

UNDERSTANDING THE MEANING OF “PERSECUTION” FROM THE “GENDER” PERSPECTIVE

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1.1 Introduction

Until recently, the field of refugee studies was spared the contentious and polarized debate over universalism and cultural relativism that has dominated the human rights discourse for so long. However, the past few decades have witnessed a progressive blurring of the traditional lines between refugee studies and the human rights discourse. Academics and policy makers have begun to cross the line that once separated human rights and the refugee field. The practice of "gender-based" persecution, while strikingly persistent throughout history and around the world, has only recently been given a name and a place in legal discourse.

While gender-based persecution takes many forms, depending on the culture and context within which it occurs, certain common threads are woven throughout women's experiences of violence. For example, women and girls, as opposed to males, often suffer violence at the hands of family members, within what many still consider to be the "private" sphere: the home. This is the case with abuses such as "honor" crimes, domestic violence, incest, female genital mutilation, forced marriage, and widow rituals, in which a woman whose husband dies at a young age is presumed guilty of his death and is subjected to various forms of punishment including shaving her head or having to marry her brother-in-law. Furthermore, these abuses often are inextricably tied to the notion that men, and by extension, the family, own the bodies of the women in the family. Therefore, the choices that women make with regard to their bodies, for example, those involving sexuality or motherhood, are not their own; rather, they are a reflection of the values of the family or even the larger cultural and/or religious community.

We have learnt that sexual and gender-based violence is most prevalent in environments where there is a general lack of respect for human rights. Sexual and gender-based violence is, of course, itself a human rights violation. Women and children, who are often most vulnerable to human rights abuses, are also the ones who suffer most from sexual and gender-based violence.

1.2 The Principle of Non-Discrimination in International Instruments

The principle of non-discrimination has been correctly described as fundamental to the concept of human rights.¹ It is specially affirmed, for example, in the Preamble to the United Nations Charter,² the Universal Declaration of Human Rights, 1948,³ the International Covenant on Civil and Political Rights, 1966,⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.⁵ The principle of equality and the prohibition of discrimination has been reaffirmed and strengthened in a multitude of international human rights treaties. Observance, however, has been far from exemplary and this is no less true in

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1. P. Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford, 1990), p. 75. See also, M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl am Rhein, Germany, and Arlington, VA, USA, 1993), pp. 458 and 460: 'Along with liberty, equality is the most important principle imbuing and inspiring the concept of human rights'; 'The principle of equality and the prohibition of discrimination runs like a red thread through the [International Covenant on Civil and Political Rights].'
 2. The UN Charter, 1945, also includes sex among the prohibited grounds of discrimination along-side race, language, and religion, Art. 1 (3).
 3. Universal Declaration of Human Rights, UNGA Res. 217 A (III), 10 Dec. 1948 (hereinafter 'Universal Declaration'), Arts. 2 and 7.
 4. International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, 6 ILM 368, 1967 (hereinafter 'ICCPR'), Arts. 2 (1), 3, and 26.
 5. Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13, Arts. 1-5.

the case of the Convention Relating to the Status of Refugees, 1951.⁶ In particular, it has not always been recognized that women and the girl-child enjoy the equal protection of the 1951 Convention.

It is paradoxical that at one level of analysis, under a general human rights framework international law is expansionary and women's rights are increasingly being addressed and yet at another level, under a refugee-specific framework, women's rights are either not addressed or subsumed under broader categories of persecution. Documents such as the UN Charter and the Universal Declaration on Human Rights (UDHR) may not explicitly address violence against women, nevertheless they do demand a change in existing patterns of discrimination, gender roles, and inequality constructed on the idea of sexual inferiority. Violence against women when seen under the light of these instruments can clearly be interpreted as a tenet of the Convention.

Art. 2(a) of the Declaration on the Elimination of Violence against Women (1993) defines violence against women as encompassing "female genital mutilation and other traditional practices harmful to women". The Special Rapporteur on violence against women concludes that it is "imperative that practices such as female genital mutilation...or any other form of cultural practice that brutalizes the female body receive international attention...(and) that these practices are curtailed..."⁷ The Special Rapporteur also points out that these cultural practices that entail "severe pain and suffering" may constitute torture which is considered a *ius cogens* right.⁸

6. Convention Relating to the Status of Refugees, 1951, 189 UNTS 150 (hereinafter "1951 Convention") References to the 1951 Convention in this paper should be read as including the Protocol Relating to the Status of Refugees, 1967, 606 UNTS 267.

7. Report of the Special Rapporteur on Violence against Women: Cultural practices in the family that are violent towards women; Commission on Human Rights, 58th Session, E/CN. 4/2002/83, 31 January 2002.

8. Ibid, p.8.

1.3 The Significance of the term “Gender Based”

There is a general consensus among legal scholars that refugee law has been developed within a male framework that reflects the typical circumstances of male asylum seekers and has largely ignored the particular protection needs of women.⁹ Although the refugee definition in the 1951 Geneva Convention¹⁰ is neutral on its face, behind it lie narrow interpretations and assumptions of the conventional refugee that rarely fit the experiences of women. Whereas the stereotypical political refugee works in the public by organising demonstrations and writing pamphlets, women are more likely to show their resistance by refusing to wear a veil and operating in the private sphere. Although there is nothing in the refugee definition which explicitly precludes women from being recognised as refugees, the interpretation by the states reinforces such a gender bias. As Charlesworth points out, “rights are defined by the criterion of what men fear will happen to them”¹¹ and although it is undisputed that women are abused on an overwhelming scale in the world, this has not been reflected in international instruments.

2. The international definition of a refugee

The 1951 Geneva Convention

Although the protection of refugees is articulated in Article 14 of The Universal Declaration of Human Rights of December 1948, which provides that “Everyone has the right to seek and enjoy in other countries asylum from persecution”, the declaration has no internationally binding force. Instead, the extent of refugee protection is regulated in the 1951 Convention Relating to the

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9. Charlesworth, H, Chinkin, C & Wright, S, *Feminist Approaches to International Law*, 85 *Am. J.Intl.L.* 613, 1991, p. 616 and Macklin, A, *Refugee Women and the Imperative of Categories*, *Human Rights Quarterly* 17, 1995, p. 232.
 10. *Convention Relating to the Status of Refugees*, Geneva 28 July 1951 (hereafter the *Refugee Convention*).
 11. Charlesworth, H, *What are "Women's International Human Rights" in Human Rights of Women: National and International Perspectives 58-84*, Philadelphia, U of Penn Press, 1994 (Rebecca Cook ed.), p.71.

Status of Refugees and the principle of *non-refoulement*, which obliges states to refrain from forcibly returning a refugee to a country where he/she is likely to suffer political persecution.¹² The term refugee is defined in Article 1(A) of the Refugee Convention as any person who “owing to 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 origin of her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

Neither the refugee definition nor the 1951 Convention in general refers to sex or gender.¹³ This omission is, however, without significance. The ordinary meaning of Article 1 A(2) of the 1951 Convention in its context and in the light of the object and purpose of the Convention requires the conclusion that the Convention protects both women and men and that it must therefore be given a gender-inclusive and gender-sensitive interpretation.¹⁴ In addition, Article 26 of the ICCPR confers an independent right to equality before the law and to the equal protection of the law, over

12. Article 33 of the Refugee Convention and Article 3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

13. The non-discrimination provision of the 1951 Convention, namely, Art.3, refers only to race, religion and country of origin as prohibited grounds of discrimination.

14. Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art. 31, which provides: ‘A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ See also, *Applicant A v. Minister for Immigration and Ethnic Affairs*, High Court of Australia, (1997)190 CLR 225, per McHugh J; UNHCR, ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’ April 2001, paras. 2–6.

and above the accessory prohibition of discrimination in Article 2 of the ICCPR.¹⁵

Although persecution is not defined by the Refugee Convention, the grounds of such persecution are listed as race, religion, nationality, membership of a particular social group or political opinion. This definition of what constitutes a 'refugee' has been highly debated given its perception of being a cold war instrument, narrowly defined to contain future refugee flows within the South and its failure to address and recognize present day refugee movements that may be a result of economic disasters, break down of state machinery, and persecution on account of gender.

In the words of Goodwin-Gill, the Convention is,

"...founded upon a laudable, if highly individualistic conception of persecution, premised upon admission and integration, the Convention's capacity for narrow or restrictive interpretation in the highly structured environments of case by case adjudication leaves thousands 'outside' or 'beyond' protection. They become objects of ad hoc, discretionary and extra-legal policies that finally benefit no one. Individuals are commonly denied even basic rights, or any opportunity to contribute to their own solution. Administrations in turn, appear incompetent to combine humanitarian policy with effective management of their borders."¹⁶

Originally, the 1951 Convention also required that the events causing the well-founded fear must have occurred before January

15. M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl am Rhein, Germany, and Arlington, VA, USA, 1993), p. 465.

Art.26 of the ICCPR provides: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

16. Guy Goodwin-Gill, "Asylum: The Law and Politics of Change", *International Journal of Refugee Law* vol.7 (1995), p.8.

1, 1951, but the 1967 Protocol Relating to the Status of Refugees abolished that limitation.¹⁷ The 1967 Protocol to the 1951 Convention not only removed the 1 January 1951 dateline and the geographic limitation, it fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses which are properly called persecution.¹⁸

3. The term persecution

3.1 Generally

Persecution is most appropriately defined as the sustained or systemic failure of State protection in relation to one of the core entitlements recognized by the international community.¹⁹ Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the State's ability and willingness to respond effectively to that risk.²⁰

A distinction must be drawn between a breach of human rights and persecution. Not every breach of a refugee claimant's human rights constitutes persecution.²¹ It is only in certain circumstances that discrimination will amount to persecution. This would be so

17. 606 UNTS 267 (No. 8791).

18. Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art. 31(3) (a), specifically provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

19. Hathaway J.C., *The Law of Refugee Status* (Butterworths, Toronto, 1991), pp. 104–5 and 112, approved in *Horvath v. Secretary of State for the Home Department*, UK House of Lords, [2001] 1 AC 489 at 495 F, 501 C, 512 F and 517 D and by Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, (2002) 187 ALR 574, and [2002] HCA 14, 11 April 2002, at para. 111.

20. *Ibid* p. 125.

21. *Ibid* pp. 103–4.

if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned.²²

Notwithstanding the fact that the refugee definition comprises two key elements, 'persecution and 'well-founded fear', the criterion that is particularly significant in cases dealing with gender persecution and that differ from other asylum applications, is which acts amount to persecution. There is no generally accepted definition of the term 'persecution' since the drafters of the Convention intentionally left the meaning undefined.²³ Bearing in mind the impossibility of enumerating in advance all the forms of maltreatment that might entitle a person protection, the definition is wide in order to encompass new interpretations of persecution and therefore has certain flexibility. This has also been emphasized by the Committee on Population and Refugees of the Council of Europe which stated that: "The concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted."²⁴ States are therefore left with a wide margin of appreciation of interpreting the term.

3.2 The criteria 'serious harm'

The UNHCR handbook, which provides valuable guidance, states that threat to life or freedom on account of any of the five grounds in the Geneva Convention always constitutes persecution, but also that other serious violations of human rights can be considered persecution (art. 51).²⁵ UNHCR opens the definition even wider

22. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979, re-edited 1992), at para. 54.

23. Hathaway J.C, *Reconceiving Refugee Law as Human Rights Protection in Human Rights in the 21st Century*, Mahoney and Mahoney, Dordrech, 1993, p.668.

24. Resolution of January 1976, cited in Hathaway, J, *supra* note 15, p. 669.

25. UNHCR, Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and of the 1967 Protocol Relating to the Status of Refugees, Geneva 1992.

by also providing that other harmful actions and threats can be persecution depending on the circumstances in the particular case.

The psychological disposition of the applicant is of relevance (art.52) and cases where specific acts by themselves are not sufficient to rise to the level of persecution, may still be within the definition if the cumulative effect of several acts are sufficiently severe (art.53). Particularly relevant in gender-related cases is also the concept of non-discrimination. Although human rights do include a principle of equality and a prohibition of discrimination, discriminatory treatment *per se* has generally not been enough to establish persecution. However, discriminatory treatment can under certain circumstances rise to this level, e.g. if it affects the possibility to support one's self (art.54).

The application of the term persecution therefore very much becomes a question of degree and proportion.²⁶ However, what seems to be clear is that there has to be a risk of *serious harm* for the act to be considered persecution and that the harm should be inconsistent with the basic duty of protection owed by a state to its own population.²⁷ The question is therefore how to measure the level of harm of various acts and practices. Relevant jurisprudence as well as legal scholars have shown that there is definite linkage between persecution and the violation of recognized human rights. Hathaway has defined persecution as "sustained or systematic violation of basic human rights demonstrative of a failure of state protection".²⁸

Although not accepted by all, this reasoning is the dominant view among scholars who advocate that it would clarify the relatively undefined terms contained in the Refugee Convention and "breathe new life into refugee law" since refugee law can evolve in

26. Goodwin-Gill, Guy, *The Refugee in International Law*, 2nd ed, Oxford, 1996, p.68.

27. Crawley, H, *Women as Asylum Seekers: A Legal Handbook*, Immigration Law Practitioners Association, London, 1997, p. 9.

28. Hathaway J.C, *The Law of Refugee Status*, Butterworths, Canada, 1991, p. 105.

synchronization with the human rights field.²⁹ Von Sternberg argues that an essential function of the law of refugee status is to further the growth of human rights and humanitarian law.³⁰

Further, UNHCR has stated that “in recognition of the adaptable nature of the refugee definition to meet the ever changing needs of protection, UNHCR recognizes an important link between persecution and the violation of fundamental human rights”. Also Goodwin-Gill argues that a “comprehensive analysis (of the concept of persecution) requires the general notion to be related to the developments within the broad field of human rights”.³¹ The premise of linking the term persecution to human rights is that all individuals are entitled to expect a minimum standard of rights from the state, and if the state cannot fulfil these, the individual has a right to seek it elsewhere. Since persecution traditionally “has not been widely interpreted to include generally female-specific experiences”³², identifying persecution and the meaning of serious harm in light of agreed standards of human rights would allow for a wider interpretation that would also include those harms that are gender-specific.

3.3 The various grounds of persecution

According to Article 1(A) of the Refugee Convention, the risk faced by the asylum-seeker must have a nexus to either *race, religion, nationality, political opinion or membership of a particular social group* and the woman asylum-seeker must show that the persecution is causally related to one of the grounds. As the Refugee Convention of 1951 was formulated in the aftermath of World War II and in the midst of the Cold War, the typical refugee in mind of the draftsmen was the male political dissident. When ‘sex’ was proposed by a delegate as a ground of persecution

29. Hathaway J.C, supra note 15, p. 669.

30. Von Sternberg, M, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law*, Kluwer, The Hague, 2002, p.319.

31. Goodwin-Gill, Guy, supra note 18, p. 67.

32. Crawley, H, supra note 27, p.48.

at the conference where the Refugee Convention was drafted, the proposal was dismissed by the Chairman who doubted that there would be any cases of persecution on account of sex and that the equality of the sexes was merely a matter for national legislation.³³

3.4 Convention Grounds

Gender is a relevant and at times highly significant factor and characteristic which must be taken into account when deciding whether the well-founded fear of being persecuted is for a Convention reason. Gender must inform the assessment of race, religion, nationality, membership of a particular social group, or political opinion. 'Religion' and 'political opinion' in particular need to be properly interpreted to include women's experiences. In some cases, 'women' (or some subcategory thereof) may qualify as a 'particular social group'.³⁴ The UK Immigration Appellate Authority has noted: Women may face persecution because of a Refugee Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion and social affiliations are often seen as aligned with relatives or associates or with those of her community. It is therefore important to consider whether a woman is persecuted because of a Convention ground which has been attributed or imputed to her.³⁵

As previously stated, persecution must be for reasons of one of the grounds enumerated in the refugee definition. The following injects a gender perspective in interpreted the grounds:

3.4.1 Race and Nationality

Racism knows no gender, however, persecution on this ground may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or

33. Spijkerboer, T, *Gender and Refugee Status*, Ashgate , UK, 2000, p.1.

34. Refugee Women's Legal Group (RWLG), 'Gender Guidelines for the Determination of Asylum Claims in the UK', July 1998, para , 4.1.

35. Immigration Appellate Authority (IAA), 'Asylum Gender Guidelines', Nov. 2000 (UK) para. 3.3.

incarcerating the men, whilst the women may be viewed as propagating the ethnic identity and persecuted in a different way, such as through sexual violence.

3.4.2 Religion and Political Opinion

There is some overlap between these two grounds in gender-related claims, especially in the realm of an imputed political opinion. In certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other agents of persecution may perceive the failure of women to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could also be interpreted by the persecutor as evidence of an unacceptable political opinion that threatens the basic structure from which certain political power flows.

Failure to conform to certain key State decisions could equally be equated as diversion, or disrespect for the politics of the authorities. For example, ignoring the family planning policies of a certain State could be interpreted by the persecuting agent as a different political opinion. A different political opinion could thus be imputed on the person concerned.

3.4.3. Membership of a Particular Social Group

The ground of membership of a particular social group has not been easy to define. Gender-related claims have most often been analyzed within the parameters of this ground, making a proper understanding of this term of paramount importance in assessing gender-related claims. What is needed is an orderly and principled approach to the construction of the Convention ground, favouring neither an artificially restrictive or a meaningless broad approach to the term.

The following key considerations could be identified in determining whether a "particular social group" exists.

- The 1951 Convention does not entitle a person to asylum whenever she fears persecution if returned to his/her own country. Had the Convention so intended, it could and would have said so. Instead, refugee status was confined to those

who have a well-founded fear of persecution on one of a number of specific grounds set out in Article 1A(2). To give the phrase "membership of a particular social group" too broad an interpretation would conflict with this objective;

- The concept of "particular social group" must apply to social groups which exist independently of persecution,
- In order to determine whether persecution is the sole distinguishing factor, it is necessary to examine the State's broader policies, legislative provisions, factual circumstances and how people similarly situated are treated by law and society. This makes relevant country of origin information that much more important in assessing such claims.
- The distinct characteristics setting the group apart as a "particular social group" could be innate, or ones from which although dissociation may be possible, it would result in renunciation of basic human rights;
- Behaviour can become a reflection of who a person is.
- There is no requirement of voluntary association in the sense that members of the group must have met or have other close association. Internal cohesion thus is not a requirement.
- Rather, the issue of "voluntary association" may be interpreted in the context of a determination of whether by leaving the group, the claimant can eliminate the risk of persecution. It is in this context that "voluntary association" could be protected if it becomes a question of abdicating human dignity and fundamental human rights.
- Members of a social group must have associative qualities that go to the members' identity. In other words, the association must go to what a person is rather than to what she or he does.
- While the meaning of the expression "membership of a particular social group" is a question of law, whether an asylum-seeker is a member of a particular social group is a question of fact.

Against the background of the above considerations, innate

characteristics such as those of "women", or "married women" could create a "particular social group" -but again emphasizing the need for some relationship between the persecutory harm to the innate characteristics creating the group in defining a refugee.

More specifically, women who behave in a manner at odds with the prevailing social or cultural mores can also constitute a particular social group. The group ties derive from shared attitudes and value systems, intrinsic to the nature of the persons concerned which go to their identity. In this context, external factors beyond a group's internally-unifying characteristics are also relevant in associating persons as a social group. For example, while discrimination alone does not create the particular social group, it helps to give it more definition, by setting persons aside from the broader tolerated segments of society. This approach would recognize the proposition that women who choose to live outside the framework of the accepted social codes and who are severely punished for it in a discriminatory manner can fall within the 1951 Convention.

3.5 Sexual Violence as a means of Persecution

The 1993 Executive Committee recognized that women often experience persecution differently from men, and that sexual violence has indeed been a cause of refugee movements. The Executive Committee "strongly condemned persecution through sexual violence, which not only constitutes a gross violation of human rights, as well as, when committed in the context of armed conflict, a grave breach of humanitarian law, but is also a particularly serious offence to human dignity" and "supported the recognition as refugees of persons whose claims to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion."

As the majority of cases of sexual violence involve female victims and male perpetrators, sexual violence can be analyzed in the context of its disproportionate impact on women and girls. Article 2 of the Declaration on the Elimination of Violence against Women provides that

"violence against women shall be understood to encompass, but not limited to the following:

- a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation,
- b) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

International human rights principles support the characterization of sexual violence against women as a violation of human rights.³⁶ There is no doubt that rape and other forms of sexual assaults are acts which inflict severe pain and suffering - both mental and physical and which have been used as a form of persecution. Such treatment clearly comes within the bounds of torture as defined by the Convention against Torture. Sexual violence amounts to a violation of the prohibition against cruel, inhuman or degrading treatment, the right to security of person and in some instances the right to life, as contained in a variety of international human rights instruments.

The fact that the violence does not emanate directly from the authorities should be no obstacle to recognizing rape and other forms of sexual violence as a form of persecution. UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* states clearly in its paragraph 65 that "Where... offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer protection." In addition, international instruments clearly establish State responsibility in safeguarding against such human rights violations.

36. See the 1993 Vienna Declaration and Programme of Action, para. 28, UN doc. A/CONF. 157/23; 1994 Report of the International Conference on Population and Development in Cairo, para. 4.9, UN doc. A/CONF.171/13/ Rev. 1; 1995 Beijing Declaration, paras. 29 and 30.

3.6. Well founded fear of Persecution

What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterization as serious abuses, amounting to persecution.³⁷ In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking,³⁸ are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.

The Convention does not, however, protect persons against any and all forms of even serious harm.³⁹ There must be a risk of a type of harm that would be inconsistent with the basic duty of protection owed by a State to its own population.⁴⁰ The dominant view is that

37. See UNHCR's Handbook, paragraph 51.

38. For the purposes of these Guidelines, "trafficking" is defined as per article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000. Article 3(1) provides that trafficking in persons means "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

39. J.C.Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), p.103

40. *Ibid.*, pp.103 –4.

refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.⁴¹ Persecution is most appropriately defined as the sustained or systemic failure of State protection in relation to one of the core entitlements recognized by the international community.⁴²

The most difficult circumstances for women to establish persecution and the need for international protection have been those in which the instruments of persecution are consonant with traditional or historical practices—such as forced marriage, spousal battery, genital mutilation, honor killings and so forth—that are deeply discriminatory or even inherently persecutory but are seen as lying within the private sphere. The state often fails in its duty to protect women from such violence, particularly when it is directed against them within a family or community context because they have transgressed religious or cultural norms. Such persecution on account of religion or nationality often goes unrecognized in international refugee adjudications.

Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to endeavor to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.”

The ways that women experience persecution often differ from the ways men experience it. They may be persecuted because of their sex—because, as women, they are seen, for example, as symbolic bearers of the honor and power of their family or clan or ethnic group, which is being targeted for persecution on one of the five grounds. Women reproduce the group both physically and socially; violation of women is often a symbolic as well as a literal assault on the group, a strategy to humiliate and demoralize the

41. *Ibid.*, p.108.

42. *Ibid.*, pp.104–5 and 112.

targeted group. Their own views, beliefs, or actions may not be known or considered relevant by their persecutors, as only their kinship or affiliation matters. This pattern has, perversely, sometimes made it difficult for women to establish a nexus between their persecution and one of the five enumerated grounds, although “imputed” political opinion or nationality may be accepted.

Violence within the family is one of the most controversial emerging areas of refugee law. Violence committed by spouses or domestic partners, fathers, brothers, etc. is the most common form of violence against women, and the failure of the state to protect women is a clear failure of “national protection”. Yet it has been difficult for women seeking asylum on these grounds to establish, in particular, a “nexus” with Convention grounds of persecution. Yet there is an emerging body of jurisprudence that places domestic violence in a human rights framework and argues that women subject to it in certain circumstances constitute a “particular social group”.⁴³

Tribunals for former Yugoslavia and Rwanda, have acknowledged the use of rape as a weapon of war, a war crime, and a crime against humanity. This should help to dispel the lingering notion that rape inhabits the private, domestic sphere. Gender guidelines issued by a number of governments and by UNHCR have made clear that sexual violence is no different from any other form of physical violence when it is used as a means of persecution.

4. Difference between sex and gender

In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms “gender” and “sex”. Gender refers to the relationship between women and men based on socially or culturally constructed and defined

43. *Matter of R-S-*, Interim decision 3403, 2001 BIALEXIS (AG 2001; BIA 1999). See Karen Musalo and Stephen Knight, “Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States”, in *International Journal of Refugee Law*, Vol. 13 No. 1/2.

identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.

The purpose of the 1951 Convention is to provide surrogate protection to men, women, and children from persecution. Since men, women, and children can be persecuted in different ways and since Article 1 A(2) demands an inquiry into the specific characteristics and circumstances of the individual claimant, the sex and/or age of the refugee claimant are integral elements of the refugee inquiry.

Equally integral are the power structures in the country of origin and in particular the civil, political, social, and economic position of the refugee claimant. In this context, as has been explained by Heaven Crawley and others:

“The term ‘gender’... refers to the social construction of power relations between women and men, and the implications of these relations for women’s (and men’s) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and culturally specific, so that what it is to be a ‘woman’ or ‘man’ varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences.”⁴⁴

Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant’s sex

44 H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001) pp. 6-7; See also, Refugee Women’s Legal Group, ‘Gender Guidelines for the Determination of Asylum Claims in the UK’, July 1998, paras. 1.8 - 1.15 and UNHCR, ‘Gender-Related Persecution’, UNHCR Position Paper, Jan. 2000.

may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex. Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.

Women not only face stereotypes regarding their particular role in society in their local community, but also on the international law arena. The idea of the stereotypical refugee as an activist who organizes demonstration, prints pamphlets and speaks at public meetings still prevails. Although some women are involved in such a manner, most women do not fit this model since they are more likely to show their political opposition by providing support and refuge, pass messages and money or cook for the party members. Women's political activity can also entail *not* performing a specific activity, e.g. refusing to wear ascribed clothes or abide by discriminatory laws.⁴⁵ Other problems specific to gender-related claims is the recognition of the abuse as rising to the level of serious harm.

5. The term “Gender Based Persecution”

There are a number of statements of relevance to the issue of gender-based persecution in international documents. UNHCR's Executive Committee, in Conclusion No.39, recognized as early as 1985 that States “in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group within the meaning of Article 1 A2 of the Geneva Convention...”.⁴⁶

45. Folkelius, K and Noll, G, *Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act*, *International Journal of Refugee Law*, Vol.10, Oxford, nr. 4 1998, p.611.

46. Report of the 36th Session of the Executive Committee of the High Commissioner's Programme, 36th Session., 7- 18 October 1985 at 36, UN Doc. A/AC96/673, para. 115 (4) (k).

Further recognition followed at the Beijing Fourth World Conference on Women in September 1995 which called upon states to particularly recognise the persecutory claims of women refugees.⁴⁷ That same year the General Conclusion on International Protection adopted in October 1995 by the Executive Committee of the High Commissioner's Programme "called upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women".⁴⁸ Also on the national level, Canada led the way by publishing guidelines for the Immigration and Refugee Board in 1993 with the title "Women Refugee Claimants Fearing Gender-Related Persecution". Shortly after this, similar guidelines were published in the United States and Australia, followed by the United Kingdom in 2000, which have greatly developed the area of gender-related persecution.⁴⁹

While gender has not generally been advocated as an additional ground in the Refugee Convention in the Ex Com directives or guidelines, what is recognised is that it should be accepted that (gender) can influence or dictate the type of persecution or harm suffered and the reason for this treatment. Although women in many cases suffer the same types of harm as male refugees and not all asylum-claims should be labelled as gender-persecution when the claimant is a woman, it has been generally accepted that certain abuses are directly connected to gender. Gender-related persecution has no legal meaning *per se*, but "is used to encompass

47. Beijing Declaration and Platform for Action, 4th World Conference on Women, UN DOC.A/CONF.177/20.

48. UN doc A/AC.96/878, III A. 1.

49. Women Refugee Claimants Fearing Gender-Related Persecution, Immigration and Refugee Board of Canada, 9 March, 1993; US Immigration and Naturalization Service, "Considerations For Asylum Officers Adjudicating Asylum Claims From Women", 26 May 1995; Australian Department of Immigration and Multi-Cultural Affairs "Guidelines on Gender Issues for Decision-Makers", July 1996; Asylum Gender Guidelines, Immigration Appellate Authority, UK, Nov. 2000.

the range of different claims in which gender is a relevant consideration in the determination of refugee status.”⁵⁰ However, the definition of the term “gender-related persecution” has caused conceptual difficulties of interpretation in both case law and legal doctrine. Not only does it include persecution *because* of gender, where gender may explain *why* a woman was persecuted but gender may also determine the *form* that the persecution takes and the refugee is then persecuted *as* a woman.

6. Refugee Status Determination Procedures

Although quite a distinct subject matter in and of itself, it would simply be important to emphasize the equal need to have gender-sensitive refugee status determination procedures in place. Proper protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive asylum procedure.

A female asylum-seeker can face particular difficulties in presenting her story, and very much so where that story involves acts of sexual violation:

- She may not always be given the necessary separate interview if she is accompanied by her spouse;
- yet she may be reluctant to speak freely in front other spouse or a male interviewer, either because of cultural mores or past experiences;
- she may feel embarrassed or humiliated when relating information about sexual assaults she has had to endure;

Due sensitivity needs to be paid attention to women who may experience in telling their story. Female interpreters, confidentiality of records, trained female interviewers and country of origin information, - including on the role, status and treatment of women, are all important issues in ensuring a gender-sensitive approach to gender sensitive definition.

50. UNHCR Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, para.6.

7. Right to international protection

Women flee their homes for a wide variety of reasons including persecution, war, natural disasters, violence and poverty. Some seek asylum in another country, others try to find safety elsewhere in their country of origin. Some go to refugee camps or to camps for the internally displaced within their own countries. If they reach another country, the reason for their flight will determine whether or not they are considered refugees under international law, and therefore entitled to international protection.

In December 2001, the UN High Commissioner for Refugees made five commitments to refugee women. They included: ensuring the participation of refugee women in all management and leadership committees; registering refugee women on an individual basis, and providing relevant documentation; developing strategies to counter sexual and gender-based violence; and ensuring direct participation of refugee women in the management and distribution of food. In October 2003, the Executive Committee of UNHCR adopted a *Conclusion on Protection from Sexual Abuse and Exploitation* highlighting the need for measures to empower women in refugee situations, codes of conduct, prompt investigation of allegations of sexual abuse and exploitation, and the need for accountability mechanisms. The Conclusion also recognizes that states, UNHCR and other implementing and operational partners all have the responsibility to take concrete measures to prevent and respond to sexual and gender-based violence.

Violations of women's rights are predominantly confined to the privacy of the home and are often performed by non-state actors, automatically excluding their claims from traditional refugee law. Although the definition of "persecution" was intentionally left open for reinterpretation in accordance with social changes, such renewal has met great resistance apart from a limited number of countries. However, one cannot view refugee law in isolation from the developments in the human rights field. Not only are the forms of persecution directly tied to what constitutes violations of human rights, but there has been a greatly extended individual

responsibility under both international humanitarian law and international criminal law where human rights violators are no longer only states but also individuals, not the least in the newly established International Criminal Court and the war crime tribunals for Rwanda and former Yugoslavia. As we have seen in such documents as CEDAW and the UNHCR Handbook, the state also has a greater responsibility for protecting the rights of its citizens and preventing violations. By requiring that states provide efficient remedies in situations of violations by private individuals, international law has now delved into the national criminal system. Non-state actors can therefore no longer hide behind the traditional notion of state accountability in international law nor state's behind their inaction. These changes are slowly opening up the gates of the private sphere to the inspection of international law institutions.

8. Conclusion

The link between human rights and refugee law is essential for gender-based claims since refugee law in the end is only a surrogate for the state's own protection of the rights of its citizens and the interpretations of the refugee definition can only be made with reference to human rights instruments. The human rights field is evolving slowly but steadily when it comes to gender issues. CEDAW, the Declaration on the Elimination of Violence against women, UNHCR's guidelines and the reports by the Special Rapporteur on violence against women have set an important platform for an extended state obligation and a gender-conscious interpretation of persecution. By basing the definition of "persecution" on these standards, refugee law can evolve in a positive direction.