenzetende jurisprudentie. In Nederland werd lang de lijn gevolgd dat gedwongen abortus en sterilisatie, zo die al voorkwamen, een proportioneel middel tot een legitiem doel waren. Deze jurisprudentie werd in 1996 door de Afdeling bestuursrechtspraak van de Raad van State opzij gezet; ook besliste de Afdeling dat er in dit soort zaken een vervolgingsgrond was. In Australië werd uitgemaakt dat in deze zaken een vervolgingsgrond ontbreekt; in de Verenigde Staten werd bij wet bepaald dat er in deze zaken sprake was van vervolging op grond van politieke overtuiging; en in Canada is de situatie niet helder. Een volgend onderwerp dat aan de orde komt is, of de werkelijke bedoeling was om specifiek de asielzoeker te treffen. Deze bedoeling wordt vaak geacht te ontbreken omdat er het ging om seksueel geweld, vervolging die was gericht op een politiek actief familieled, en dergelijke. Concluderend wordt gesteld dat het in de jurisprudentie gemaakte onderscheid tussen "gewone zaken" en "typische vrouwenzaken" een extra hobbeltje opwekt voor vrouwen. De feiten in "typische vrouwenzaken" worden in eerste aanleg als niet relevant voor vluchtelingschap aangemerkt; eerst moet aangetoond worden dat deze feiten in principe relevant kunnen zijn. Het onderscheid tussen "gewone zaken" en "typische vrouwenzaken" is echter niet vanzelfsprekend. Zo is al decennia in handboeken te vinden dat gedwongen onzinnigheid van mannen vervolging kan zijn, terwijl de Amerikaanse belasting uit 1996 dat vrouwenbesnijdenis (een aanmerkelijke ingrijpende handeling) vervolging kan opleveren als sensationele nieuws werd beschouwd. Ook wordt dienstweigering (vrijwel overal een "typische vrouwenzak") als onderdeel van de algemene dogmatiek behandeld, en nooit gerubriceerd onder de categorie "gender": vergelijkbare problemen van vrouwen met algemeen geldende sekssepsieke regels worden echter wel als bijzondere en problematische gevallen beschouwd. Deze bijzondere behandeling van vrouwen heeft drie negatieve consequenties. Ten eerste ligt het voor de hand om deze bijzondere gevallen te beschouwen, die restrictief geïnterpreteerd moeten worden. Ten tweede bestaat de neiging om in deze bijzondere gevallen niet de gewone vluchtelingenstatus te verlenen, maar een "mindere" verblijfsstiel. Ten derde worden de in deze bijzondere gevallen soms extra zware eisen ingevoerd, uit angst dat anders talloze vrouwen toegang zouden kunnen krijgen. Het onderscheid tussen "gewone zaken" en "typische vrouwenzaken" hangt samen met etniteit. Seksueel geweld tegen Timorees werden beschouwd als een sekssepsieke kwestie, terwijl seksueel geweld tegen Bosnische Moslimvrouwen werd beschouwd als een onderdeel van etnische zuivering. Ook worden vrouwenzaken in Derde Wereldlanden als net aangemerkt als een probleem dat voortkomt uit de desbetreffende cultuur, waarmee vaak de kwalificatie politiek wordt uitgesloten. Wel tonen veranderingen in de jurisprudentie aan dat het in dit hoofdstuk geïdentificeerde discours niet stabiel en coherend is, en niet dwingend samenhangt met de gehanteerde juridische begrippen. Dat betekent dat zowel het discours als het juridisch begrippenapparaat aanknopingspunten kunnen bieden voor andere benaderingen dan de heersende.

In Hoofdstuk 5 wordt bestudeerd op welke manier weerstand wordt geboden tegen het heersende discours. Hoe asielzoekers dat doen is niet te achterhalen, omdat zij in de asielprocedure slechts indirect aan het woord komen. Daardoor wordt het perspectief van de bemiddelaar (contactambtenaar of rechtshulpverlener) dominant. Rechtshulpverleners verzetten zich tegen de constructie van hun cliënten door de administratie door hen af te schilderen ofwel als dissident, ofwel als slachtoffer. Problematisch daarbij is, ten eerste, dat deze twee strategieën elkaar vaak in de weg zitten. Ook vereisen beide strategieën dat de cliënt als uitzonderlijk wordt afgeschilderd. Rechtshulpverleners worden daardoor welhaast gedwongen om te stellen dat deze cliënt (in tegenstelling tot anderen) in aanmerking komt voor verblijf, zo dat strakke regels van het asielbeleid in de mond van rechtsambtenaren gelegd, die pogen om op die manier deze ene cliënte van dienst te zijn. Aan de hand van een aantal zaakbeschrijvingen wordt getoond hoe inventief rechtshulpverleners met deze dilemma's omgaan.

Vervolgens wordt de feministische kritiek op het vluchtelingenrecht geschept. Er worden drie "stromingen" onderscheiden. De eerste critici stelden dat het (vluchtelingen)recht patriarchaal is, en dat het op een lijn te stellen is met de onderdrukking van vrouwelijke asielzoekers in de landen van herkomst. Zij bepleiten een politieke aanval op het vluchtelingenrecht, met als doel om het fundamenteel te veranderen. De mensenrechtelijke benadering bekritiseert de eerste critici omdat zij, ten eerste, een te monolitische opvatting hebben over vrouwennederlandrukkingsen, ten tweede, de mogelijkheden die het bestaande vluchtelingenrecht biedt verwaarlozen. In de mensenrechtelijke benadering worden de vluchtmotiveven van vrouwen exact gerubriceerd. Het eerste onderscheid is dat tussen gewone zaken en sekssepsieke zaken. De sekssepsieke zaken werden beschouwd tegen
Samenvatting

de achtergrond van de cultuur in het land van herkomst, die vaak in schrille termen wordt geschilderd. In deze seksespecifieke zaken wordt een seksespecifieke oplossing bepleit, namelijk het hanteren van sociale groep als vervolgingsgrond. Deze oplossing, zo wordt gesteld, is logisch uitvoel-

sel van de ontwikkelingen op het vlak van de internationale menserech-
ten. De derde benadering, die voor dit boek als uitgangspunt heeft gediend, bekritiseert het tweevoelige essentialisme van de menserechtelijke bena-
dering. Onderdrukking van vrouwen wordt voorgesteld als iets dat speci-

fiek is voor de Derde Wereld; zulk culturalisme is echter een onderdeel van het probleem, en moet dus niet overgenomen maar bestreden worden. Daarnaast wordt kritiek geuit op de stelling dat alle seksespecifieke vormen waarvan asielzoeksters het slachtoffer zijn geweest hebben plaatsgevonden omdat zij lid zijn van een bepaalde sociale groep die geïdentificeerd is aan hun sekse. Zo een benadering versterkt de gedachte dat vluchtelingschap man-

nelijk is en dat er iets aparts moet gebeuren om het voor vrouwen rele-
vant te maken; ook wordt genegeerd dat de positie van vrouwen een politie-

k onderwerp is. Tenslotte bekritiseert de anti-essentialistische kritiek de instrumentalistische rechtspatiënt van de menserechtelijke benadering. De anti-essentialisten bepleiten een expliciet politieke benadering—omdat van het recht op zichzelf niet een oplossing verwacht kan worden voor de problemen die asielzoeksters ondervinden; wel wordt onderkend dat het juridisch discours niet monolithisch is.

Overheden in verschillende Westerse landen hebben deze kritiek ge-
honoreerd; in Canada, de Verenigde Staten en Australië werden omvatten-
de richtlijnen voor het behandelen van de asielverzoeken van vrouwen uit-
gevaardigd, terwijl in Nederland een aparte Werknijverheid werd opgesteld. Deze richtlijnen hebben positieve aspecten. De campagne die zijn gevoerd om de richtlijnen aanvaard te krijgen hebben een mobiliserend effect gehad; de richtlijnen legden de grondslag voor een meer ruimtelijke en politieke benadering—hetgeen een markante vermindering zou opleveren. De richtlijnen zijn echter ook problematisch. Ten eerste bieden ze geen wer-
zenlijk nieuw vluchtelingenconcept; ze hebben geen merkbaar effect gehad op het erkenningspercentage van vrouwen. Het is dus de vraag welk effect ze hebben in de rechtspraktijk. Ten tweede versterken alle bestaande offi-
ciële richtlijnen de tendens om een onderscheid te maken tussen "gewone zaken" en "typische vrouwenzaken." Ten derde bevatten sommige richtlij-
nen passages die ten opzichte van het geldende recht restrictief zijn; op die punten zijn het dus stappen achteruit voor vrouwen.

Concluderend wordt gesteld dat de kritiek grotendeels gecoopteede

wordt door het bestaande vluchtelingenrechtelijke discours. Asielzoeksters

zelf hebben geen gelegenheid om eventuele kritiek een plaats te geven in

de procedure. Rechtshulpverleners worden geconfronteerd met een zeer

problematische situatie, die hen vaak dwingt om het restrictieve aspect van

het vluchtelingenrecht over te nemen. En de feministische kritiek is ge-

neigd om essentiële onderdelen van het heersende discours (essentialisme

op het punt van sekse en etniciteit) over te nemen, waardoor het toegeven

aan deze vorm van kritiek niet tot echte veranderingen leidt.

In Hoofdstuk 6 wordt geconcludeerd dat de constructie van vrouwen in het

vluchtelingenrecht draait om dichotomieën tussen de Westen en de Rest,

en "gewone zaken" en "vrouwenzaken." Dit spits zich toe op de familie,

en op de regulering van seksualiteit en reproduktie. Vrouwen worden ver-

ondersteld primair in de familie te verkeren; informatie die niet met die

vooronderstelling overeenstemt wordt niet goed begrepen. De familie

wordt enerzijds voorgesteld als een natuurlijk fenomeen dat voorafgaat aan

de politiek, maar anderzijds wordt het verschil tussen het Westen en andere

delen van de wereld deels bepaald door de verlichte Westerse familie af te

zetten tegen de traditionele, onderdrukkende familie in het islam. De regu-

lering van seksualiteit en reproduktie wordt in zijn algemeenheid als legitiem beschouwd. Hier wordt een onderscheid gemaakt tussen accep-
tabiele vormen van reguleren, die in het Westen gangbaar zijn, en onaccept-
tabele vormen, die kenmerkend zijn voor andere landen. Op sommige pun-
ten wordt zelfs ontkend dat in Westerse landen van regulerende sprake is,

zoals op het punt van kledingvoorschriften. De constructie van vrouwen in

het vluchtelingenrecht is coherent, maar heeft geen dwingende innerlijke

nodzaak of logica. Door deze instabiliteit is de constructie productief, Er

is ruimte om onderscheid te maken tussen "echte vluchtelingen" en "eco-
nomische asielzoekers," ook als de casusposities sterke gelijkenissen verto-

nen. Bovendien maakt de instabiliteit het mogelijk om regels op verbale

niveau te veranderen (bijvoorbeeld door concessies te doen aan de femi-

nistische kritiek), terwijl de beslissingspraktijk vrijwel onveranderd blijft.

Doordat de centrale dichotomieën tussen het Westen en de Rest, en tussen

"gewone zaken" en "vrouwenzaken" door de administratieve richtlijnen

niet worden aangetast (en zelfs zijn overgenomen door veel feministische
critici) zijn de veranderingen slechts oppervlakkig van aard.

Ondanks deze seksespecifieke constructie van vluchtelingen lijkt de

heersende gedachte dat vrouwelijke asielzoekers worden gediscrimineerd

to moeten worden verworpen. Vrouwen krijgen, zowel in Nederland als in

Canada, iets vaker asiel dan mannen. Het feit dat de constructie van vluch-
telingen seksespecifiek is, valt dus niet negatief uit voor vrouwen. Het is
denkbaar dat dit verband houdt met de (evenzeer seksespecifieke) con-

structie van mannen in het vluchtelingenrecht. De gehanteerde stereotypen over niet-blanke mannen kunnen negatieve effecten hebben voor mannelijke asielzoekers. Hiermee wordt in ieder geval duidelijk dat een onderzoek naar vrouwen en mannen in het vluchtelingenrecht niet beperkt kan blijven tot de vraag naar numerieke discriminatie, of tot de vraag van vrouwen en mannen nu inherent gelijk of verschillend zijn.

Het is natuurlijk de vraag waarom er in de Westerse wereld zo veel belangstelling bestaat voor het fenomeen vrouwelijke vluchtelingen, en waarom regeringen bereid blijken om min of meer liberale richtlijnen over dit onderwerp uit te vaardigen terwijl het vluchtelingenrecht in het algemeen steeds restrictiever geformuleerd wordt. Op dit punt wordt de suggestie aangedragen dat het vluchtelingenrecht, nu het geen ideologische functie meer vervult in het Oost-West conflict, een rol speelt in het conflict tussen de Westerse wereld en de Rest. Het als fundamenteel afgeschilderde contrast tussen de positie van onderdrukte vrouwen in landen van de Derde Wereld en die van geëmancipeerde vrouwen in het Westen draagt bij aan de legitimatie van de macht van Westerse landen. De verschillende posities van Westerse landen in dit conflict kan helpen om de verschillen tussen de respectievelijke richtlijnen over vrouwelijke asielzoekers te verklaren. Bovendien kan het als absoluut voorstellen van het contrast tussen het Westen en de Rest helpen om het feminisme in Westerse landen te verzwakken, dat in deze voorstellingen van zaken immers nog slecht over details gaat.

Afgesloten wordt met enkele concrete suggesties. Allereerst dient het verslag van gehoor niet meer een vrije reproductie van de woorden van de asielzoeker te zijn, maar de uitgetypeerde versie van een bandopname. Ten tweede verdienen specifieke trainingen van betrokken ambtenaren en rechtshulpverleners aanbeveling, maar moet daarbij niet uit het oog worden verloren dat goede gesprekstechnieken niets kunnen verhelpen aan de communicatieproblemen die verband houden met het machtverschil tussen de asielzoeker en de ambtenaar of hulpverlener anderzijds. Ten derde zouden beleidsstukken (inclusief landeninformatie) moeten worden geanalyseerd en gewijzigd om een einde te maken aan de situatie dat “algemene” stukken over mannen gaan, en de positie van vrouwen wordt ondergebracht in aparte paragrafen of documenten. Ten vierde dient voor elke beleids- of wetswijziging van enig belang een emancipatie-effectrapportage te worden gemaakt, waarbij de effecten van de wijziging voor mannen en vrouwen in kaart wordt gebracht. Maar uiteindelijk komt het er op aan om de in het vluchtelingenrechtelijke praktijk gehanteerde vooronderstellingen over gender en etniciteit te identificeren en ter discussie te stellen. Het vluchtelingenrecht is, ook waar het sekse en etniciteit betreft, immers niet alleen een technisch-juridische kwestie, maar ook een politieke.
Stellingen

behorend bij het proefschrift van Thomas Pieter Spijkerboer,

Gender and Refugee Status

1. De kwalitatieve ongelijke behandeling van vrouwen en mannen in het asielrecht resulteert niet in kwantitatieve ongelijke behandeling.

2. Het verslag van het gehoor waaraan asielzoekers (m/v) worden onderworpen verschafft evenveel informatie over de interviewer als over de geïnterviewde.

3. Het gehoor in asielzaken dient op band te worden opgenomen.

4. Het onbegrip voor asielzoekers die man en kinderen hebben achtergelaten in het land van herkomst toont aan dat de regel dat de man het domicilie van het gezin bepaalt wel uit het Burgerlijk Wetboek geschrept is, maar desondanks nog geldt.

5. Conflicten binnen de familie zijn niet alleen emotioneel, maar ook politiek als ze gaan over de ‘background rules’ inzake bijvoorbeeld de gezagsverhouding tussen mannen en vrouwen en tussen ouders en kinderen, inzake de mogelijkheid tot echtscheiding en inzake reproductie.

6. Uit de inkomensachterstand van vrouwen ten opzichte van mannen in Nederland blijkt dat handelingen van vrouwen lager gewaardeerd worden. In het asielrecht blijkt dit uit de geringe betekenis die toegekend wordt aan “typisch vrouwelijke” handelingen.

7. Het onderscheid tussen “gewone” asielzaken en “vrouwelijke” asielzaken is van dezelfde aard als de praktijk om onder meer de KU Nijmegen om de namen van mannelijke personeelsleden niet vooraf te laten gaan door de aanduiding “dhr”, maar die van vrouwen wel door “m.w.”

8. Reeds een vluchtige blik op de inzittenden van een eerste klas coupé leert dat niet-blanke vrouwen in Nederland het voorwerp zijn van sterke vormen van uitsluiting.

9. “Il n’y aura pas de civilisation tant que le mariage entre hommes ne sera pas admis.”
   Michel Foucault, geciteerd in Didier Eribon:

10. De zeggenschap over het openbaar vervoer dient te berusten bij het openbaar bestuur.