

Problems of Protection

*The UNHCR, Refugees,
and Human Rights*

Edited by
Niklaus Steiner, Mark Gibney,
and Gil Loescher

ROUTLEDGE
NEW YORK AND LONDON

anti-immigration sentiments is less likely to host refugees, or provide humanitarian relief for them elsewhere, than a society that is committed to human rights values and international solidarity. Only by promoting the values underlying human rights—both in countries of origin and in receiving countries—can refugee issues be effectively addressed. UNHCR's TP proposal did not work toward the realization of this objective.

4

Defining Persecution and Protection *The Cultural Relativism Debate and the Rights of Refugees*

BONNY IBHAWOH

Until recently, the field of refugee studies was spared the contentious and polarized debate over universalism and cultural relativism that has dominated human rights discourse for so long. One reason for this is the fact that for decades there existed both in academic and policy-making circles a clear dichotomy between the human rights field and the refugee field. That line was represented by international borders. While the human rights field was primarily concerned with abuses of the rights of citizens by their own governments or institutions, the refugee field comes into play only after persons fleeing persecution have crossed international borders. Even the UN system clearly divided responsibilities for human rights distinctly from responsibilities for refugee protection. The refugee and human rights fields have therefore developed largely independently of each other, in spite of the obvious commonalities that underlie them both.¹

However, the past few decades have witnessed a progressive blurring of the traditional lines between refugee studies and the human rights discourse. Academics, policy makers and the UN system have now crossed the line that once separated human rights and refugee issues. The admission of asylum seekers, their treatment, and the granting of refugee status have become crucial elements of the international system for the protection of human rights. One of the consequences of this trend toward the intermingling of both fields has been the extension of the debates that have underlined the human rights discourse about refugees. Perhaps the most prominent of these is the “universalism versus cultural relativism” debate. At the core of the debate is whether modern human rights conceptions are of universal character and applicability, or whether they are culturally relative—that is, dependent on socio-cultural contexts. In relation to refugee rights, the debate has focused on concerns that international refugee laws and national refugee policies in some Western countries are informed by cultural chauvinism and a lack of sensitivity toward non-Western cultures. This raises significant questions about the definition of persecution and protection as they relate to the rights of refugees.

This paper addresses the cultural relativism debate within the context of refugee rights. It examines the argument that contemporary international conceptions and instruments relating to refugee protection are, like the “universal” human rights regime, disproportionately skewed in favor of Western values and take inadequate consideration of non-Western perspectives. It explores the implications of these arguments both for the rights of refugees and the cross-cultural legitimacy of international and domestic refugee laws and policies. The broad objective here is to explore ways in which the protection of refugees can be offered in a truly universal manner. The chapter is divided into two main parts. The first part broadly reviews the cultural relativism debate in the human rights discourse, focusing on the African and Asian values debate. The second part examines the extension of this debate to the refugee field and its implications for refugee protection.

Human Rights and the Cultural Relativism Debate

The debate over whether, and to what extent, human rights conceptions are universal or culturally relative was the dominant feature of the global human rights discourse for the greater part of the last century. The debate proceeds partly from various international documents, particularly the United Nations instruments on human rights, which in spite of obvious Western influence declare their contents to be universal and inalienable. Also at the core of this debate is the conflict between collectivist thinkers who place the community above the individual and the individualists who place the individual above the community. It is not possible in this limited space to discuss in detail the varied and contending arguments that have been advanced for and against cultural relativism within the context of human rights. These themes have been adequately addressed elsewhere.² It is sufficient here to outline the major arguments in the cultural relativism debate and how they bear relevance to the rights of refugees.

Claims of cultural relativism in the human rights discourse have a great diversity of meaning and any evaluation of such claims must be sensitive to this diversity. In general however, proponents of the cultural relativity of human rights argue that human rights as conceived in the West are not necessarily applicable to “Third World” and non-Western societies, because their philosophical basis is not only different but indeed opposite. Whereas Western conceptions of rights are based on the notion of the autonomous individual, many non-Western conceptions do not know such individualism.³ Proponents of cultural relativism have frequently stated that the classical “Western” liberal notions of human rights emphasize the primacy of individual, political, and civil rights.⁴ On the other hand, most non-Western, Third World traditions place greater emphasis on the community basis of human rights and duties, on economic and social rights, and on the relative character of human rights. The complexities reflected in these categories have proved a vexing

issue for those approaching the study of human rights from a global comparative perspective.

Proponents of the cultural relativism of human rights argue that the current formulation of “universal” human rights contains three elements that reflect Western values and makes them ill suited to some non-Western societies. First, the fundamental unit of the society is conceived as the individual, not the family. Second, the primary basis for securing human existence in society is through rights, not duties. Third, the primary method of securing rights is through adversary legalism, where rights are claimed and adjudicated upon, not through reconciliation, repentance, or education.⁵ Other writers, however, have tempered the stridency of the cultural relativist position by arguing that while claims of universality and inalienability may be plausible for some specific rights, strong claims of universality and inalienability were not valid for many other rights.⁶

Arguments for cultural relativism in the human rights discourse have been categorized into *strong cultural relativism* and *weak cultural relativism*. Strong cultural relativism holds that culture is the principal source of the validity of a moral code or rule. The presumption is that rights and other social practices, values, and norms are culturally determined, but the universality of human nature and rights serves as a check on the potential excesses of relativism. Weak cultural relativism, on the other hand, holds that human rights are *prima facie* universal, but recognizes culture as an important source of exceptions in the interpretation of human rights.⁷

The position of most writers is that rather than a wholly universal approach, human rights discourse should apply “weak cultural relativism”—in other words, it should consider culture as an important consideration, without omitting the aspect of universality.⁸ A related argument that has been advanced is that empirically there exists a core of universally applicable basic principles of rights that govern the relationship between the state and its citizens. To that extent, we can talk about some basic universal standards of human rights. At the same time, however, it is recognized that different human rights are considered important and fundamental at different points in time and under different circumstances.⁹ Many of those who oppose arguments for the cultural relativism of human rights have based their criticism on a fear that a relativist position condones or even approves of social and cultural practices that violate individual rights. It is also feared that recognizing the legitimacy of the cultural relativity of human rights will undermine the entire universal human rights movement. These fears have largely informed the tension between the doctrine of cultural relativity and international human rights.

The debate on the universality or cultural relativity of human rights principles has centered, for the most part, on the Universal Declaration of Human Rights (UDHR) and other related international conventions such as the 1951

Refugee Convention. Perhaps the most famous argument for cultural relativism as it applies to the UDHR is the oft-quoted reaction of the American Anthropological Association to the draft proposal for the Universal Declaration of Human Rights in 1947. The Association argued that:

Standards and values are relative to the culture from which they derive . . . [such] that what is held to be a human right in one society may be regarded as antisocial by another people . . . If the [Universal] Declaration must be of world wide applicability, it must embrace and recognize the validity of many different ways of life . . . The rights of man in the Twentieth Century *cannot be circumscribed by the standard of any single culture, or be dictated by the aspirations of any single people.*¹⁰

This position has since been echoed by other writers and continues to provide a reference point to which many writers anchor their arguments for cultural relativism in the human rights discourse.¹¹

Non-Western Values and “Universal” Human Rights

The developing world has set its imprint on human rights thought, both by making human rights more socially oriented and also by questioning the focus on the individual that has characterized human rights discourse in the West. The arguments for “Asian values” and lately, “African values” in the conception and interpretation of human rights have been central to this trend.¹² The main themes in the African and Asian values debate have dwelt on the philosophical foundations of non-Western concepts of human rights and how these concepts contrast with western notions and institutions that were subsequently extended to other parts of the world through Western political and cultural imperialism.

In the African context, the approach to the discourse on the cultural relativism of human rights can be broadly divided into two schools. The first of these is the less radical approach, which is ideologically closer to the dominant universalist schools of the West. Proponents of this school, while arguing for the validity of a uniquely African concept of human rights, also recognize the universality of a basic core of human rights.¹³ The second school stands in more radical opposition to the universalist approach. It seeks to fundamentally challenge Western-oriented state-individual thinking that otherwise dominates human rights. The main argument here is rooted in a belief in the distinctively different philosophical basis and worldviews of Western European and African societies, with a particular emphasis on the collectivist rather than individualistic nature of the concept of rights and duties in Africa.¹⁴

It is contended that in traditional Africa, the concept of rights was founded not on the individual but on the community, to which the individual related on the basis of obligations and duties. Rights in this context included, but were

not limited, to the right to political representation, which was often guaranteed by the family, age groups, and the clan. The society developed certain central social features that tended to foster the promotion of both individual and collective rights. The dominant social orientations toward rights emphasized the group, sameness, and commonality, as well as a sense of cooperation, interdependence, and collective responsibility.¹⁵ In these circumstances, the concept of human rights did not stand in isolation. It went with duties. Although certain rights were attached to the individual by virtue of birth and membership of the community, there were also corresponding communal duties and obligations. This matrix of entitlements and obligations, which fostered communal solidarity and sustained the kinship system, was the basis of the African conception of human rights. This communal philosophy has been made the cornerstone of the African Charter of Human and Peoples’ Rights, which emphasizes the relationship between rights and duties as well as the collective rights of peoples.

The arguments for “Asian values” in the human rights discourse are similar to those that have been advanced for “African values.” Leaders of East and Southeast Asian countries stress Asia’s incommensurable differences from the West and demand special treatment of their human rights record by the international community. They reject outright the globalization of human rights and claim that Asia has a unique set of values, which, as Singapore’s ambassador to the United Nations has urged, provide the basis for Asia’s different understanding of human rights and justify the “exceptional” handling of rights by Asian governments.¹⁶ According to this argument, the circumstances that prompted the institutionalization of human rights in the West do not exist in Asia. Besides, the importance of the community in Asian culture is incompatible with the primacy of the individual, upon which the Western notion of human rights rests. The relationship between individuals and communities constitutes the key difference between Asian and Western cultural values.

These arguments for peculiarly communal African or Asian values in the conception of human rights are confronted however with their own theoretical and empirical limitations in their relevance to contemporary African and Asian societies. Rather than the persistence of traditional cultural values in the face of modern incursions, the reality in much of contemporary Africa and Asia is a situation of disruptive and incomplete Westernization, “cultural confusion,” or even the enthusiastic embrace of “Western” practices and values. The ideals of traditional culture and its community-centered values, advanced to justify arguments for the cultural relativism of human rights in the African or Asian context, far too often no longer exist.

It has been suggested that in asserting these values, leaders and elites in Africa and Asia find that they have a convenient tool to silence internal criticism and to fan anti-Western nationalist sentiments. At the same time, the

concept is welcomed by cultural relativists, cultural supremacists, and isolationists alike as fresh evidence for their various positions against a political liberalism that defends universal human rights and democracy.¹⁷ Some writers have even suggested that the picture of an idyllic communitarian society whether in the Asian or African context has been presented by rulers and elite to perpetuate patriarchy and the dominance of ruling groups as well as rationalize state violations of human rights.¹⁸

This is not the place to analyze the diverse criticisms that have been advanced against arguments for African and Asian values in the human rights discourse. It suffices here to point out that indeed, the extreme relativist argument for a distinctively Asian, African, or other concepts of human rights, which stands in contrast with the concepts and traditions of the "West," has its limitations. If anything, such notions of the absolute cultural relativism of human rights comes through as a misunderstanding inspired by cultural nationalism. What its proponents see as radically distinctive communitarian African or Asian traditions and conceptions also clearly possess ideals that are universal. However, while there may be a core of universal values that reflect inherent human worth in various societies, the broad expression of these values varies, not only in accordance with historical circumstances, but also from one social context to another. In order to find cross-cultural legitimacy, universal human rights necessarily have to be tempered by the specific cultural experiences of various societies. The challenge is how to strike the delicate balance between maintaining a core of basic universal human rights and yet allowing for some form of cultural expression and diversity.

Prioritizing and Categorizing Human Rights

The debate over the cultural relativism of human rights also extends to the question of the categorization and prioritization of rights. A number of attempts have been made to establish a hierarchy of human rights, or alternatively, a list of basic human rights that cannot be violated under any circumstances as opposed to human rights that are of secondary importance. The central question here is whether human rights are of equal importance or whether some rights take precedence over others.

Several writers have cataloged the emergence of a hierarchy of rights contained in the International Bill of Rights (the UDHR, ICCPR, and the ICESCR). First order rights are non-derogable under any circumstances and include the right to life, freedom from torture and other cruel, inhuman, or degrading punishment, as well as the freedom of thought, conscience, and religion. Second order rights include such rights as freedom from arbitrary arrests and detention, rights to fair trial, presumption of innocence, and freedom of expression and association. States may derogate from these rights during an officially proclaimed public emergency. Third order rights include the positive duties of the state to work towards the achievement of the rights to work, the

right to education, social security, and medical care. These rights are unenforceable but states are required to undertake efforts within the limits of available resources to realize the goals in a non-discriminatory way.¹⁹

Some proponents of the cultural relativism of human rights disagree with this schema and have questioned the primacy of civil and political rights within the emerging universal human rights regime. They argue that unlike the West, where the dominant social orientation towards rigid and abstract individualism makes civil and political rights a priority, the priority in most non-Western societies is (or should be) the guarantee of a basic level of social and economic rights. They therefore stress the importance of basic social and economic rights over political and civil rights within certain social contexts. In some cases, this argument has been carried further, particularly by rulers in developing countries, to justify the curtailment of civil and political rights purportedly in the interest of the collective social and economic development. As one African ruler put it, "one man, one vote is meaningless unless accompanied by the principle of one man, one bread."²⁰ The same sentiments are echoed in China's 1991 White Paper, where it is stated that "[t]o eat their fill and dress warmly were the fundamental demands of the Chinese people who had long suffered cold and hunger."²¹ Political and civil rights, in this view, do not make sense to poor and illiterate multitudes, as such rights are not meaningful under destitute and unstable conditions.

This disagreement over the prioritization of rights has been extended to the definition and interpretation of refugee rights. It has been suggested that the contemporary definition of a refugee has been informed by, and represents the Western liberal orientation of the preeminence of civil and political rights over economic and social rights. For instance, under the 1951 Refugee Convention, an asylum claimant must demonstrate that s/he fled because of a legitimate fear of persecution occasioned by his/her "race, religion, nationality, membership in a particular social group or political opinion." This legal construction of the 1951 Convention, which many Western countries have adopted, does not take adequate consideration of socio-economic concerns such as starvation, war, and environmental disasters as a basis for refugee status. This narrow definition of "refugee" reflects the Eurocentric liberal rights paradigm from which it emerged. As such, it focuses on the violation of liberal individual rights for which the state can be accountable. It is less concerned about violations of social and economic rights that may not necessarily be occasioned by the state.

Cultural Relativism and Refugee Rights

Criticisms of the definition of refugee rights and the international laws relating to these rights have not only centered on the point that they disproportionately reflect Western notions. Much of the critique has also focused on concerns about cultural chauvinism and cultural imperialism in the definition

and interpretation of refugee rights. To what extent do international laws and domestic refugee policies offer protection to refugees in a truly objective and universal manner? Do the phrases “fear of *persecution*” and “*protection of refugees*” carry with them some implicit ethnocentrism? These concerns have not only come from writers in the South but also from commentators in the North. Writers and policy makers in several Western countries have voiced concerns about cultural insensitivity or inadequate cultural consideration in the formulation of policies relating to refugees. One example of this is Canada, where questions have been raised about cultural chauvinism with regards to recent immigration and refugee policies in that country.

In 1993, Canada’s Immigration and Refugee Board (IRB) issued a set of guidelines entitled *Women Refugee Claimants Fearing Gender Related Persecution*. The purpose of the guidelines was to provide the IRB decision-makers with a means of interpreting the legal definition of refugee in a gender sensitive manner. The guidelines were issued amid public outcry over several well publicized incidents regarding the plight of women who had made unsuccessful refugee claims based on gender related persecution. In one of such cases, a Saudi woman defied the law in her country by refusing to wear the mandatory veil. For this transgression, she claimed that she was publicly harassed and threatened by the unofficial “religious police” in Saudi Arabia.²² The guidelines were therefore aimed at addressing such peculiar cases of refugee claims based on gender persecution.

Although the Canadian guidelines incorporate international norms in characterizing certain forms of culture-based discrimination and oppression as persecution, they go even further in that direction. The Canadian guidelines include extensive provisions for the protection of women fleeing culture-based persecution in their home countries. For instance, the guidelines stipulate that “a gender claim cannot be rejected simply because the claimant comes from a country where women face generalized oppression and violence and the claimant’s fear of persecution is not identifiable to her on the basis of an individualized set of facts.”²³ The guidelines also provide that “a woman who opposes institutionalized discrimination of women, or expresses views of independence from male social or cultural dominance in her society, may be found to fear persecution by reason of imputed political opinion.”²⁴

For the most part, the Canadian guidelines have been commended as a groundbreaking policy document that has facilitated significant advances in the protection of the rights of women refugees. Its provisions strengthen grounds on which women can be identified as a “particular social group” as a basis for proving persecution in a way that adheres to the definition of refugee under the 1951 Refugee Convention. This lead has been followed by other countries.²⁵ However, the guidelines have also been criticized by a few for going too far in judging other cultures by “Western” values. One Canadian official criticized the guidelines when they were introduced, wondering if by their terms Canada was

not acting as an “imperialist country and impos[ing] its values on other countries around the world.” He cautioned that Canada should not unilaterally try to impose its values on other countries through its refugee policies.²⁶

This extension of cultural relativism to the realm of refugee rights, and specifically to Canadian refugee policies on women refugee claimants has been cautiously received. It has been suggested that what it asserts is that “the legal institutions of Canadian patriarchy ought to respect the patriarchal customs and laws of other states.”²⁷ It has also been argued that no question of imposing Western values on other countries need arise at all in the realm of refugee rights because the recipient country plays a relatively minor role in asylum claims. Individuals arrive in the haven countries asking for admission, and that country simply says yes or no. A positive decision entails *no* consequences for the country of origin. A finding of refugee status does not reverberate in the official domain of international human rights law. At best, countries are embarrassed when their citizens are recognized as refugees elsewhere. Mostly, they are indifferent, dismissive, or disdainful.²⁸

Indeed, concerns about cultural relativism may not have as much resonance and relevance with regards to refugees as in the field of international human rights. However, they have more consequences for countries and societies of origin than mere embarrassment. An international refugee law regime that is perceived as dominantly reflective of Western culture and disdainful of non-Western culture raises significant questions about the legitimacy of such laws and policies. While a finding of refugee status may not reverberate in the official domain of international human rights law, its effects on the country of origin are sometimes far-reaching when such findings are perceived as affronts on the legitimate cultures and institutions of the society of origin. This particularly arises when the refugee determination process and the Western media construct refugee claimants from non-Western societies as victims of a particular religion or culture. Such constructs influence official and public opinion in the countries of origin as to the legitimacy of international human rights and refugee laws. One example of this is the concern that has been raised in many Islamic societies about Western attitudes to Islamic tradition in relation to refugee claims. By categorizing such “innocuous”²⁹ Islamic traditions as those that require women to wear the veil as gender persecution, Western refugee policies exhibit insensitivity towards Islamic cultures. Related to this is the debate among feminist scholars about differences across cultures and the perils of imposing Western notions of feminism on the experiences of non-Western women.

The point here is not that discourses about cultural relativism or collective rights should be deployed in formulating refugees laws and policies to the detriment of the rights and welfare of individual asylum seekers. Indeed, the protection of individual refugee claimants must remain the central concern of international and national refugee laws and policies. However, protection

must be pursued, as much as possible, in a way that will enhance the international and cross-cultural legitimacy of the refugee determination process. The protection of refugees both under international law and domestic policies must be offered in a truly universal and cross-culturally sensitive manner. Some national processes for refugee determination have been sensitive to this need. One example of this is a recent decision that generated widespread media interest in Canada. It involved the successful claim by a Somali woman and her two children that was based on "a well founded fear" of genital mutilation should they be returned to their native Somalia. In making the decision to grant the claimant refugee status, the Refugee Board, sensitive to possible accusations of cultural insensitivity, used African sources in evaluating the practice of genital mutilation. It noted that "subjecting a young girl to Female Genital Mutilation (FGM) is seen as a 'torturous custom' by women's rights advocates in Africa who are campaigning to eradicate this practice."³⁰ It is significant that the Refugee Board sought to ground its decision on sources from the claimant's own society rather than sources from Canada even when both sources clearly point to the same conclusion. Such processes strengthen the cross-cultural legitimacy and validity of the refugee determination process. They also lend a universal character to the refugee determination and protection process.

"Cruel, Inhuman, or Degrading Treatment"

The protection against cruel, inhuman, or degrading treatment is central to the contemporary universal human rights regime as reflected in the Universal Declaration of Human Rights. Over the years, this provision has evolved in the direction of enlarging and multiplying the possible fields of its application. One of the most relevant results of this evolution has been the broadening of refugee status requirements. The concept of "inhuman or degrading treatment," as inferred by both universal and regional treaties, is often taken into account by national authorities when deciding to implement an order of expulsion or return of refugee climate to his or her country of origin.³¹

While there is relative agreement on the point that the infliction of cruel, inhuman, or degrading treatment constitutes persecution that may provide a basis for granting refugee status, there is disagreement on what constitutes cruel, inhuman, or degrading treatment. International human rights instruments simply stipulate that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."³² There is, however, little guidance from the history of these articles as to the precise meaning of cruel, inhuman, or degrading punishment. In the course of drafting the ICCPR in 1952, the Philippines suggested that the word "unusual" should be intersected between the words "inhuman" and "or degrading." While some delegates supported the addition, many others opposed it arguing that the term is vague and relative, as what is unusual in one country may not be so in other countries.³³

One writer wonders why the criticism of vagueness was not extended to the words "cruel, inhuman, or degrading," because what can be seen as "cruel and inhuman" in one culture may not be seen in the same light in another culture.³⁴

To demonstrate this point, Abdullahi Ahmed An-Naim argues that in the majority of human societies today, corporal punishment is not regarded as necessarily cruel, inhuman, or degrading, yet in others it is viewed as a human rights violation. Similarly, the meaning of cruel and inhuman treatment or punishment in Islamic cultures may be significantly different from perceptions of the meaning of this clause in other parts of the world.³⁵ Definitions and interpretations of "cruel and degrading" treatment have also evolved with time and social contexts. In the earlier part of the last century, the League of Nations grouped polygamy in African and Islamic societies along with slavery as a gross abuse of the rights of women. Perceptions have since changed. All these show the dangers and difficulty of providing monolithic criteria for defining what constitutes cruel, inhuman, or degrading treatment. According to An-Naim:

[t]he interpretation and practical application of the protection against cruel, inhuman, or degrading treatment or punishment in the context of a particular society should be determined by the moral standards of that society [although] there are many legitimate ways of influencing and informing the moral standards of a society. To dictate to a society is both unacceptable as a matter of principle and unlikely to succeed in practice.³⁶

Indeed, while the infliction of torture necessarily entails subjection to inhuman and degrading treatment, it does not follow that inhuman treatment is necessarily also degrading. The absoluteness of the individual's rights to be treated in a humane manner has to be counterbalanced by the "justifiability" of the treatment in the particular situation. The general interest of the entire community on one hand and the threat to the social order, on the other hand, should be taken into account in determining whether a particular cruel or inhuman treatment is justified. As Alberta Fabbicotti categorically puts it, "the meaning of cruel, inhuman or degrading treatment is relative."³⁷

These concerns that have been raised about the subjectivity in defining what constitutes cruel, inhuman, or degrading treatment logically translate to the realm of refugee rights when the phrase is deployed as a basis for determining whether claimants have demonstrated a "well founded fear of persecution." Within this context even the meaning of "persecution" becomes problematic. Persecution is not defined in the 1951 Refugee Convention, and some have suggested that its meaning is deliberately left vague in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*. The *Handbook* simply indicates that "a threat to life or freedom on account of race, reli-

gion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.”³⁸ However, persecution has been broadly defined as “sustained or systematic violation of basic rights demonstrative of a failure of state protection.”³⁹

Interpretations of what constitutes persecution have developed significantly in the past few years. For instance, in the realm of international refugee law, a growing number of judicial decisions have held that Female Genital Mutilation (FGM) amounts to inhuman and degrading treatment and constitutes persecution of women as a “particular social group.” This precludes national authorities from expelling women to countries where they may be forced to undergo the practice.⁴⁰ But although FGM or female circumcision (depending on one’s perspective)⁴¹ has been generally recognized as a form of violence against women and a health hazard, there is an increasingly vocal group of writers (particularly women from the South) who disagree with this “labeling.” They argue that the concerted international action against FGM stems from a lack of understanding and sensitivity towards non-Western cultures where female circumcision is practiced.⁴²

These writers have raised significant questions about the neglect of salient cultural issues in international discourses and programs of action on FGM. Their point is not so much to dispute the established health risks and trauma associated with the practice but to draw attention to the stereotyped treatment and representation of the subject. According to Ifeyinwa Iweriebor:

What is bothersome is not so much that people have a negative opinion of the practice, but that the issue is misrepresented as a form of child abuse or a tool of gender oppression. The language and the tone of the outcry in most cases reflect a total lack of respect for the culture of other peoples. Even more bothersome is the false portrayal: the falsification of statistics and a successful demonization of the practitioners.⁴³

The point here is that whatever the benefits of including FGM as a form of gender persecution within the realm of refugee law and policies, such a move is inadequate if it is not sensitive to the cultural context of the practice. It is important, even in examining the human rights implications of FGM, to locate the discussion within the broad framework of the cultural dynamics that inform and affect the practice.

Criticism of the broadening of refugee status requirements to include FGM has also come from other quarters. While most legal scholars agree that female circumcision is indeed a legitimate ground for asylum,⁴⁴ some others have cautioned that this may not ultimately be in the interest of international human rights. They warn against an uncontrolled enlargement of human rights procedures, particularly as they relate to grounds for asylum. Although the enlargement of the application of the phrase “inhuman and degrading

treatment” may be justified from a humanitarian point of view, it is questionable in so far as it raises the unprecedented result of progressively nullifying the very legal nature of asylum.⁴⁵

Refugee Producers and Refugee Acceptors

An important feature of the refugee rights discourse that further highlights the debate over cultural relativism and the definition of persecution is the tendency towards the polarization of the world into categories of “refugee producers” and “refugee acceptors.” In discussing this polarization, Audrey Macklin makes an interesting reference to the critique by contemporary post-modernist scholars of the parallel dichotomies that have been drawn along race and culture in the dominant discourses in the West—the Westernized or Northern Self versus the exotic Eastern or Southern Other. Within this schema of what Edward Said has described as “Orientalism,” the exotic Southern or “oriental” Other is objectified and constitutes the reference point against which the West defines and asserts itself.⁴⁶

This same critique also applies to the binary structure of the discourse on refugee rights. As with races and cultures, refugee discourse can be organized according to the binary opposites of self/other. In the refugee context, there are “refugee producers” and “refugee acceptors.” The Western nations locate themselves firmly in the category of “refugee acceptors” and constitute themselves as distinctive and superior by reference to what they are not—that is states that “produce” refugees. To describe oneself as a refugee acceptor is to say that one is also a “non-refugee producer.” This binary structure underlines the global refugee discourse.⁴⁷

However, this categorization is problematic, particularly in relation to discrimination against women across the world. Consider the UNDP’s conclusion that no country (not even the “non-refugee producers”) treats its women as it treats its men, within the context of the assertion that severe discrimination on grounds of gender constitutes persecution.⁴⁸ Given that every country discriminates against women, how will the line be drawn between “mere” discrimination and discrimination so “severe” that it amounts to persecution? One concern is that the line may be drawn by reference to whatever Western (the non-refugee producing) countries do. As Macklin puts it:

What “we” do is discrimination. The more the claimant state looks different from ours, the more what “they” do begins to look to “us” like persecution. In other words, the fear is that cultural difference may become the yardstick along which the shift from discrimination to persecution will be measured.⁴⁹

The fear here is that notions of cultural superiority and inferiority may be employed to distinguish between those states that are “willing or unable” to protect women from domestic violence (non-democracies, current refugee

producing states) and those Western states whose systems are simply “imperfect” and cannot be held accountable for an inability to protect each woman from individual human rights abuse. The practical consequence of this conception is that gender persecution tends to be more visible and identifiable as such only when it is committed by a cultural Other. For example, it seems that when some North American feminists want to make a pitch for granting asylum to victims of gender persecution elsewhere, they tend to be blind to the compelling evidence gathered by other North American feminists documenting local practices that might constitute gender persecution.

This is a concern that has been raised by “Third World” feminists who argue that because Western feminists are primarily concerned with themselves rather than the experiences of the non-Western woman “their conclusions are necessarily ethnocentric.”⁵⁰ Others have questioned the cultural connotations often associated with the persecution of Third World women by Western feminists, arguing that discrimination against women is not derived from culture, but from power. As such, the answer to the global politics of power that seeks to control women across the world is to disarticulate “women” from “culture,” deconstruct women as symbols, reconstruct them as human beings and problematize women’s rights as human rights.⁵¹

At one level, the stance of Western superiority in the realm of gender relations seems innocuous, in that it is deployed in a discursive setting that is meant to benefit individual women seeking asylum. At another level, however, it bespeaks of a certain ethnocentrism that has been identified by many non-Western feminists.⁵² This includes a tendency to posit Western women as the normative reference point against which the situations of Other women are evaluated and articulated. What this means in the refugee context is that the commonality of gender oppression across cultures is suppressed to ensure that what is done to women in non-Western societies looks fundamentally different from or worse than what is done to women in the West. This obscures an inherent contradiction in admitting women from non-Western societies as refugees in Western countries even when the lot of some women within these countries may not, in fact, be significantly better. The dichotomy between refugee-acceptors and refugee-producers, therefore, compels a parallel classification of Western women/Other women that serves to facilitate the admission of non-Western women fleeing gender persecution but does so in a way that remains politically and empirically problematic.⁵³

Conclusion

Although the debate over the universality or cultural relativism of human rights continues among scholars, recent trends indicate that the discourse has gradually moved away from whether contemporary human rights are truly universal, and therefore cross-culturally applicable, to how the cross-cultural

legitimacy of the emerging “universal” human rights regime may be enhanced.⁵⁴ One reality that has strengthened the need for the universalization of human rights is the trend toward rapid globalization in almost every sphere of human endeavor. The spread of the Western model of the state to other parts of the developing world has given rise to the need for constitutional and other legal guarantees of human rights. Thus, the modern concept of human rights, admittedly a product of the West, is increasingly becoming equally relevant in other parts of the world.

Besides, cultural relativism has been charged with neutralizing moral judgment and thereby impairing action against injustice.⁵⁵ Many writers are suspicious of what they see as a notion of cultural relativism that denies to individuals the moral right to make comparisons and to insist on universal standards of right and wrong. However, as An’Naim has argued, the merits of a reasonable degree of cultural relativism are obvious, especially when compared to claims of universality that are, in fact, based on the claimant’s rigid and exclusive ethnocentricity. In an age of self-determination, sensitivity to cultural legitimacy is vital for the international protection of human rights. This does not preclude cross-cultural and moral judgment and action, but it provides a direction for the best ways of formulating and expressing judgment and undertaking action.⁵⁶

Globalization and the universalization of human rights need not necessarily preclude attempts to temper the modern content of “universal” rights with the specific cultural experiences of various societies. In the refugee field, this calls for international and national refugee laws and policies founded on the basic universal human rights standards, but also informed by some level of cultural sensitivity. The present challenge is how to achieve this delicate balance. A first step in this direction would be for scholars and policy makers on all sides of the debate to accord more attention to the concerns of ethnocentricity and cultural chauvinism that have been voiced about international and national refugee laws and policies. So far this does not seem to be happening, as such voices are often dismissed as patriarchal, paternalistic, and perpetuating injustice. Yet, although these voices may not always represent the best ways of protecting the rights of individual asylum seekers, and in some cases may even be antithetical to these rights, they deserve close attention if the standards of international refugee protection are to be truly objective and universal. They also deserve attention if the humanistic philosophies that inform international refugee law and policies are not to be occluded by the perceived cultural biases and socio-economic inequities of the international world order.