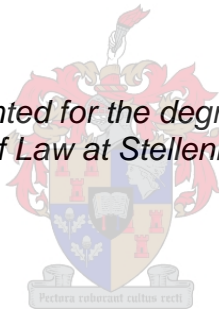


# **Sixty Years of Silence: Gender Discrimination under International Refugee Law**

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*Dissertation presented for the degree of Doctor of Law  
in the Faculty of Law at Stellenbosch University*



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March 2016

## **Declaration**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Tuuli Karjala, March 2016, Stellenbosch

## **Abstract**

Gender-related violence is a global pandemic affecting millions of women worldwide. Yet, in many instances, states continue to tolerate and indirectly condone the various forms that it takes. In cases where the gender-related violence amounts to persecution because of its severity and the lack of state protection, victims are left with a drastic solution: to flee and seek refuge in another country. However, international refugee law, as one of the final mechanisms to protect basic human rights, has proved to be inadequate to provide sufficient protection for victims of gender-related persecution.

This dissertation argues that the definition of 'refugee' under international refugee law is obsolete and in dire need of reconceptualisation in order to adequately encompass the unique persecution that women face because of their gender. Therefore, this dissertation seeks to establish the reasons behind the inadequate protection of victims of gender-related persecution. To examine this question, the dissertation carries out a detailed analysis of various aspects that have an impact on the interpretation and implementation of the international refugee law framework.

As a result of this analysis, the dissertation demonstrates how the historical events that took place at the time of the drafting of the main international refugee law instruments impacted their substance and resulted in a heavily androcentric focus. Similarly, this dissertation reveals how the patriarchal nature of the international law regime as a whole has had a negative impact on gender-related asylum claims. Moreover, it discloses the asylum adjudicators' gender-biased construction of 'persecution' and analyses the difficult fit between gender-related persecution and the nexus requirement under the 1951 Refugee Convention.

Furthermore, this dissertation takes the important step of examining the manners in which the current protection afforded by international refugee law to victims of gender-related persecution can be improved and developed, and it analyses best practices. Ultimately, based on this in-depth analysis, this dissertation's key contribution to the field of international refugee law is the identification of the emerging recognition of gender as an independent category of persecution to the existing 'refugee' definition. This addition will

have a fundamental impact on the gender-equal application of international refugee law and, importantly, on the protection of women's human rights worldwide.

## Opsomming

Geslagsgebaseerde geweld is 'n wêreldwye pandemie wat miljoene vroue affekteer. Dog word hierdie probleem deur vele state verdra en selfs indirek gekondoneer. In sulke gevalle waar hierdie geweld tot vervolging lei as gevolg van die erns daarvan, sowel as die gebrek aan staatsbeskerming daarteen, het dit 'n drastiese impak op die slagoffers. Hulle beste oplossing is dikwels om uit hul land te vlug en asiel in ander lande te probeer bekom. Die internasionale reg van toepassing op vlugteling as een van die finale regsinstrumente om basiese menseregte te beskerm, is egter nie altyd voldoende om genoegsame beskerming vir dié slagoffers te bied nie.

Hierdie tesis probeer illustreer dat die omskrywing van “vlugteling” onder die internasionale reg daarop uitgedien is en dat daar 'n dringende behoefte aan herformulering is, om die besondere vervolging van vroue as 'n direkte gevolg van hul geslag voldoende te reflekteer. Om dit te kan bewerkstellig, poog hierdie tesis om die redes vir die ondoeltreffende beskerming van slagoffers van geslagsgebaseerde vervolging te identifiseer. Hierdie kwessie word ondersoek deur 'n gedetailleerde analiese van verskeie elemente wat 'n impak het op die interpretasie en implementering van die raamwerk van die internasionale reg op vlugteling.

Na aanleiding van dié analiese, demonstreer hierdie tesis die impak wat die historiese gebeurtenisse ten tye van die opstel van die vernaamste internasionale regsinstrumente op vlugteling op hul inhoud gehad het, en wat gelei het tot hul sterk androsentriese fokus. Insgelyks onthul die tesis hoe die patriargale aard van die internasionale reg oor die algemeen geslagsgebaseerde asielaansoeke negatief beïnvloed het. Verder openbaar hierdie tesis die geslagsvooroordeelde samestelling waarmee asielbesluitnemers vervolg, en dit analiseer die onverenigbaarheid tussen geslagsgebaseerde vervolgings en die *nexus* vereiste onder die 1951 Refugee Convention.

Belangrik tot hierdie tesis is die indiepte ondersoek na verbeteringe en ontwikkeling van die huidige beskerming verleen aan die slagoffers van geslagsgebaseerde vervolgings deur die internasionale reg daarop, asook die ontleding van beste praktyke. Deurslaggewend tot hiedie tesis is die

identifisering van 'n ontluikende gewoontereg wat geslag as 'n onafhanklike vervolgingskategorie as deel van die “vlugteling” omskrywing beskou. Hierdie toevoeging sal 'n grondliggende effek hê op die geslagsgelyke toepassing van die internasionale reg op vlugteling, veral die beskerming van vroueregte wêreldwyd.

## **Acknowledgements**

First and foremost, I want to express my profound appreciation and thanks to my supervisor, Professor Annika Rudman, for her expert guidance, constructive comments and deep insights into the subjects of international refugee law and feminist legal theory. Furthermore, I want to express my deep gratitude for her continuous mentorship, support and encouragement over the years, all of which have been fundamental to the completion of my doctoral dissertation. Thank you for believing in me.

I am especially grateful to the Stellenbosch University Law Faculty and the National Research Foundation of South Africa for their considerable institutional support and funding that made my doctoral research possible. I would further like to acknowledge the support of the Emil Aaltonen Foundation for providing me with the funding to attend the International Summer School in Forced Migration at the University of Oxford in July 2014, where I had the opportunity to conduct further research and present aspects of my doctoral research.

I also want to extend my gratitude to my fellow doctoral candidates at the Stellenbosch University Law Faculty, as well as to my family and friends, for their support and encouragement over the years it has taken to complete my research. I am blessed to have you in my life.

Finally, I dedicate my doctoral dissertation to my parents, Leena and Jorma Karjala, and thank them for their love and endless support and encouragement, which have made so many things in my life possible.

### List of abbreviations

ACHPR	African Charter of Human and Peoples' Rights
AU	African Union
BIA	Board of Immigration Appeals (United States)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CNDA	Cour nationale du droit d'asile (French National Asylum Court)
CRR	Commission des recours des réfugiés ( <i>French Refugee Appeals Commission</i> )
DFT	Detained Fast Track
DHS	Department of Homeland Security
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FGM	Female genital mutilation
IAA	Immigration Appellate Authority (United Kingdom)
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJ	Immigration judge
INS	Immigration and Naturalization Service (United States)
IRB	Immigration and Refugee Board (Canada)
IUD	Intrauterine device
LGBTI	Lesbian, gay, bisexual, transgender and intersex
OAU	Organisation of African Unity
PSG	Particular social group
QC	Queen's Counsel



RPD	Refugee Protection Division (Canada)
RRT	Refugee Review Tribunal (Australia)
RSAA	Refugee Status Appeals Authority (New Zealand)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKBA	United Kingdom Border Authority
UN	United Nations
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
US	United States
WWII	World War II

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## Chapter 1

### Introduction

"[W]omen are always and never refugees – always, because they cannot confidently rely on state protection wherever they live; and never, because there is no place to which they can flee."<sup>1</sup>

#### 1 1 Background to the study

Since its advent, international refugee law has been one of the most contested regimes of international law. The 1951 Convention relating to the Status of Refugees<sup>2</sup> (1951 Convention) offers protection to any person that owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unwilling to return to the state of his or her nationality or habitual residence.<sup>3</sup> The preamble to the 1951 Convention furthermore importantly confirms the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination. As such the 1951 Convention was originally drafted to respond to the plight of the millions, of predominantly male, European refugees in the aftermath of World War II (WWII) while at the same time confirming the fundamental principles of non-discrimination and equality.<sup>4</sup> Furthermore, at the time of the creation of modern refugee law, the Cold War was reaching its height.<sup>5</sup> Accordingly, the substance of the international refugee law framework, as I will discuss further in this dissertation, was undoubtedly shaped by the international politics and foreign policies of the time.

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<sup>1</sup> A. Macklin, "Refugee Women and the Imperative of Categories" (1995) 17(2) Human Rights Quarterly 213, 271.

<sup>2</sup> Convention relating to the Status of Refugees (*entered into force* 22 April 1954) 189 UNTS 150.

<sup>3</sup> Art 1 A (2).

<sup>4</sup> L. C. Chan, "Everything in Moderation: Why Gender Nexus Under U.S. Asylum Law Must Be Strictly Limited in Scope" (2011) 29 Boston University International Law Journal 169, 177.

<sup>5</sup> J. Bhabha, "Embodied Rights: Gender Persecution, State Sovereignty and Refugees" (1996) 9 Public Culture 3, 7.

As a consequence, “the definition of a refugee incorporated into the Convention reflected liberal political values of (...) individual autonomy and rationality and excluded socialist social-economic concerns”.<sup>6</sup> Therefore, as Bhabha observes, the Western claims of the 1951 Convention protecting universal human rights must be assessed critically in the light of this fundamental, liberal individualistic bias.<sup>7</sup> This, as I continuously argue throughout this dissertation is equally true with regard to the seeming gender-neutrality of the framework.

Since the end of the Cold War, drastic changes in world politics have disrupted the direct causal link between foreign policy concerns and refugee policy,<sup>8</sup> and states have begun to view refugee procedures as a possible loophole in border control procedures.<sup>9</sup> According to the most recent statistics published by the United Nations High Commissioner for Refugees (UNHCR), there were 19.5 million refugees in the world in 2014<sup>10</sup> of which women constituted slightly less than half.<sup>11</sup> Overall, as the numbers of refugees worldwide escalates, the West’s commitment to refugee protection has weakened due to an increase in restrictionist policies on migration and border control.<sup>12</sup> Recently, this has been demonstrated by the slow and reluctant responses of some European governments to the on-going refugee crisis as a result of the massive influx of predominantly Syrian refugees.

As indicated by Amnesty International the ethical limits of the international order have been laid bare.<sup>13</sup> Ultimately, refugees have become the personification of the conflict between two fundamental principles, “the belief in universal human rights (...) and the sovereignty of nation states”.<sup>14</sup> This conflict, as I argue in this dissertation, has had a detrimental effect on women’s asylum claims in particular, due to the asylum adjudicators

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<sup>6</sup> 8.

<sup>7</sup> 8.

<sup>8</sup> 8.

<sup>9</sup> 8.

<sup>10</sup> UNHCR, “World at War – Global Trends: Forced Displacement in 2014” (UNHCR, 2014) <<http://www.unhcr.org/556725e69.html>> accessed 28 October 2015.

<sup>11</sup> United Nations Statistics Division, “Refugees and internally displaced persons” (UNSTATS, 26 May 2015) <<http://unstats.un.org/unsd/genderstatmanual/Print.aspx?Page=Refugees-and-internally-displaced-persons>> accessed 28 October 2015.

<sup>12</sup> Amnesty International, “Global refugee statistics” (Amnesty International, 13 August 2012) <<http://www.amnesty.org.au/refugees/comments/29462/>> accessed 5 June 2013.

<sup>13</sup> 4.

<sup>14</sup> 3.

increasing use of culturalist arguments to turn down women's asylum applications. Gender-related persecution, which is defined as persecution in which the forms of the persecution, the motivation behind it or both are gendered, is often based on several instances of private behaviour.<sup>15</sup> Consequently, gender-related persecution has traditionally been and continues to be disregarded as “relatively trivial and frivolous”, in contrast with the traditional grounds of persecution, as I will unceasingly demonstrate in this dissertation.<sup>16</sup> This is reflected in the statistics. For example, according to the official statistics of the European Commission, in 2014 only 30,925 female asylum applicants were granted refugee status in the twenty-eight EU member states.<sup>17</sup> This constitutes only 34 per cent of all refugee statuses granted. This can be compared to the 58,630 male asylum applicants, who were granted refugee status in the same year.<sup>18</sup> Similarly, in Australia, in 2013-2014 out of the 6500 refugee visas granted only 16 per cent (1040 visas) were granted to female asylum seekers.<sup>19</sup> Correspondingly, in 2013 only 23 per cent of female asylum applicants were granted a refugee status in the United States (US).<sup>20</sup>

Additionally, within the currently dominant restrictionist immigration policies of Western Europe, North America and Australia, adjudicators are often encountering a “high-stakes comparison and ‘objective’ evaluation of opposing normative and ethical systems, where a sovereign state’s internal cultural norms and policies”<sup>21</sup> are being assessed. Very often the outcome, especially in gender-related persecution cases, as I will demonstrate in this

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<sup>15</sup> 4.

<sup>16</sup> 4.

<sup>17</sup> Eurostat, “First instance decisions on applications by citizenship, age and sex - Annual aggregated data” (Eurostat, 18 September 2015).

<[ec.europa.eu/eurostat/product?code=migr\\_asydcfsta](http://ec.europa.eu/eurostat/product?code=migr_asydcfsta)> accessed 21 October 2015.

<sup>18</sup> Eurostat, “First instance decisions on applications by citizenship, age and sex - Annual aggregated data” *Eurostat*.

<sup>19</sup> Parliament of Australia, “Australia’s refugee population: A statistical snapshot of 2013-14” (Parliament of Australia, 28 November 2014)

<[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2014/November/Refugee\\_population\\_2013-14](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/November/Refugee_population_2013-14)> accessed 21 October 2015.

<sup>20</sup> In 2013, out of the 32 117 female asylum applicants to US only 7 518 were granted an asylum status. US Department of Homeland Security, “Refugees and Asylees: 2013” (US Department of Homeland Security, August 2014)

<[https://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf)> accessed 21 October 2015.

<sup>21</sup> US Department of Homeland Security, “Refugees and Asylees: 2013” 10.

dissertation, is the “invocation of state sovereignty to define ethical and ideological boundaries for international protection”.<sup>22</sup> As the current international refugee law regime has not been amended since its inception in 1951, except for 1967 Protocol relating to the Status of Refugees (1967 Protocol)<sup>23</sup>, the refugee status criterion does not reflect the realities and causes behind present-day refugee flows. This is particularly true for women fleeing gender-based persecution. In a changing world, the development of the refugee law framework and consequently the addition of new categories for refugeedom are arguably required.

In 2014 the Committee on the Elimination of Discrimination against Women (CEDAW Committee) recognised that the lack of ‘gender’ as an independent ground for persecution in international refugee law has dire consequences for women fleeing gender-related persecution.<sup>24</sup> The CEDAW Committee expressed concern over the fact that many asylum systems continue to treat the claims of women through “the lens of male experiences”.<sup>25</sup> According to the CEDAW Committee this method leads to an improper assessment of women’s claims to refugee status, which could result in their wrongful rejection.<sup>26</sup>

The recognition by the CEDAW Committee, that international refugee law fails women fleeing gender related persecution, is long overdue. The striking inconsistencies between the protection of women’s rights under international and regional human rights instruments and the way women’s rights are protected under the international refugee law regime has prompted me to question the causes behind the evident and substantial gender protection gap under international refugee law, as pointed out by the CEDAW Committee and as further substantiated throughout my dissertation. The central question of my research is why international refugee law still struggles to uphold and protect the rights of women fleeing gender-related persecution

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<sup>22</sup> 12.

<sup>23</sup> Protocol relating to the Status of Refugees (entered into force 4 October 1967) 606 UNTS 267. The 1967 Protocol removed the temporal and geographic restrictions included in the 1951 Refugee Convention.

<sup>24</sup> Committee on the Elimination of Discrimination against Women, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, CEDAW/C/GC/32.

<sup>25</sup> Para. 16.

<sup>26</sup> Para. 16.

when international human rights law has taken great leaps forward in acknowledging the protection of the same group. As I argue in this dissertation, a re-conceptualisation of the refugee definition is acutely needed in order to acknowledge women's specific need for protection. This would, I argue, effectively end the indirect tolerance, under the international refugee law framework, of the persistent and brutal violent crimes against women that are taking place on a global scale, often committed by or condoned by the states. By failing to address women's experiences of persecution, the international refugee framework leaves women utterly vulnerable and without any protection. This failure to protect victims of gender-related persecution arguably breaches the main objective of the international refugee law, which is to provide interim protection to persons who are deprived of meaningful protection of their essential human rights in their own state.<sup>27</sup> As Crawley argues, "protection is at the heart of the responsibility that the international community bears towards refugees".<sup>28</sup>

The recognition of women's need for specific refugee protection is not an entirely novel idea on the domestic level. As an example South Africa, already in 2008, became one of the first jurisdictions in the world to include 'gender' as an independent category linked to well-founded fear of persecution by amending its existing legislation. While this amendment has not yet been brought into effect and the outcome therefore remains to be established in the years to come, this pioneering attempt to protect women fleeing gender-related persecution through domestic law, together with the recent recognition by the CEDAW Committee, prompted me to examine on the one hand the causes behind the current international refugee law framework's apparent failure to provide adequate protection to victims of gender-related persecution and, on the other, to try to unearth the way in which the complex nature of gender-based persecution have been approached under the current system.

As the main instrument of international refugee law the 1951 Convention has continuously guided the domestic conception of refugee

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<sup>27</sup> J. Hathaway, "Reconceiving Refugee Law as Human Rights Protection" (1991) 4 *Journal of Refugee Studies* 113, 124.

<sup>28</sup> H. Crawley, *Refugees and Gender: Law and Process* (Bristol: Jordan Publishing, 2001) 4.



protection. Therefore I found it worth exploring why states, such as South Africa, have deemed it necessary to move outside the realm of the 1951 Convention to adequately protect women fleeing gender persecution. This line of inquiry furthermore impelled me to question whether the addition of gender, as an independent ground under international refugee law, would ensure a more genuine protection of the basic human rights of refugee women i.e. could the domestic approach in this regard inform the development of international refugee law? And would such an inclusion perhaps motivate more states to follow the example of South Africa? In this regard I was moreover motivated to examine whether the recognition of certain states of the need to reconceptualise the refugee definition to include gender, together with the recommendations of the CEDAW Committee and the development of gender specific human rights law could amount to emerging state practice that could ultimately lead to a change in the international refugee law framework through the creation of customary international law.

## **1 2 Research problem**

The broad research problem that I explore in my dissertation is the underlying reasons for the inability of international refugee law to grant adequate protection to victims of gender-related persecution. My research takes its point of departure in the fundamental principles of non-discrimination and equality as protected under international human rights law and as such I undertake my analysis from a feminist legal perspective, as I further set out under sub-chapter 1 4 below.

According to feminist critics, the current international instruments and the refugee determination processes fail to protect women refugees and often render them invisible.<sup>29</sup> Women fleeing persecution simply cannot benefit, equitably, from protection under the 1951 Convention.<sup>30</sup> Overall, the current statistics on women's asylum applications, as exemplified under 1 1 above,

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<sup>29</sup> N. Valji, L. A. de la Hunt and H. Moffet "Protecting the Invisible: The Status of Women Refugees in Southern Africa" in J. Handmaker, L. A. de la Hunt and J. Klaaren (eds) *Advancing Refugee Protection in South Africa (Human Rights in Context Series, No. 2)* (Oxford/New York: Berghahn Book, 2008), 214.

<sup>30</sup> 214.

reflect discrimination in the outcomes.<sup>31</sup> Furthermore, it reveals the failure of international refugee law to protect women, because of the regime's inherent androcentricism and exclusion of women's experiences of persecution.

Furthermore, as I pointed out under 1.1, the failure of international refugee law to protect women refugees stands in stark contrast to international human rights law that has been developed to safeguard women's fundamental rights. This is significant, as the international human rights instruments, standards and jurisprudence are or should be standard setting and directional in the development of international refugee law.<sup>32</sup>

For example, Article 1(3) of the Charter of the United Nations<sup>33</sup> (UN Charter) calls for international co-operation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex language or religion". In the same vein, the Universal Declaration of Human Rights<sup>34</sup> (UDHR) guarantees the rights to life, liberty and security without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>35</sup> Furthermore, Article 14(1) of UDHR expressly states that "everyone has the right to seek and to enjoy in other countries asylum from persecution".<sup>36</sup> As with the rights to life, liberty and security this right to asylum is granted without distinction of any kind.

The equal entitlement of women and men to civil, political, economic, social and cultural rights is also included in the International Covenant on Civil and Political Rights<sup>37</sup> (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights<sup>38</sup> (ICESCR). According to Article 3 of the ICCPR, the state parties "undertake to ensure the equal right of men and

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<sup>31</sup> H. Crawley and T. Lester, "Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe" para. 17 (UNHCR Evaluation and Policy Analysis Unit, May 2004) <<http://www.unhcr.org/40c071354.html>> accessed 15 April 2013.

<sup>32</sup> UNHCR, Guidelines on International Protection No. 1: Gender-related Persecution within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (7 May 2002), UN Doc. HCR/GIP/02/01.

<sup>33</sup> Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.

<sup>34</sup> Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A (III)

<sup>35</sup> Articles 2 and 3.

<sup>36</sup> Article 14.

<sup>37</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171.

<sup>38</sup> International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3.

women to the enjoyment of all civil and political rights set forth in the (...) Covenant". Similarly, Article 3 of the ICESCR requires the state parties "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the (...) Covenant".

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women<sup>39</sup> (CEDAW) confirms women's and men's equal enjoyment of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Furthermore, Article 2 of the CEDAW condemns discrimination against women in all its forms and calls for the elimination of discrimination against women by all appropriate means and without delay. Finally, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>40</sup> (CAT) defines torture as "severe pain or suffering, whether physical or mental, [which] is intentionally inflicted on a person (...) for any reason based on discrimination of any kind".

Overall, the failure of international refugee law to recognise and account for and women's experiences amounts to a systematic infringement of women's right to equality and fundamental human rights, which are, as is stipulated above, entrenched in international human rights instruments and in the Preamble of the 1951 Convention, as mentioned under 1.1.<sup>41</sup> This infringement is a serious cause for concern, as the role of refugee law can be described as the last resort to protect fundamental human rights.

### **1.3 Research questions and hypothesis**

Against the background of the study and the research problem as set out above the primary research question that has guided my research is whether women's absolute rights to non-discrimination, equality, dignity, life, safety and security of person are safeguarded under current international refugee law. My assumptions, in respect of this primary research question, is firstly that women's rights are not adequately protected under the current refugee

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<sup>39</sup> Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 13.

<sup>40</sup> Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85.

<sup>41</sup> N. Valji, L. A. de la Hunt and H. Moffet, "Where Are the Women? Gender Discrimination in Refugee Policies and Practices" (2003) 55 *Agenda* 61, 63.

law framework; and secondly that the addition of gender as a ground for persecution would considerably enhance the protection afforded to women and reduce existing gender discrimination under international refugee law. The primary objective of my research is therefore to establish whether the addition of gender as a ground for persecution would enhance the protection afforded to women and reduce existing gender discrimination under international refugee law in line with the fundamental rights of non-discrimination and equality protected under international human rights law. In this regard I investigate, in particular, whether the omission of gender as a ground for persecution is owed to the substance of existing international refugee law, its interpretation by the domestic courts or a combination of both.

Taking my point of departure in the primary research question and the related, two-folded, hypothesis set out above I have conducted my research in accordance with five secondary research questions related to each of the five substantial chapters presented.

The first (secondary) research question relates to the origins of the 1951 Convention. As briefly indicated under background to the study above and as further substantiated in my pre-study constituting the point of departure for my research, the 1951 Convention contains a gender bias. The first (secondary) research question set out is therefore why the 1951 Convention contains such a gender bias in favour of a male experience of persecution and if and how the nature of international law has aggravated this bias.

The second (secondary) research question examined is whether the current interpretation of what 'persecution' constitutes can encompass the unique persecution that women face because of their gender. This discussion is based on the assumption that gender-related persecution is "not the result of spontaneous individual behaviour but rather part of a larger pattern of violence caused by unequal relations of power".<sup>42</sup>

As the determination of persecution is central to the refugee definition, a further, important issue is whether the five existing grounds of persecution, included in the current international refugee law framework, are capable of

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<sup>42</sup> J. Freedman *Gendering the International Asylum and Refugee Debate*, (Palgrave Macmillan, October 2007) 46

capturing persecution based solely on gender. In particular, I examine, as the third (secondary) research question whether the grounds most commonly used in gender-related persecution cases (political opinion, religion and particular social group) are adequate to cover the wide range of gender-related persecution uniquely faced by women.

Within this context, it also becomes relevant to further enquire whether the dichotomous construction of persecutory acts as ‘public’ and ‘private’ ones has aggravated the gender inequality under the current refugee law framework. A, fourth, connected (secondary) research question is therefore whether states have obligations and responsibilities under international law with regard to gender-related persecution committed by non-state actors.

Lastly, as gender is currently not included under the international refugee law framework, my final (secondary) research question relates to the usefulness of the additional methods that states have used in their attempts to include gender-related persecution under the current refugee law framework. I examine whether these methods have filled the existing protection gap created by international refugee law, or whether more fundamental changes to the refugee law framework are required.

#### **1 4 Theory and methodology**

As alluded to under 1 1 above, this dissertation is based on feminist legal theory and applicable feminist legal methods are used in the examination and analysis of the relevant international and national legal refugee law instruments and jurisprudence. Feminist methods have been described as a “reaction (...) to the overwhelming masculinity of privileged and historically dominant knowledges, acting as a kind of counterweight to the imbalances resulting from the male monopoly of the production and reception of knowledges”.<sup>43</sup>

The theoretical point of departure of this dissertation is based on the notion of the ‘dominance approach’ as framed by MacKinnon. In accordance with her approach, I argue that the seeming ‘gender neutrality’ of the current international refugee law framework is based on the ‘difference/equality

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<sup>43</sup> E. Grosz, “A Note on Essentialism and Difference” in S. Gunew (ed), *Feminist Knowledge: Critique and Construct* (London: Routledge, 1990), 332.

approach', according to which men and women are 'different' but 'equal'.<sup>44</sup> However, as MacKinnon argues, this approach conceals "the substantive way in which man has become the measure of all things".<sup>45</sup> This is true especially with regard to the definition of 'persecution' under international refugee law, which is often defined through the 'traditional' male-centred experience of persecution, which takes place in the public realm. This leaves forms of persecution more often experienced by women, which mainly take place in the private sphere, outside the protection framework of international refugee law. This issue is further examined in chapter 3.

Subsequently, the 'difference/equality approach' offers two alternative routes to equality for women, either being the same as men (which is also termed 'gender neutrality' or 'single standard') or being different from men.<sup>46</sup> Both of these approaches judge women through the standard of maleness.<sup>47</sup> To put it in other words, the "equality theory has been written out of men's practice, not women's".<sup>48</sup>

Furthermore, while the double standard of the 'difference/equality theory' has enabled men to obtain the same benefits that what women have traditionally had<sup>49</sup> it does not give women any dignity of the single standard.<sup>50</sup> According to MacKinnon, the 'difference/equality approach' has silenced the abuse that women suffer, specifically because such abuse does not usually happen to men.<sup>51</sup> In this dissertation, I argue that this is still true with regard to the current international refugee law's approach to gender-related persecution.

MacKinnon also argues that women are transforming the definition of equality "not by making ourselves the same as men (...) or by reifying women's so-called differences but by insisting that equal citizenship must

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<sup>44</sup> C. A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 34.

<sup>45</sup> 34.

<sup>46</sup> 33.

<sup>47</sup> J. Wong, "The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond" (1999) 5 *William and Mary Journal of Women and the Law* 273, 278.

<sup>48</sup> C. A. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" (1991) 4 *Yale Journal of Law and Feminism* 13, 14.

<sup>49</sup> Wong (1999) *William and Mary Journal of Women and the Law* 280.

<sup>50</sup> MacKinnon *Feminism Unmodified: Discourses on Life and Law* 38.

<sup>51</sup> Wong (1999) *William and Mary Journal of Women and the Law* 280.

include what women need to be human, including a right not to be sexually violated and silenced”.<sup>52</sup>

In order to do so, there is a need to re-assess the question of equality in terms of distribution of power rather than focus on the ‘difference/equality’ of sexes.<sup>53</sup> By using this approach I, in this dissertation, aim to uncover the existing male dominance and female subordination embedded in the international legal refugee framework.<sup>54</sup>

To this end, various feminist legal methods are used in this dissertation. As Charlesworth states, feminist methods “seek to expose and question the limited bases of international law’s claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis”.<sup>55</sup> This is done by examining the historical origins of the international refugee regime in chapter 2 with an emphasis on its inherent bias in favour of the male experience of persecution. Similarly, in chapter 2, the seeming gender neutrality and objectivity of the international refugee law framework is questioned, especially with regard to its apparent lack of protection from gender-related persecution.

To analyse the research problem and test the related hypothesis as set out above, I apply three interlinked methods. Firstly, I use the method of ‘searching for silences’ in the international refugee law regime. The omission of gender as a basis for persecution, as well as the regime’s failure to include protection from persecution, which is unique to women, is one of the dissertation’s central focus areas. As Charlesworth argues, “the silences of international law may be as important as its positive rules and rhetorical structures”.<sup>56</sup> This is especially important, as the silence of women exists on all levels of international law.<sup>57</sup> Ultimately, these silences form an “integral part of the structure of the international legal order, a critical element of its

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<sup>52</sup> C. A. MacKinnon, “Points against Postmodernism” (2000) 75 *Chicago-Kent Law Review* 687, 692.

<sup>53</sup> Wong (1999) *William and Mary Journal of Women and the Law* 279.

<sup>54</sup> MacKinnon *Feminism Unmodified: Discourses on Life and Law* 40.

<sup>55</sup> H. Charlesworth, “Feminist Methods in International Law” (1999) 93 *American Journal of International Law* 379.

<sup>56</sup> 381.

<sup>57</sup> 381.

stability”.<sup>58</sup> This method is used especially in chapter 2 while examining the current refugee law framework’s silence on gender.

Secondly, I examine the ‘gendered coding’ of the dichotomies and binary oppositions<sup>59</sup> (especially the public/private distinction) in the construction of international refugee law. The utilisation of this method is important, as the gendered dichotomies has the effect of “blot[ting] out the experiences of many women and [silencing] their voices in international law”.<sup>60</sup> This method is used especially in chapter 5 while analysing the construction of what ‘persecution’ is interpreted by the domestic courts to encompass.

Lastly, in the search for silences and apparent gender coding, I ask ‘the woman question’ to examine whether international refugee law takes into account experiences specific to female refugees and whether the existing legal standards and concepts might put asylum seeker women at a disadvantage.<sup>61</sup> This method is used throughout the dissertation.

Furthermore, by concentrating exclusively on the experiences of asylum-seeking women, who arguably constitute one of the most under-represented, marginalised and disregarded group of women, methods proposed by Hunter, Crewshaw and Minow are used to examine the international refugee law regime from an inclusive feminist legal standpoint.<sup>62</sup> In particular, by focusing on the experiences of asylum seeking women alone, the method of focusing on those most underrepresented as advocated by Hunter, is applied.<sup>63</sup> In the same vein, through the exclusive emphasis on persecution uniquely experienced by women, the proposition that Crewshaw made to “place those who currently are marginalized, in the centre”<sup>64</sup> is employed throughout this study. Finally, by examining the discrimination and

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<sup>58</sup> 381.

<sup>59</sup> 381.

<sup>60</sup> 383.

<sup>61</sup> K. T. Bartlett, “Feminist Legal Methods” in D. Kelly Weisberg (ed), *Feminist Legal Theory* (Philadelphia: Temple University Press, 1993), 551.

<sup>62</sup> R. Hunter “Deconstructing the Subject of Feminism: The Essentialism Debate in Feminist Theory and Practice” (1996) 6 *Australian Feminist Law Journal* 135, 157-161.

<sup>63</sup> 158.

<sup>64</sup> K. Crenshaw, “A Black Feminist Critique of Antidiscrimination Law and Politics” in D. Kairys (ed) *The Politics of Law: A Progressive Critique* (3<sup>rd</sup> Ed, New York: Basic Books, 1998), 374.



hurdles faced by asylum seeking women in securing refugee status Minow's proposal of promoting voices that usually remain unheard is utilised.<sup>65</sup>

I apply the feminist theoretical approach and use the relevant methods set out above fully aware of the fact that anti-essentialist critics have criticised these methods for neglecting the differences between women. Despite disagreeing with some of these anti-essentialist criticisms, I recognise the validity of the critique against the 'neo-colonial' approach, currently dominant in the international refugee law regime. Under the neo-colonial approach the domestic courts have constructed victims of gender-related persecution as 'cultural others' who have to be saved from their 'uncivilised cultures' in the few cases where the victims have been granted a refugee status.<sup>66</sup>

Despite it having resulted in the granting of refugee status in few gender-related persecution cases, the neo-colonial approach is detrimental to female asylum seekers, as it fails to focus on the actual crime of gender-related persecution itself but rather centres on the 'moral superiority' of the First World. The use of neo-colonial approach in refugee status determination is further analysed in chapter 5.

A further criticism by the anti-essentialist and post-modern scholars relates to feminist legal theory's approach that there are some specific experiences that shared by all women, which fundamentally differentiate women from men<sup>67</sup>, as is the case with victims of gender-related persecution. The anti-essentialist and post-modern critics deny the possibility of the existence of a general category of 'women', as according to the critics, there are always other aspects to women's identities than their gender, and other reasons for their oppression than sex.<sup>68</sup> For example, according to Cornell, the construction of a category of 'women' is impossible, as "there is no ontology of female identity, only representations of 'women' in discourse and performance".<sup>69</sup> Fuss, another deconstructionist, further argues that the

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<sup>65</sup> M. Minow, "Feminist Reason: Getting It and Losing It", (1988) 38 *Journal of Legal Education* 47, 60.

<sup>66</sup> J. Middleton, "Barriers to protection: gender-related persecution and asylum in South Africa" in I. Palmary; E. Burman; K. Chantler & P. Kiguwa (eds.) *Gender and Migration: Feminist Interventions* (Zed, 2010) 82.

<sup>67</sup> Hunter (1996) *Australian Feminist Law Journal* 135.

<sup>68</sup> MacKinnon (2000) *Chicago-Kent Law Review* 695.

<sup>69</sup> D. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge, 1991) 19, 33 in Hunter (1996) *Australian Feminist Law Journal* 142.

“female experience is never as unified, as knowable, as universal and stable as we presume it to be”<sup>70</sup> and states that “Derrida is right to suggest that ‘egoity is the absolute form of experience’”.<sup>71</sup>

However, as MacKinnon argues, “postmodern feminists seldom build or refer to the real lives of real women directly”<sup>72</sup> and consequently postmodernism “is far, far away from the realities of the subordination of women”.<sup>73</sup> Even though this dissertation is not based on real experiences documented through fieldwork and interviews, the real experiences of women who have suffered gender-related persecution are captured through the comprehensive analysis of case law as is carried out in chapters 3, 4 and 5.

Furthermore, as MacKinnon states, feminist theory does not argue that “gender is all that there is” but that “gender is big and pervasive, never not there (...) and that it explains a lot”.<sup>74</sup> At the same time, feminist legal theory has never denied the existence of ‘skin privilege’. Nevertheless, as MacKinnon states, “skin privilege (...) has never insulated white women from the brutality and misogyny of men (...) or from its effective legalization”.<sup>75</sup>

With regard to the violence that women of colour experience, feminist legal theory, on which this dissertation is based on, does not deny the relevance of race nor claim that the violence can be understood outside a racial context.<sup>76</sup> As MacKinnon argues, according to feminist legal theory, ‘gender’ is made up of the reality of the experiences of all women.<sup>77</sup> Consequently, “to argue that oppression ‘as a woman’ negates rather than encompasses the recognition of the oppression of women on other bases is to say that there is no such thing as the practice of sex inequality.”<sup>78</sup> By agreeing to MacKinnon’s standpoint, this dissertation is based on the acknowledgement that there is indeed a practice of sex inequality in the international refugee law regime.

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<sup>70</sup> D. Fuss, *Essentially Speaking: Feminism, Nature & Difference*, (New York: Routledge, 1989), 144.

<sup>71</sup> 144.

<sup>72</sup> MacKinnon (2000) *Chicago-Kent Law Review* 702.

<sup>73</sup> 702.

<sup>74</sup> 702.

<sup>75</sup> C. MacKinnon “From Practice to Theory, or What is a White Woman Anyway?” (1991) 4 *Yale Journal of Law and Feminism* 13, 20.

<sup>76</sup> 20.

<sup>77</sup> 20.

<sup>78</sup> 20

Similarly, I agree with MacKinnon's position that the basis and content of feminist legal theory is "the substantive experience that women in all their particularities and variations have" and is consequently "built on, and accountable to, women's experiences of abuse and violation".<sup>79</sup> As MacKinnon argues, the diversity of women's experiences has not undermined feminist theory's reality, but rather constituted it.<sup>80</sup> This is true also with regard to the experiences of victims of gender-related persecution under international refugee law.

Overall, feminist theory simply claims the reality of women's experiences as a ground to stand and move from.<sup>81</sup> As MacKinnon argues, "feminism makes its 'women' from the ground up, out of particularities (...) rather than from the top down, out of abstractions",<sup>82</sup> and thus, "the so-called essentialism problem cannot occur".<sup>83</sup>

## 1 5 Significance of the research project

Although some academics<sup>84</sup> argue that gender-related persecution claims are already included under the current international refugee law framework and can be brought under the persecution grounds of religion, political opinion and particular social group, thousands of women facing gender-related persecution continue to fall outside the scope of protection of the international refugee law regime.<sup>85</sup>

My research highlights how the gender bias in the 1951 Convention continues to exclude thousands of female asylum-seekers from the ambit of international refugee law, which serves as the last resort to protect women against human rights violations. Furthermore, in my dissertation I draw

<sup>79</sup> MacKinnon (2000) *Chicago-Kent Law Review* 689-690.

<sup>80</sup> 689.

<sup>81</sup> 692.

<sup>82</sup> 692.

<sup>83</sup> 696.

<sup>84</sup> See for example, B Barreno, "In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims" (2011) 64 *Vanderbilt Law Review* 225, V. Beety "Reframing Asylum Standards for Mutilated Women" (2007-2008) 11 *The Journal of Gender, Race and Justice* 239, A. Bahl, "Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution" (1997) 4 *Cardozo Women's Law Journal* 33, J. Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1 *International Journal of Refugee Law* 518 and N. Kelly, "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26(3) *Cornell International Law Journal* 625.

<sup>85</sup> This is evidenced by case law from Australia, New Zealand, US, Canada, France and UK as discussed in chapter 4.

attention to the predominant use of the 'male lens' in the assessment of asylum claims. Through a comprehensive analysis of a number of aspects, I highlight the need for a re-conceptualisation of the definition of 'refugee' in order to provide a truly equal protection to those in need of it. These aspects include firstly the historical background of and the consequently entrenched gender bias in international legal instruments; secondly, the gendered interpretation of what 'persecution' entails; thirdly the legal uncertainty caused by the attempts to fit gender-related persecution under the existing enumerated grounds; fourthly the gender bias public/private dichotomy in the interpretation of what constitutes 'persecution' and lastly the examination inadequate solutions adopted to fill the gendered protection gap through the introduction of gender guidelines and complementary protection.

Furthermore, in this dissertation I specifically underscore the need for the international refugee law regime to continue to evolve in order to stay on par with developments in other international human rights instruments with respect to the protection of women's rights and the elimination of gender discrimination. In this regard the examination undertaken offers insight into the ways in which international refugee law can, and as I argue, should evolve in a more effective, consistent and relevant manner to capture gender-related persecution. This dissertation also stresses the need for greater engagement with the true reasons behind gender-related persecution rather than attempting to fit it into the existing five grounds. On a related note, my research plays an important role in examining the arguably growing recognition of gender as an independent ground of persecution, as evidenced by the inclusion of gender as an independent ground in certain domestic jurisdictions and by the CEDAW Committees' General Recommendation No 32, which calls for states to include gender as an independent ground in their national refugee determination processes. Furthermore, as this dissertation examines various solutions to the existing gender gap under international refugee law framework the analysis of the changes made to domestic jurisdictions regarding the inclusion of gender as an independent ground for persecution provides a 'testing ground'. The results of this analysis provide a good point of departure for the further development of international refugee law regime as a whole.

## **1 6 Scope of the dissertation**

In this dissertation I specifically analyse Article 1(A)(2) of the 1951 Convention and the refugee criteria embedded in it. I examine the interpretation and implementation of Article 1(A)(2) in domestic jurisdictions of Australia, Canada, France, Finland, Germany, Israel, New Zealand, Sweden, United Kingdom and United States, with a special focus on the attempted inclusion of gender-related asylum claims under the categories of religion, membership of a particular social group and political opinion included in the definition under this article. As I indicated under the research problem, while my research takes place within the scope of international human rights law, the main focus of this dissertation is not on human rights law per se, but the nature of gender-based persecution and the ability of refugee law to protect women from this kind of human rights violations. International human rights law is however used in my research to highlight the stagnation of the development of international refugee law and as such a limited discussion is included in chapter 2. Throughout the dissertation I return to the issues of discrimination and inequality created by the application of international refugee law in relation to female victims of gender-based persecution. Furthermore, the principles of equality and non-discrimination as encompassed in the international human rights law framework are strongly linked to feminist legal theory which I have based my dissertation on as substantiated under 1 4 above.

It is also important to set out the fact that this dissertation does not focus specifically on refugees generated by any specific conflict or coming from any specific point of origin, it was sparked by the addition of gender as a sixth ground in the domestic legislation of South Africa alongside another handful of states as I indicted above under 1 1. It is clear however that my research has taken a North-South, a developing-developed, a first-world-third-world perspective as refugees, male and female, tend to leave to a location that is perceived as 'better' and 'safer'. My research has not focused specifically on whether this location is in Europe, the Americas, Asia or Africa but rather on the effects of the international norms as they are applied either

directly or through the domestication of the international and regional instruments.

I would however like to acknowledge that I have put emphasis on the jurisprudence of what I continuously refer to in my dissertation as 'Western' courts, specifically while examining the interpretation and implementation of 'persecution' in with regard to gender-related violence in chapter 3. This selection was influenced on the one hand by the developed asylum jurisprudence of these jurisdictions and on the other the availability of primary and secondary sources in this regard. What further influenced my selection was the fact that while Western countries are often the final destination for many asylum applications from individuals leaving developing countries, their domestic jurisdictions have adopted a highly restrictionst approach to the inclusion of gender-related persecution to the refugee law paradigm in particular, and to refugee flows in general as demonstrated by the dominant 'Fortress Europe' ideology behind the slow responses of the European governments to the recent Syrian refugee crisis.

As a consequence the Western domestic courts tend to interpret the relevant international refugee law in a very limiting manner that leads to further restrictions on the access that gender-related persecution victims have to refugee status. My selection is not an indication of the lack of relevant asylum cases in other non-western jurisdictions, but could serve as good point of departure specifically with regard to the examination of the gender bias in the application of the international refugee law.

Overall, while examining the way gender-persecution is perceived, be it in the UK, France, Canada or the US, the bringing together of the many interpretations and application of refugee law on this very matter would constitute a very important bird's eye view on a phenomena that is still hidden under layers of misconceptions be it legal or cultural.

As gender is introduced into the context of refuge protection all the aspects of its 'being', such as the way international refugee law was conceived, the inherently male-centred notion of persecution, the liability of the states vis-à-vis persecution, the complexity of the involvement of non-state actors the growing understanding of gender discrimination, the acceptance of violence taking place in private sphere, such as domestic

violence, as a human rights violation, the political dimension of gender-related persecution, and the acknowledgement of severe gender-discrimination as a form of persecution become relevant to the successful use of 'gender' as ground for providing women with protection against gender-based persecution becomes important. As there is not enough domestic case law to substantiate any contribution of the introduction of gender as a sixth category yet, I have attempted in my research to instead, on the one hand provide evidence for the reasonableness and acute need for such inclusion arguably not only on the domestic level but also at the international level, and on the other to provide the context within which it could be applied taking into consideration all the possible drawbacks.

Furthermore, while the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) and the 1984 Cartagena Declaration on Refugees (1984 Cartagena Declaration) are important refugee law instruments and contain similar substance to the 1951 Convention with the addition of broader refugee definition<sup>86</sup>, I have excluded them from this dissertation as the additions that they contain are not central to the discussion. Thus, the focus of this dissertation is solely on the main international refugee law instrument, the 1951 Convention and the definition that it contains. Consequently, this dissertation excludes a wider assessment of the expanded definitions of refugee as included in the 1969 OAU Convention and the 1984 Cartagena Declaration.

Overall, while there is a need for the addition of various new categories to the criteria in order to provide an adequate refugee protection framework to all those who deserve it, this dissertation, however, focuses exclusively on the examination of gender-related asylum claims and the addition of gender as an independent ground for refugee status. Furthermore, the scope of this dissertation has been limited to an exclusive focus on the asylum claims of

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<sup>86</sup> Article 1(2) of the 1969 OAU Convention expands the refugee definition as embedded in the 1951 Convention by adding "any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality" to the refugee definition. Similarly, Section III(3) of the 1984 Cartagena Declaration expands the refugee definition of 1951 Convention by including among refugees "persons who have fled their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

female victims of gender-related persecution. While acknowledging that the concept of 'gender' is much wider than just women, and that gender-related persecution includes other forms of violence, than just that aimed at women due to their gender other claims that are often compounded with gender-related claims in the relevant literature, such as LGBTI claims, have been excluded from this dissertation. In this way, the focus is only on one complex cause behind persecution, and there is no overly broad analysis of all gender-related claims. This study therefore excludes a broader evaluation of the existing protection gaps under the current international refugee law framework.

Similarly, while acknowledging there has not been a complete silence with regard to gender-related persecution in academic debates, human rights body recommendations and in certain State and UN Guidelines and policies, the title of this dissertation "Sixty Years of Silence", refers to the continued absence of 'gender' as a ground of persecution in the language of the 1951 Refugee Convention and consequently, in international law governing the state of refugees.

Finally, despite the fact that women make up approximately half of the world's refugees fewer women than men apply for refugee status.<sup>87</sup> The explanation given for the low percentage of women's asylum applications is that persecuted women are unable to "leave their homes the same way that [other] persecuted (...) groups may leave".<sup>88</sup> According to Valji, women's "economic, cultural, and social subordination, familial obligations such as dependent children, and in some cases inability to gain even a passport without male accompaniment, prevent [them] from leaving their countries".<sup>89</sup> As Crawley and Lester further observe, women only flee "when the circumstances have become so hostile that remaining is no longer an

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<sup>87</sup> UNHCR, "Global Trends 2012" p. 34 (UNHCR, 2012)

<<http://www.unhcr.org/51bacb0f9.html>> accessed 5 October 2015.

According to UNHCR Global Trends of 2012, "in most industrialized countries, fewer women than men apply for asylum. In 2012, the proportion of females applying for asylum was around 30 per cent or below in Belgium (27%), Bulgaria (12%), Czech Republic (29%), Denmark (31%), Finland (30%), Hungary (19%), Italy (15%), Norway (33%), and Switzerland (29%). In Germany, France and Sweden – the three major recipients in Europe in 2012 – the proportion of female asylum-seekers ranged between 37 and 39 per cent".

<sup>88</sup> N. Valji, "Women and the 1951 Convention: Fifty Years of Seeking Visibility" (2001) 19(5) *Refugee* 25, 30.

<sup>89</sup> 30.



option”.<sup>90</sup> However, despite social, economical and cultural reasons being important hurdles with regard to women’s limited access to asylum, this dissertation focuses on solely on the legal barriers that the victims of gender-related persecution face while attempting to secure a refugee status.

## **1 7 Outline of the dissertation**

This dissertation begins with an analysis of the assumption of a gender bias in the 1951 Convention in favour of a male experience of persecution. In chapter 2 I examine why such a gender bias exists by analysing the influence that historical events had on the substance of 1951 Convention. I place specific emphasis on the strong protection and application of the principles of state sovereignty and non-intervention during the drafting of the 1951 Convention. The heavy focus on these principles has arguably resulted in very limited conception and protection of human rights by the 1951 Convention. Specifically, the development of women’s rights within the broader field of human rights has highlighted the considerable gap that remains between the rights protected under international/regional human rights law and those protected within the refugee law regime. I examine this gap in detail in chapter 2, with special emphasis on the vulnerability and intersectionality of women asylum-seekers.

As a backdrop to the gendered discussions on the 1951 Convention I furthermore analyse the inherent patriarchal nature of international law and the discipline’s existing gender bias through the feminist method of exposing and questioning the limited base of international law’s claim to objectivity and impartiality. Arguably, owing to the stagnation of its development, the international refugee law regime will eventually be rendered ‘paradoxically peripheral’ to the real needs of refugee women.<sup>91</sup> Chapter 2 also includes an analysis of the discipline’s underlying public/private dichotomy. The negative impact of the inbuilt gendered public/private dichotomy under international refugee law on the claims of victims of gender-related persecution will be further discussed in chapter 4. In sub-chapter 2 5 I use the feminist method of

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<sup>90</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit* para. 17.

<sup>91</sup> G. Goodwin-Gill “Asylum: The Law and Politics of Change” (1995) 7 *International Journal of Refugee Law* 1, 8.

'searching for silences' as discussed under 1.4 above, to examine the current refugee law framework's silence on gender. This is a significant part of the deconstruction of the current refugee regime, since the 'silences of international law [are] as important as its positive rules and rhetorical structures', because they enforce the status quo and are a critical element of the frameworks' stability.<sup>92</sup>

In chapter 3, I examine whether the current interpretation of what 'persecution' constitutes can encompass the unique persecution that women face because of their gender. I specifically analyse the gender-bias construction of 'persecution' as referred to in Article 1(A)(2) of the 1951 Convention. The gender bias in the definition of 'persecution' is examined through an analysis of the dominant understanding of what 'persecution' entails, which, I argue, is based mostly on male experiences. Similarly, I examine the gender bias caused by the primacy that the current international refugee law framework accords to protection from civil and political persecution. This discussion is based on the assumption that gender-related persecution is part of a larger construction of structural violence against women caused by uneven power relations between the sexes.

I furthermore reflect on a number of problems related to the normalisation of gender-related violence and the current gender-bias definition of persecution. I specifically examine the lack of recognition by Western domestic courts of gender-related violence as persecution, despite its brutality and prevalence. This lack of recognition has serious consequences for women seeking asylum, as the concept of persecution is essential to the refugee definition under international law and therefore directly linked to the affordance of protection and a right to stay under domestic law.<sup>93</sup> In chapter 3, I further explore the argument that the fact that 'persecution' itself is an ill-defined concept under international refugee law has had a part to play in courts' rejection of a large number of gender-related persecution cases. This argument is supported by Freedman who argues, that the various definitions of persecution in different jurisdictions have resulted in the strengthening of "gendered inequalities already existing in various

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<sup>92</sup> Charlesworth (1999) *American Journal of International Law* 381.

<sup>93</sup> Freedman *Gendering the International Asylum and Refugee Debate* 45.

countries by failing to acknowledge breaches of women's rights and resulting persecutions".<sup>94</sup>

Furthermore, as an example of increased level of harm required by the asylum adjudicators specifically in asylum claims including sexual persecution, case law from US is deliberated upon. Chapter 3 also contains an analysis of the impact of underlying global structural violence against women with regard to both the prevalence and trivialisation of gender-related persecution.

In chapter 4 I focus on the tension in the current international refugee law framework between two opposing objectives. On the one hand, the obligation to protect victims of persecution, and on the other hand, the will of states to protect their borders and sovereignty by limiting the numbers of refugees to groups of victims of a certain type of persecution.<sup>95</sup> This inherent tension in the refugee law framework, together with the stagnation of the framework's development, has led to numerous problems. The cessation of the legal development of the regime has had an especially severe impact on women asylum-seekers because of gender not being expressly included as a ground for persecution at the time of the drafting of the 1951 Convention. The outcome has been the near exclusion of gender asylum claims from the international refugee law regime, because they do not have a proper outlet under the current legislative framework.<sup>96</sup>

In chapter 4, I therefore evaluate whether the five existing grounds of persecution included in the current international refugee law framework are capable of capturing persecution based solely on gender. In particular I examine the efforts of adjudicators in Australia, New Zealand, Canada, US and UK to include gender asylum cases under the three most commonly used grounds of persecution: particular social group (PSG), political opinion and religion.

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<sup>94</sup> 75.

<sup>95</sup> T. Inlender, "Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims" in S. Benhabib and J. Resnik (eds.) *Migrations and Mobilities: Citizenship, Borders and Gender* (NYU Press, March 2009) 358-359.

<sup>96</sup> T. D. Bosj, "Yadegar-Sargis v INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognise a Gender Category" (2004) 48 New York Law School Law Review 777.

While discussing the inclusion of gender under the PSG ground, I analyse PSG with a specific focus on the problems arising from the unsuitable fit of gender-based persecution cases under this category. Furthermore, I examine the alternative ground of 'political opinion' category. While there have been some successes in applying this category to cases where the form of persecution has been gendered, but the motivation behind the persecution is based on the victim's political opinion, this category is inadequate for a majority of gender asylum claims. Moreover, problems arising from the use of 'political opinion' in cases where the gendered form of persecution is sexual are discussed through the analysis of US case law such as *Klawitter v INS*.<sup>97</sup>

Finally, I focus on the attempts of domestic courts to include gender persecution cases under the 'religion' category. Similarly to PSG and 'political opinion' grounds, despite there have been a few successful gender-based asylum cases under this category, it remains unsuitable to cover the whole array of gender-related persecution cases.

In chapter 5, I aspire to create further context and understanding of gender-based persecution by examining whether the dichotomous construction of persecutory acts as 'public' and 'private' has aggravated the gender inequality under the current refugee law framework. I deliberate on this question by using the feminist method of analysing the 'gendered coding' in the deep-rooted public/private dichotomy embedded in the current interpretation of persecution, as discussed under 1 4 above.<sup>98</sup>

In this chapter I also examine specifically Australian, Canadian and UK courts' response to gender-related persecution perpetrated by non-state actors. Furthermore, I explore whether states have obligations and responsibilities under international human rights and refugee law with regard to persecution committed by non-state actors. In this discussion, I examine the emerging 'bifurcated approach' and accordingly argue that gender-related violence escalates to the level of direct persecution when the violence is

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<sup>97</sup> 970 F.2d 149 (6th Cir. 1992).

<sup>98</sup> Charlesworth (1999) *American Journal of International Law* 379.

either directly linked to the state or tolerated by the tacit silence and passivity displayed by the state.<sup>99</sup>

Moreover, I deliberate on other significant hurdles that asylum-seeking women face, including the requirement of 'utility' that many of the developed receiving states place on them. I also analyse the multiple forms of discrimination that many women asylum-seekers face as well as the rapidly increasing xenophobic attitude towards refugees in many receiving countries. In the same spirit, I examine the impact of the 'culturalist approach', under which women asylum-seekers are constructed either 'culturally' or 'socially', which results in the diminishment of their experiences as refugees.

Finally chapter 5 includes a consideration of the questions of the creation of an 'exotic other female' and the failure to acknowledge the multiple forms of discrimination that non-Western women face in the context of Western countries.

In chapter 6, the last substantial chapter, I examine whether the inclusion of gender as an independent ground for persecution in domestic legislation enhances women's rights to non-discrimination, equality, dignity, life and security of person and whether the current international refugee law regime should be similarly amended to include gender as a ground for persecution in order to ensure adequate protection for women asylum-seekers. This examination focuses on three alternative approaches used under domestic law to capture gender-related persecution, namely gender guidelines, complementary protection and the addition of gender as an independent ground of persecution to domestic legislation. These three approaches, in one way or another, have been created to supplement the weak protection afforded by the current international legislative framework.

I begin chapter 6 by discussing the gender guidelines that have been formulated to aid adjudicators in their decision making in cases involving gender-related persecution. Although the creation of the gender guidelines is a step in the right direction, it is questionable whether they will be sufficient, due to their non-binding nature. Despite the creation of gender guidelines, the final decision is still at the discretion of the adjudicator.

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<sup>99</sup> D. Asthana, "Gender Politics: Refugee Definition & the Safe Third Country Agreement" (2011) 12 Georgetown Journal of Gender and the Law 1.

Secondly, I analyse the emerging concept of complementary protection and its applicability to gender-related asylum claims. While the possibility of finding alternative forms of protection for victims of gender-related persecution is worth exploring, the lack of universal understanding and a legislative framework has made complementary protection an inadequate solution to the protection gap that victims of gender-related persecution are facing.

I end chapter 6 by examining the alternative solution of adding gender as an independent, legally binding category to the refugee definition. This exploration includes a review of domestic legislation in Spain, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela, where gender is included as an independent ground of persecution. In this section I examine the hypothesis that the embedding of gender as an independent category in the legal framework would secure adequate protection to those fleeing gender-related persecution. By granting gender the status of an independent category under the refugee definition, the root cause of the persecution faced by women worldwide would be recognised and its seriousness acknowledged.

## Chapter 2

### Historical origins and the nature of the current refugee law framework

#### 2 1 Introduction

Part of the problem of gender discrimination in the asylum process is caused by the framing, phrasing and implementation of the 1951 Convention. The Convention does not “recognis[e] either the specifics of gender-based persecution or the particularities of women refugees or of womanhood as a whole”.<sup>100</sup> Oloka-Onyango argues that this is equally true whether viewed “in relation to the conceptualisation of the term ‘refugee’ or in the dominant solutions to the refugee crisis that are usually proffered”.<sup>101</sup>

Some of the causes of the underrepresentation of women successfully claiming and receiving refugee status can be traced back to wording of the 1951 Convention, as rooted in the historical contexts at the time it was drafted. The exclusively male delegations that drafted the 1951 Convention did not, for example, consider gender as a possible ground of persecution. Therefore gender is omitted as a valid ground on which to claim refugee status under the 1951 Convention definition of refugee.<sup>102</sup>

In chapter 2 I examine the causes of the gender bias under the current international refugee law framework by analysing the influence that historical events had on the substance of 1951 Convention. In sub-chapter 2 2 I focus specifically on the historical origins of the 1951 Convention and its impact on the current refugee law framework, on both the international and regional levels. As mentioned in the introduction, the 1951 Convention was originally drafted to respond to the plight of the millions of refugees seeking asylum in the aftermath of WWII. It is important to note that the majority of these refugees were male.<sup>103</sup> There are different reasons behind the overwhelming numbers of qualified male refugees. As with modern-day asylum-seekers,

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<sup>100</sup> J. Oloka-Onyango, “The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa” (1995-1996) 24 *Denver Journal of International Law and Policy* 349, 350.

<sup>101</sup> 350.

<sup>102</sup> R. Haines, “Gender-related persecution” 332 (UNHCR, 2001)  
<<http://www.refworld.org/pdfid/470a33b50.pdf>> accessed 28 October 2015.

<sup>103</sup> Chan (2011) *Boston University International Law Journal* 177.

women in the post-WWII era lacked financial means and were often the primary caregivers of their families, which made it very difficult for them to leave their country of origin.<sup>104</sup> More germane to the discussion in this chapter, however, is the 1951 Convention's strict focus on the violations of civil and political rights, often committed in the (male-dominated) public sphere. This was arguably one of the contributing factors to the massive number of males in qualified refugee populations. Consequently, the 1951 Convention arguably privileged male applicants in the post-WWII era and will continue to do so if not amended. To an extent, the sharply polarised politics between the West and the Eastern Bloc at the beginning of the Cold War was responsible for creating this bias in the law.

Both the WWII and Cold War contexts had an influence on the 1951 Convention, and the present-day international refugee law instruments display a very limited definition and protection of human rights. Violations of human rights committed by non-state actors in the 'private sphere' are completely excluded from the jurisdiction of the 1951 refugee regime, even though they are the common arena for gender-related persecution that women experience, as further discussed in Chapter 4. Subsequently, the current refugee regime does not acknowledge the continuing brutal crimes against women that are taking place around the world and often committed or tolerated by the state.

In sub-chapter 2.3 I investigate the strong focus on preserving state sovereignty and the impact it has had on the protection awarded to women refugees fleeing persecution. This relates to the protectionist sentiment that is dominant in many developed countries.<sup>105</sup> Additionally, I determine the impact of the lack of international legal instruments specifically protecting women's rights during the drafting of the 1951 Refugee Convention. This section begins with an analysis of the travaux préparatoires of the 1951 Refugee Convention and the drafters' exclusive focus on safeguarding a limited area of human rights, namely civil and political rights. Specific attention is paid to the wholesale omission of gender from both the drafting processes and the final

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<sup>104</sup> 177.

<sup>105</sup> D. Vigneswaran "A Foot in the Door: Access to Asylum in South Africa" (2008) 25(2) *Refuge* 41.



instruments. This discussion also looks at the emergence of international instruments safeguarding women's rights post-1951. The development of specific women's rights within the broader field of human rights has highlighted a considerable gap that still exists between the rights protected under international/regional human rights law and those protected within the refugee law regimes. This gap is examined in detail with special emphasis on the vulnerability and intersectionality of female asylum-seekers.

As a backdrop to the gendered discussions about the 1951 Convention, the final sub-chapter examines the inherently patriarchal nature of international law and the gender bias in the discipline. Firstly, the archaic nature of the refugee law framework is analysed. Furthermore, the seemingly gender-neutral character of international law is deconstructed, and the inherently patriarchal nature of the international law regime as whole is analysed. This sub-chapter also examines the discipline's underlying public/private dichotomy as well as the refugee law regimes' silence with regard to gender. This is a significant part of the deconstruction of the current refugee regime, as the "silences of international law [are] as important as its positive rules and rhetorical structures", because they enforce the status quo and are a critical element of the frameworks' stability.<sup>106</sup>

## 2 2 The 1951 Refugee Convention

The origins of modern refugee law go back to the emergence of an international consensus on the importance of safeguarding "the inherent dignity and (...) the equal and inalienable rights of all members of the human family"<sup>107</sup> as a way to prevent the "extermination and unprecedented barbarity of governments against their own citizens"<sup>108</sup> that had taken place during WWII. In the war's aftermath, the international community acknowledged that "states could no longer be regarded as the sole arbiters of the needs and

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<sup>106</sup> Charlesworth (1999) *American Journal of International Law* 381.

<sup>107</sup> Preamble, Universal Declaration of Human Rights, U.N.G.A. Res. 217 A(III) of December 10, 1948 as quoted in Bhabha (1996) *Public Culture* 5.

<sup>108</sup> 5.

entitlements of their citizens” and that the citizens “might become a legitimate concern of international law”.<sup>109</sup>

The drafting of the convention took place between 1948 and 1951,<sup>110</sup> at the height of social dislocation in Europe.<sup>111</sup> Consequently, the convention was strongly influenced by the political will to prevent persecution such as the Holocaust from ever happening again. Following the Allied victory, the international refugee law regime was shaped to find solutions for those persecuted as well as those displaced by the conflict.<sup>112</sup> As Fitzpatrick observes, the specific paradigm inspiring the creation of the 1951 Convention was “the right-wing totalitarian regime of Nazi-Germany, which acted upon its hatred with astounding efficiency, thoroughness and candour”.<sup>113</sup> As a result, the main concern was to address the large-scale persecution directed at European Jews.<sup>114</sup> Condon notes that “[a]fter the recent horror of genocide in Nazi-Germany, the foremost concern of the Convention drafters (...) was the protection of persons persecuted for racial and religious reasons”.<sup>115</sup> Accordingly, the convention was drafted exclusively to promote the protection of those who were targeted for their race, religion, nationality, membership in a particular social group and political opinion, which were all bases upon which the Nazis chose their victims.<sup>116</sup> These types of persecution were, and continue to be today, more commonly asserted by male than female asylum-seekers.<sup>117</sup>

Furthermore, the 1951 Convention was constructed within a heavily Eurocentric context, and the drafters initially limited its jurisdiction to the “redistribution of the refugee[s] from the shoulders of front-line European

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<sup>109</sup> 5.

<sup>110</sup> J. Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law” (1990) 31(1) *Harvard International Law Journal* 129, 143.

<sup>111</sup> R. Bacon and K. Booth, “Intersection of Refugee Law and Gender: Private Harm & Public Responsibility – Islam; Ex parte Shah Examined” (2000) 23 *UNSW Law Journal* 135, 138.

<sup>112</sup> S. Martin, “Gender and the Evolving Refugee Regime” (2010) 29(2) *Refugee Survey Quarterly* 104, 107.

<sup>113</sup> J. Fitzpatrick, “Revitalizing the 1951 Refugee Convention” (1996) 9 *Harvard Human Rights Journal* 229, 240.

<sup>114</sup> A. Binder, “Gender and “Membership in a Particular Social Group” (2001) 10 *Columbia Journal of Gender and Law* 167, 169.

<sup>115</sup> J-B. Condon, “Asylum Law’s Gender Paradox” (2011) 33(1) *Seton Hall Law Review* 207, 214.

<sup>116</sup> S. Martin, “Refugee and displaced women: 60 years of progress and setbacks” (2011) 3(2) *Amsterdam Law Forum* 72.

<sup>117</sup> Chan (2011) *Boston University International Law Journal* 177.

states”.<sup>118</sup> However, this restriction was criticised during the drafting process, where the Chinese delegate, Mr Cha, observed that the convention text “as it [stands] would apply only to European refugees, whereas it ha[s] to be remembered that other groups of people outside Europe might also stand in need of legal protection, either immediately or in the future”.<sup>119</sup> Similarly, the Pakistani delegate, Mr Brohi, voiced Pakistan’s opposition by arguing that “the problem of refugees [is] not a European problem only and (...) therefore (...) the definition of the term ‘refugee’ should cover all those who might properly fall within the scope of that term”.<sup>120</sup> Also Mr Habicht of the International Association of Penal Law expressed concern over the Eurocentric nature of the refugee definition, which would place “thousands, and in the future (...) hundreds of thousands of persons” outside of the refugee definition.<sup>121</sup> Overall, various non-Western countries either rejected the Western view of the 1951 Convention or regarded it as concerning only the European refugee situation.<sup>122</sup> As Coles notes:

“[A]lmost all the Socialist countries denounced the politics behind the approach [of the 1951 Convention], which were, of course, a complete change from the wholesale enforced returns organized by the Allies at the end of the War, and they criticized vehemently both the Statute and the Convention. The Arab States, also, were unhappy, and they inserted a provision in both instruments to ensure that neither was to be considered as applying to Palestinian refugees. The Asian countries kept their distance, as did a number of major Latin American countries”.<sup>123</sup>

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<sup>118</sup> Hathaway (1990) *Harvard International Law Journal* 151.

<sup>119</sup> Statement of Mr Cha of China, 11 U.N. ESCOR (161st mtg.) at 7, U.N. Doc. E/ AC.7/SR. 161 (1950) as cited by Hathaway (1990) *Harvard International Law Journal* 151.

<sup>120</sup> Statement of Mr Brohi of Pakistan, 11 U.N. ESCOR (399th mtg.) (1950) at 215 as cited by Hathaway (1990) *Harvard International Law Journal* 151.

<sup>121</sup> Statement of Mr Habicht of the International Association of Penal Law, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 26, U.N. Doc. A/CONF.2/SR. 19 (1951) as cited by Hathaway (1990) *Harvard International Law Journal* 155.

<sup>122</sup> G. Coles, “Approaching the Refugee Problem Today” (1987) 5 (unpublished manuscript) as cited by Hathaway (1990) *Harvard International Law Journal* 151.

<sup>123</sup> 151.

In summary, the drafters of the 1951 Convention “look[ed] toward past events rather than anticipat[ing] categorical possibilities in drawing their standard”.<sup>124</sup>

A further factor that influenced the drafting of the 1951 Convention was the international politics of the Cold War. During the drafting process, the Cold War was reaching its height, and the states participating in the drafting process were sharply polarised.<sup>125</sup> According to Bhabha, this particular context is “a crucial historical determinant of the shape of contemporary international refugee law”.<sup>126</sup>

During the drafting process, the communist bloc focused heavily on the inclusion of the protection of social and economic rights in the 1951 Convention, while the Western bloc accorded more importance to the protection of civil and political rights, with the protection focusing on those fleeing for ideological reasons.<sup>127</sup> Eventually, the Western states “successfully utilised their greater power during the drafting process”<sup>128</sup>, which resulted in a document that reflected largely American conceptions of civil liberties.<sup>129</sup> As a result, the 1951 Convention was directed at victims of left-wing totalitarian governments in Eastern Europe<sup>130</sup>, with the “the definition (...) reflect[ing] liberal political values of (...) individual autonomy and rationality and exclud[ing] socialist social-economic concerns”.<sup>131</sup> Refugees became “principally conceived as male political activists who were persecuted by the State [while] women and children were regarded as passive dependents”.<sup>132</sup>

Hathaway highlights the importance of Cold War politics in the formation of the refugee definition by noting that “the five enumerated categories were chosen for their expected applicability to individuals fleeing Eastern bloc countries where social and economic rights were emphasised

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<sup>124</sup> D. L. Neal, “Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum” (1988) 20 *Columbia Human Rights Law Review* 203, 228.

<sup>125</sup> Bhabha (1996) *Public Culture* 7.

<sup>126</sup> 7.

<sup>127</sup> 7.

<sup>128</sup> 7.

<sup>129</sup> C. MacIntosh, “When “Feminist Beliefs” Became Credible as “Political Opinions”: Returning to a Key Moment in Canadian Refugee Law” (2005) 17 *Canadian Journal of Women and Law* 135, 137.

<sup>130</sup> Fitzpatrick (1996) *Harvard Human Rights Journal* 240.

<sup>131</sup> Bhabha (1996) *Public Culture* 8.

<sup>132</sup> H. Muggeridge and C. Maman “Unsustainable: the quality of initial decision-making in women’s asylum claims” 11 (*Asylum Aid*, January 2011) <<http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf>> accessed 30 October 2012.

over political and civil rights”.<sup>133</sup> Owing to this ideological favouritism, the claims of the 1951 Convention protecting universal human rights are tainted by the strong liberal individualistic bias.<sup>134</sup> As Coles observes, the 1951 Convention was indisputably “tailored by the Western bloc for its own purposes in dealing mainly with the Eastern European refugee situation, favouring a particular characterization of the cause of the refugee problem and a particular solution”.<sup>135</sup>

The protection provided by the 1951 Convention is restricted to the protection of a limited category of human rights. Overall, the international refugee law regime suffers from an overall conceptual narrowness of human rights that only addresses “a narrow aspect of human dignity: the civil and political rights firmly rooted in Western political thought and consistent with Western political goals”.<sup>136</sup> This limited scope unavoidably has a disproportionately severe impact on women due to women comprising the bulk of the world’s forcibly migrated people.<sup>137</sup> According to Mertus, for those who do not fit the definition of persecution and who not fall within the limited persecution grounds, there is “no recourse to international legal protection and, for the most part, [they are] denied any assistance”.<sup>138</sup>

During the Cold War, the states receiving refugees had a strong incentive to open their doors to asylum-seekers, due to a desire to welcome refugees from those States which supported the opposing ideology.<sup>139</sup> These states utilised the flow of refugees both to “discredit the government of the country of origin and to bolster the image of countries granting them asylum.”<sup>140</sup> During the creation of the current refugee law regime, any type of humanitarian aid, including asylum, was linked to Cold War foreign policy concerns.<sup>141</sup> Hathaway further argues that neither a humanitarian nor a

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<sup>133</sup> Hathaway *The Law of Refugee Status* 8.

<sup>134</sup> Bhabha (1996) *Public Culture* 8.

<sup>135</sup> Coles (1990) *Harvard International Law Journal* 151.

<sup>136</sup> 141.

<sup>137</sup> Macklin (1995) *Human Rights Quarterly* 219.

<sup>138</sup> J. Mertus, “The State and the Post-Cold War Refugee Regime: New Models, New Questions” (1998) 10 *International Journal of Refugee Law* 321, 324.

<sup>139</sup> 325.

<sup>140</sup> 325.

<sup>141</sup> 325.

human rights vision can account for the creation of refugee law.<sup>142</sup> He poignantly summarises the strongly political nature of the refugee law regime in the following statement:

“If [refugee law was] conceived in humanitarian terms, [it] would be a politically neutral response to the needs of suffering persons who have in some way been forced to leave their homes. The law would not focus on the ‘how’ or ‘why’ of the need for protection, but rather would inquire only into the extent of the denial of physical security or liberty leading to and consequent upon departure”.<sup>143</sup>

### **2 3 The broader framework of international and regional human rights law relevant to women’s refugee claims**

As discussed above in sub-chapter 2 2, the 1951 Refugee Convention was the first attempt to extend legal protection to a universally defined group of ‘refugees’.<sup>144</sup> However, it also inevitably reflects the specific concerns of its drafters, majority of whom were white, educated, Western males.<sup>145</sup> During the travaux préparatoires, the French delegate, Mr Rain, argued that a connection between refugee law and human rights should be made in the spirit of the Universal Declaration of Human Rights.<sup>146</sup> However, the French suggestion to link refugee status to violations of fundamental human rights and to the general human right to seek asylum<sup>147</sup> was rejected for being ‘theoretical’ and too far removed from reality.<sup>148</sup> As Hathaway observes, “neither a holistic view of humanitarian need nor of human rights protection was seen as the appropriate foundation for the new convention”.<sup>149</sup> Ultimately, the focal feature of the current international refugee law became “its rejection

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<sup>142</sup> Hathaway (1990) *Harvard International Law Journal* 130.

<sup>143</sup> 130-131.

<sup>144</sup> Valji (2001) *Refugee* 26.

<sup>145</sup> 26.

<sup>146</sup> Statement by Mr Rain of France, UN ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Third Meeting, U.N. Doc. E/AC.32/SR.3 (1950), para. 25.

<sup>147</sup> Hathaway (1990) *Harvard International Law Journal* 148.

<sup>148</sup> 148.

<sup>149</sup> 148.

of comprehensive humanitarian or human rights based approach in favour of a narrowly conceived focus”.<sup>150</sup>

Owing to the 1951 Convention’s exclusive focus on protection from persecution based on civil and political rights (which primarily affected male European refugees), any form of persecution based on gender was completely absent from the 1951 Convention’s considerations. Overall, the issue of gender-related persecution was simply not considered significant enough to deliberate upon during the drafting procedure.

According to Kumin, the drafters of the 1951 Convention “did not deliberately omit persecution based on gender – it was not even considered”.<sup>151</sup> It was the drafters of the Convention’s failure to recognise women’s experiences as internationally relevant that strongly contributed to exclusion of gender from the definition of ‘refugee’.<sup>152</sup> Specifically, the drafters failed to acknowledge that persecutors harmed the victims specifically due to their gender,<sup>153</sup> and during the drafting little thought was given to forms of persecution which might only affect women.<sup>154</sup> The fact that the drafters did not contemplate gender persecution during the drafting process did not signify that gender-related persecution was unfamiliar to the world<sup>155</sup> but rather, demonstrated the lack of concern for women’s rights at the time.

Hence, the lack of international instruments focusing on women’s rights at the time of drafting the 1951 Convention played a major role in the omission of women and gender from the definition of a refugee.<sup>156</sup> According to Valji, at the time there were very few international instruments for drafters to draw upon in recognising women’s experiences.<sup>157</sup> Owing to the dearth of instruments in the Convention that would protect women’s rights in particular, the document has been interpreted as an instrument that protects citizens from abuse by their state i.e. in the public sphere, which is mostly dominated by male experiences.<sup>158</sup> Consequently, the confined scope of the refugee

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<sup>150</sup> 148.

<sup>151</sup> J. Kumin, “Gender: Persecution in the Spotlight” (2001) 2 *Refugees* 12

<sup>152</sup> Condon (2011) *Seton Hall Law Review* 214.

<sup>153</sup> 214.

<sup>154</sup> Kumin (2001) *Refugees* 12.

<sup>155</sup> Condon, (2011) *Seton Hall Law Review* 214.

<sup>156</sup> Valji (2001) *Refugee* 27.

<sup>157</sup> 27.

<sup>158</sup> 27.

definition has had an excessively severe impact on women,<sup>159</sup> whom it effectively excludes.

Since the drafting of the 1951 Refugee Convention the understanding of concepts such as discrimination, human rights, women's rights, gender and inequalities in power has evolved and expanded significantly.<sup>160</sup> International and regional human rights instruments that provide women with specific rights have emerged. These instruments have been crucial with regard to the protection of women's human rights and have proved to be "a valuable tool for supplementing the more obvious deficiencies in international refugee law".<sup>161</sup> Ultimately, these instruments have had an impact, albeit a very limited one, on the interpretation of the 1951 Convention in the form of gender guidelines, as is further discussed in sub-chapter 6 2.

According to Stamatopoulou, the creation of instruments such as the CEDAW and ICESCR have "facilitated the incorporation of women's perspectives into interpretation of the 1951 Convention via explicit non-discriminatory principles".<sup>162</sup> The influence of the international and regional human rights instruments has resulted in both states and individuals being increasingly acknowledged as perpetrators of human rights violations as well as gender-based discrimination against international human rights standards.<sup>163</sup> Conversely, this development has led to the acknowledgement that gender-based human rights abuses, even when perpetrated by individuals, may amount to the persecution of women as members of a social group if they occur in an overall social or political context that discriminates against women.<sup>164</sup> Furthermore, the recent developments that have taken place through the recommendations of international human rights treaty bodies (mainly CEDAW Committee's General Recommendation No 32) and the entry to force of regional instruments (Istanbul Convention) have furthered acknowledgement of gender-related persecution in the international plane.

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<sup>159</sup> Macklin (1995) *Human Rights Quarterly* 218.

<sup>160</sup> Bacon and Booth (2000) *UNSW Law Journal* 139.

<sup>161</sup> C. Harvey, "Reconstructing Refugee Law" (1998) *Journal of Civil Liberties* 159, 162.

<sup>162</sup> C. Palmer and H. Smith, "Refugee Women and Domestic Violence: Country Studies"

(Asylum Aid, Refugee Women's Resource Project, September 2001)

<[http://www.asylumaid.org.uk/data/files/publications/43/Refugee\\_Women\\_and\\_Domestic\\_Violence\\_Edition\\_1.pdf](http://www.asylumaid.org.uk/data/files/publications/43/Refugee_Women_and_Domestic_Violence_Edition_1.pdf)> accessed 10 October 2012.

<sup>163</sup> Palmer and Smith "Refugee Women and Domestic Violence: Country Studies" *Asylum Aid*.

<sup>164</sup> Palmer and Smith "Refugee Women and Domestic Violence: Country Studies" *Asylum Aid*.



Yet, despite these advancements, a major gap continues to exist between the rights accorded to women by the international human rights regime and the protection that the 1951 and 1969 conventions afford them. Kourula notes that the “efforts to address the particular situation of refugee women have so far fallen short of the adoption of any legally binding international instruments singling them out as a specific group”.<sup>165</sup> While international and regional human rights law have continued to expand and evolve, international refugee law has remained stagnant and is now showing its age.<sup>166</sup> The refugee definition’s exclusive focus on civil and political rights ignores the interdependent nature of all human rights.<sup>167</sup> As Harvey observes, in the light of the progressive developments in international human rights law, international refugee seems to be rendered marginal to the real needs of those in need of international protection.<sup>168</sup> This is a particularly accurate assessment of the protection that the international refugee regime offers to refugee women.

The failure of international and regional refugee law to protect refugee women stands in stark contrast to other international and regional human rights law instruments that safeguard the principles of equality and women’s fundamental rights. This point is significant, as the international and regional human rights instruments, standards and jurisprudence are (or should be) establish the standard and steer the development of international refugee law.<sup>169</sup>

For example, on the international level, Article 1(3) of the Charter of the UN Charter<sup>170</sup> calls for international co-operation in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex language or religion”. In the same vein, the UDHR<sup>171</sup> declares the right to life, liberty and security<sup>172</sup> without distinction of

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<sup>165</sup> P. Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (The Hague: Martinus Nijhoff Publishers, 1997) 132.

<sup>166</sup> Harvey (1998) *Journal of Civil Liberties* 163.

<sup>167</sup> 163

<sup>168</sup> 163.

<sup>169</sup> UNHCR, Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01.

<sup>170</sup> Charter of the United Nations, 1 UNTS XVI, entered into force 24 October 1945.

<sup>171</sup> Universal Declaration of Human Rights, G.A. res. U.N. Doc A/810 at 71 (1948).

any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>173</sup> Furthermore, Article 14 of UDHR declares the right to seek and to enjoy in other countries asylum from persecution for everyone.

Additionally, the equal entitlement of women and men to civil, political, economic, social and cultural rights is included in the International Covenant on Civil and Political Rights (ICCPR)<sup>174</sup> and in the ICESCR.<sup>175</sup> According to Article 3 of the ICCPR, the state parties “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the (...) Covenant”. Similarly, Article 3 of the ICESCR requires that the state parties “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the (...) Covenant”.

As *lex specialis*, Article 1 of the CEDAW<sup>176</sup> confirms the equal enjoyment by women and men of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Furthermore, Article 2 of the CEDAW condemns discrimination against women in all its forms and calls for the elimination of discrimination against women by all appropriate means and without delay. Finally, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>177</sup> defines torture as “severe pain or suffering, whether physical or mental, [which] is intentionally inflicted on a person (...) for any reason based on discrimination of any kind”.

With regard to the African regional human rights instruments, ACHPR was drafted with the aim of addressing human rights from an Afrocentric

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<sup>172</sup> Article 3.

<sup>173</sup> Article 2.

<sup>174</sup> International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

<sup>175</sup> International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

<sup>176</sup> Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

<sup>177</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987.

perspective.<sup>178</sup> Similarly to the international human rights, the ACHPR includes various non-discrimination clauses, with Article 2 providing for equal enjoyment of all rights in the charter, regardless of sex. Furthermore, Article 3 provides that all individuals are equal before the law and be entitled to equal protection. With regard to women's rights specifically, Article 18(3) calls for the elimination of discrimination against women and for the protection of the rights of women and children as stipulated in international declarations and conventions.

The ACHPR has, however, been criticised for failing to provide adequate protection for African women.<sup>179</sup> For example, Ebeku argues that the existing instruments have done little to improve women's human rights.<sup>180</sup> Furthermore, as Nsibirwa argues, the ACHPR has failed to address various issues affecting the rights of women in Africa, including female genital mutilation (FGM), inheritance by women, forced marriages<sup>181</sup> and lobola (bride price).<sup>182</sup> This criticism of the ACHPR is supported by the fact that, although it was created to guarantee the rights of both men and women, it expressly mentions 'women' only once, and even then only in a compilation clause dealing with the family and children.<sup>183</sup>

Ultimately, the African Union recognised that women were still excluded from legal, social, economic, and cultural processes<sup>184</sup>, and in an attempt to fill the protection gap with regard to women's rights, the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)<sup>185</sup> was drafted. The Women's Protocol was created with the aim of protecting African women in a more comprehensive manner than pre-existing instruments, with a focus on

<sup>178</sup> K. Davis, "The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination" (2009) 42 *Vanderbilt Journal of Transnational Law* 949.

<sup>179</sup> See for example, Davis (2009) *Vanderbilt Journal of Transnational Law* 955 and Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 351.

<sup>180</sup> K. Ebeku, "A New Dawn for African Women? Prospects of Africa's Protocol on Women's Rights", (2004) 16 *Sri Lanka Journal of International Law* 83, 84.

<sup>181</sup> M. Nsibirwa, "A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" (2001) 1 *African Human Rights Law Journal* 40, 41.

<sup>182</sup> Davis (2009) *Vanderbilt Journal of Transnational Law* 958.

<sup>183</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 351.

<sup>184</sup> Davis (2009) *Vanderbilt Journal of Transnational Law* 952.

<sup>185</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of the Women in Africa (entered into force on 25 November 2005) CAB/LEG/66.6 (Sept. 13, 2000)

protecting women from forms of discrimination particular to Africa.<sup>186</sup> With the completion of the drafting of the Women's Protocol in 2003, the international community praised it as the most progressive tool for protecting women's rights to date, thanks to it guaranteeing rights which had never before been ensured by the international community, such the right to an abortion.<sup>187</sup> In addition, the Women's Protocol expressly guarantees various crucial rights for women. For example, Article 2 binds all state parties to "combat all forms of discrimination against women through appropriate legislative, institutional and other measures"; and Article 3 guarantees a woman's right to "dignity inherent in a human being and to the recognition and protection of her human and legal rights" while obliging the state parties to "ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence". Importantly, Article 4, dealing with women's right to life, integrity and security of the person, specifically obliges the state parties to "ensure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents".<sup>188</sup>

With regard to violence committed by non-state actors in the private sphere, Article 4 compels the state parties to "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public". Article 5 prohibits "all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them", as well as other harmful practices to women. Article 8 guarantees the equality of men and women before the law and the right to equal protection. Article 11 binds the state parties to protect asylum-seekers in general and refugee women in particular "against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are

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<sup>186</sup> 952.

<sup>187</sup> Article 14, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July, 2003, OAU Doc. CAB/LEG/66.6

<sup>188</sup> Article 4(2)(k), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July, 2003, OAU Doc. CAB/LEG/66.6.

considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction”.

By adopting the Women’s Protocol, which specifically guarantees the rights of women, the African Union “reinforces the message that women’s rights require priority attention in the protection of universal and inalienable rights”.<sup>189</sup> This position taken by the AU regarding women and their rights is very different from the approach of the international and the African regional refugee instruments.

Overall, the failure of international and regional refugee law to account for and to incorporate women’s experiences as persecution, amounts to a systematic infringement of women’s right to equality and their fundamental human rights,<sup>190</sup> which are entrenched in international human rights instruments and in the Preamble of the 1951 Refugee Convention.<sup>191</sup> This infringement is a serious cause for concern, as refugee law can be described as the last resort to protect fundamental human rights.

By neglecting women’s experiences of persecution, the international and regional refugee frameworks leave women vulnerable and without any protection, while they condone the ongoing brutal crimes against women that are taking place on a global scale and often committed by or tolerated by the states. The failure to protect victims of gender-related persecution tarnishes the main objective of the international refugee regime, which is to provide “interim protection for all such persons [for whom there is no] meaningful protection of basic human rights – whether civil, political, economic, social, or cultural – in their own state”.<sup>192</sup> Overall, as Crawley argues, “protection is at the heart of the responsibility that international community bears towards refugees”.<sup>193</sup>

## **2 4 Gender bias and the inherently patriarchal nature of international law**

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<sup>189</sup> Ebeku (2004) *Sri Lanka Journal of International Law* 83 quoting the U.N. High Commissioner for Human Rights in a speech made on 14 July 2003.

<sup>190</sup> Valji, de la Hunt and Moffet (2003) *Agenda* 63.

<sup>191</sup> 63.

<sup>192</sup> Hathaway (1990) *Harvard International Law Journal* 124.

<sup>193</sup> Crawley *Refugees and Gender: Law and Process* 4.

#### 2 4 1 *The obsolete nature of the 1951 Refugee Convention*

Since the drafting of the 1951 Convention, the refugee question has become increasingly complex, and the past few decades have been marked by exceptional changes in both the kind and scale of refugee movements.<sup>194</sup>

The new types of refugee flows that have emerged since the end of Cold War have led to an increase in the number of women who have had to flee from their country of origin as well as in different forms of persecution directed specifically at refugee women.<sup>195</sup> As Bacon and Booth observe, the number of women fleeing persecution has risen as a result of “only recently recognised circumstances specific to women [including] ‘private’ forms of harm such as domestic violence, sexual violence, forced marriage, female genital mutilation, forced abortion and severe punishment for transgressing social mores such as breach of dress code, promiscuity or disobedience”.<sup>196</sup> Overall, these ‘new’ types of persecution directed specifically at women are a difficult fit to the post-WWII perception of a refugee being a person, who seeks asylum for reasons of ideological difference.<sup>197</sup>

Despite drastic changes in the flow of refugees that set in motion the 1951 Convention, the only attempt to modernise it occurred in 1967, when the adoption of the Protocol Relating to the Status of Refugees extend the scope of the 1951 Refugees Convention to cover those individuals who had become refugees as a result of events unconnected with the Second World War.<sup>198</sup> However, this attempt to expand and update the refugee regime was utterly inadequate, as the only changes to the refugee definition that the 1967 Protocol created was the removal of the original limitations on time and geography. Ultimately the classical definition of a refugee as a male victim of political persecution has remained the standard in law and policy practice,

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<sup>194</sup> E. Arboleda and I. Hoy, “The Convention Refugee Definition in the West: Disharmony of Interpretation and Application” (1993) 5 *International Journal of Refugee Law* 66, 71.

<sup>195</sup> S. Kneebone “Women Within the Refugee Construct: “Exclusionary Inclusion” in Policy and Practice - the Australian Experience” (2005) 17 *International Journal of Refugee Law* 7, 9.

<sup>196</sup> Bacon and Booth (2000) *UNSW Law Journal* 139.

<sup>197</sup> Kneebone (2005) *International Journal of Refugee Law* 9.

<sup>198</sup> Bacon and Booth (2000) *UNSW Law Journal* 138.

despite a growing number of refugees fleeing persecution who do not fit easily into the current refugee definition as per the 1951 Refugee Convention.<sup>199</sup>

Consequently, the 1951 Convention has received criticism for its obsolete content, with Schenk criticising the current refugee definition for being “terribly outdated and (...) not reflect[ing] modern human rights standards”.<sup>200</sup> The 1951 Convention has also been described as one founded on a highly individualistic conception of persecution.<sup>201</sup> Stevens argues that, despite the current refugee definition being broader than the pre-WWII one, it is still based on “an outdated model that is designed to address refugee flows from white, Western countries during the Cold War”.<sup>202</sup> Similarly, according to Schmiechen, since the end of the Cold War, the international community “has become increasingly aware of the limitations of the [refugee law] instruments and how they do not adequately address many international problems such as violence against refugee women”.<sup>203</sup> Ultimately, the international refugee law instruments are archaic and in urgent need of reform.<sup>204</sup>

Generally speaking, no legal system is immune to change. This is also true with regard to the international refugee law regime, which has become “inadequate in the pursuit of social goals which themselves have also become unclear”.<sup>205</sup> The problems of the current international and regional protection frameworks are numerous and range from an “inadequate refugee definition; to a deficient system of obligation; to an apparent lack of capacity or political will to evolve”.<sup>206</sup> Owing to the inadequacy of the current refugee definition, only highly contrived interpretations of the refugee definition can even begin to cope with the protection needs of women.<sup>207</sup>

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<sup>199</sup> P. Mascini P and M. van Bochove “Gender Stereotyping in the Dutch Asylum Procedure: “Independent” Men versus “Dependent” Women” (2009) 43 *International Migration Review* 112, 113.

<sup>200</sup> T. S. Schenk, “A Proposal to Improve the Treatment of Women in Asylum Law: Adding a “Gender” Category to the International Definition of “Refugee”” (1994) 2(1) *Indiana Journal of Global Legal Studies* 301, 303.

<sup>201</sup> Goodwin-Gill (1995) *International Journal of Refugee Law* 8.

<sup>202</sup> M. Stevens, “Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category” (1993-1994) 3 *Cornell Journal of Law and Public Policy* 179, 203.

<sup>203</sup> M. Schmiechen, “Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps” (2003) 22 *Saint Louis University Public Law Review* 473, 474.

<sup>204</sup> 474.

<sup>205</sup> Goodwin-Gill (1995) *International Journal of Refugee Law* 8.

<sup>206</sup> 8.

<sup>207</sup> 8.

It is the current refugee law regime's limited and restrictive applicability that has resulted in thousands of refugees having been left 'outside' or 'beyond' its protection.<sup>208</sup> Thus, asylum-seekers become "objects of ad hoc, discretionary and extra-legal policies that finally benefit no one".<sup>209</sup> According to Arboleda and Hoy, who make the same argument, the refugee definition contained in the 1951 Convention is fast becoming "over-legalistic, mired in juridical abstraction, removed from the reality facing refugees, and subject to the vagaries of national interests".<sup>210</sup> Furthermore, as Goodwin-Gill argues, refugee adjudicators and administrations appear "incompetent to combine humanitarian policy with effective management of their borders".<sup>211</sup>

Hathaway states that the current refugee law regime "falls short, with the focus of rights protection limited to civil and political liberties and with definitional and procedural frameworks, which favour attainment of political goals at the expense of an even-handed assessment of risk to human dignity".<sup>212</sup> Overall, the current refugee law framework has been described as unresponsive to the needs of most refugees.<sup>213</sup> This is especially true for women seeking asylum on the basis of gender-related persecution. The stereotype of a person fleeing from the persecution of a political system is no longer applicable.<sup>214</sup> Because of its Eurocentric and reductionist nature, this type of persecution has become both antiquated and insufficient in the 21<sup>st</sup> century.<sup>215</sup> As Oloka-Onyango argues, international refugee law, in its current form, can ultimately protect only a small number of de facto refugees.<sup>216</sup> Ankenbrand criticises the outmoded liberal rights paradigm from which current refugee law emerged and concludes that it "was appropriate for the situation of refugees after the Second World War, but fails to protect people fleeing

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<sup>208</sup> 8.

<sup>209</sup> 8.

<sup>210</sup> Arboleda and Hoy (1993) *International Journal of Refugee Law* 76.

<sup>211</sup> 76

<sup>212</sup> Hathaway (1990) *Harvard International Law Journal* 132.

<sup>213</sup> 133.

<sup>214</sup> R. Ganguly-Scrase, "Infiltrators, illegals and undesirables: gender and forced migration in South Asia" in R. Julian, R. Rottier & R. White (eds.) *Community, Place, Change: TASA 2005 Conference Proceedings Australia: The Sociological Association of Australia* (TASA, 2005) 1.

<sup>215</sup> 1.

<sup>216</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 364.



from human rights violations committed by non-state actors”,<sup>217</sup> a point that is further discussed in chapter 4. Furthermore, as Cipriani observes, most refugees today are victims of violence, not of ideological persecution.<sup>218</sup> Both of these aspects characterise gender-related persecution. Overall, the 1951 Convention might in its current form offer basic protection. However, in order to guarantee true protection, it has to be complemented by other human rights instruments and as Goodwin-Gill argues, in due course replaced by an instrument appropriate to present and future needs.<sup>219</sup>

#### 2 4 2 *The universal applicability and neutrality of international law*

With the current refugee regimes in mind, it is important to consider the strong traditional universalistic assumption underlying the dominant interpretation of both international and regional law.<sup>220</sup> According to this universalistic assumption, the international human rights regime, as an example, is politically, philosophically and historically universal, free of gender and applies across cultures to all humans.<sup>221</sup> Overall, legal systems are considered to be founded on abstract rationality and are therefore regarded as “universally applicable and capable of achieving neutrality and objectivity”.<sup>222</sup> The international law regime, in particular, is considered by many not only to be impartial and objective but to have ‘universal credibility’.<sup>223</sup>

International law is also habitually regarded to be gender-neutral, and thus there is a presumption in international jurisprudence that international human rights law governing state relations and its relations with individuals within states is “universally applicable and neutral”.<sup>224</sup> Therefore, according to the universalistic approach, there is no need to define the gender dimensions

<sup>217</sup> B. Ankenbrand, “Refugee Women under German Asylum Law” (2002) 14 *International Journal of Refugee Law* 45, 50.

<sup>218</sup> L. Cipriani, “Gender and Persecution: Protecting Women Under International Refugee Law” (1993) 7 *Georgetown Immigration Law Journal* 511, 512.

<sup>219</sup> Goodwin-Gill (1995) *International Journal of Refugee Law* 8.

<sup>220</sup> A. Bunting, “Theorizing Women’s Cultural Diversity in Feminist International Human Rights Strategies” (1993) 20 *Journal of Law and Society* 6, 7

<sup>221</sup> 7.

<sup>222</sup> H. Charlesworth, C. Chinkin and S. Wright, “Feminist Approaches to International Law” (1991) 85 *American Journal of International Law* 613.

<sup>223</sup> H. Charlesworth, “The Hidden Gender of International Law” (2002) 16 *Temple International & Comparative Law Journal* 93.

<sup>224</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 625.

of any human right, as the rights are inherently neutral.<sup>225</sup> The apparent neutrality and universality are essential to the credibility of any legal system, as the system's power and the respect accorded to it are fundamentally related to its ability to appear neutral and superior to individuals and society.<sup>226</sup>

Feminists have challenged the traditional view of the legal system as inherently universal, neutral and objective. Their critique examines the seeming objectivism and formalism of international law in order to “destabiliz[e] the frozen versions of social life and human association that exclude women’s experiences”.<sup>227</sup> This is done by laying bare the way in which the structure of international law produces “forms of rationality, scientificity, objectivity, and cultural and aesthetic ideals which constitute and reinforce the exclusion of women”.<sup>228</sup> According to feminist critique, international law, and especially the international human rights discourse, is not value-free but greatly influenced by the “hegemonic philosophy and assumptions” of its creators, a vast majority of whom are white, Western men.<sup>229</sup> Consequently, international law reproduces masculine interests and values.<sup>230</sup> Overall, it has been argued that there is a general overlap between the constitution of law and the constitution of masculinity.<sup>231</sup>

Furthermore, as Gordon has observed, law in general “functions as a system of beliefs that make social, political and economic inequalities appear natural”.<sup>232</sup> This is an essential observation, as it pierces the veil of objectivity and neutrality often associated with international law.<sup>233</sup> The acknowledgement of the value-laden nature of the international legal system enables the examination of international law representing and reinforcing the interests of those in power. As Fredman argues, these interests have always

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<sup>225</sup> Bunting (1993) *Journal of Law and Society* 7.

<sup>226</sup> S. Fredman, *Women and the Law* (Clarendon Press, 1997) 2.

<sup>227</sup> C. Romany, “Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law (1993) 6 *Harvard Human Rights Journal* 87, 92.

<sup>228</sup> 91.

<sup>229</sup> S. Tamale, “The Right to Culture and the Culture of Rights: A Critical Perspective of Women’s Sexual Rights in Africa”, (2008) 16(1) *Feminist Legal Studies* 47, 51.

<sup>230</sup> 51.

<sup>231</sup> C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989), 86.

<sup>232</sup> R. Gordon, “New Developments in Legal Theory” in *The Politics of Law* (1982) 281, as quoted by Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 613.

<sup>233</sup> Fredman *Women and the Law* 2.

been predominantly male, “not only because the vast majority of law-makers have been male, but also because men have dominated over women”.<sup>234</sup> Furthermore, Crawley argues that law as a whole is an “inherently gendered system, which serves to reinforce male domination”.<sup>235</sup> Ultimately, it is the ‘male gender’ of international law that skews the discipline.<sup>236</sup>

The universalistic assumption has further been proved inaccurate by the existence of only a modest body of women’s rights jurisprudence, which is “marginalized from the mainstream of human rights [jurisprudence]”.<sup>237</sup> Nonetheless, the dominant presupposition of the impartiality of international and regional law has resulted in there being no acknowledgement that their norms impact women and men differently.<sup>238</sup> According to some critics, the experiences of most women have been comprehensively excluded from international law’s very limited concept of what is important to its subject matter.<sup>239</sup>

With regard to the presupposed equality and universality of the international human rights regime, neither human rights theory nor its application has successfully demonstrated this assertion.<sup>240</sup> As Kim argues, within the international human rights’ seemingly ‘neutral framework’, very little discussion has been devoted to human rights violations against women. Instead, “the laws that pretend to be gender neutral actually reflect male norms”.<sup>241</sup>

MacKinnon explains the foundations of the apparent gender neutrality and universality of international law by means of the ‘difference/equality approach’, as discussed in the Introduction. Under this approach, men and women are considered ‘different’ but ‘equal’.<sup>242</sup> However, MacKinnon argues that this approach conceals “the substantive way in which man has become

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<sup>234</sup> 2.

<sup>235</sup> Crawley *Refugees and Gender: Law and Process* 17.

<sup>236</sup> Charlesworth (2002) *Temple International & Comparative Law Journal* 94.

<sup>237</sup> H. Charlesworth, “Alienating Oscar? Feminist Analysis of International Law” (1993) 25 *Studies in Transnational Legal Policy* 1, 6.

<sup>238</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 625.

<sup>239</sup> R. Grant and K. Newland (eds.), *Gender and International Relations* (Milton Keynes: Open University Press, 1991) 1 as quoted in S. Kim, “Gender-related Persecution: A Legal analysis of Gender Bias in Asylum Law” (1994) 2 *Journal of Gender and the Law* 107, 111.

<sup>240</sup> Kim (1994) *Journal of Gender and the Law* 111.

<sup>241</sup> 113.

<sup>242</sup> MacKinnon *Feminism Unmodified: Discourses on Life and Law* 34.

the measure of all things”.<sup>243</sup> Accordingly, the ‘difference/equality approach’ offers two different paths to equality for women: either ‘being the same as men’ (which is also termed ‘gender neutrality’ or ‘single standard’) or ‘being different from men’.<sup>244</sup> Both of these paths make ‘maleness’ the standard by which women are judged.<sup>245</sup> In other words, the “equality theory has been written out of men’s practice, not women’s”.<sup>246</sup> As Freedman argues, the problem with this approach is that the existing values in our male-dominated world are accepted without a challenge, which results in women having to compete on male terms.<sup>247</sup>

Furthermore, the double standard of the ‘difference/equality theory’ has enabled men to obtain what women have traditionally had<sup>248</sup> without giving women “any dignity of the single standard”.<sup>249</sup> According to MacKinnon, the ‘difference/equality approach’ has silenced the abuse that women suffer “precisely because such abuse does not usually happen to men”.<sup>250</sup> MacKinnon also argues that women are transforming the definition of equality “not by making ourselves the same as men (...) or by reifying women’s so-called differences but by insisting that equal citizenship must include what women need to be human, including a right not to be sexually violated and silenced”.<sup>251</sup> In order to do so, there is a need to recast the question of equality in terms of a distribution of power,<sup>252</sup> rather than focusing on the ‘difference/equality’ of sexes. This approach would explicitly recognise and expose the existing male dominance and female subordination embedded in the international legal framework and more precisely in the context of refugee protection.<sup>253</sup>

MacKinnon’s ‘difference/equality theory’ is useful to assess the construction of the international refugee law framework. Similarly to other areas of international law, rather than being neutral and universal,

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<sup>243</sup> 34.

<sup>244</sup> 33.

<sup>245</sup> Wong (1999) *William and Mary Journal of Women and the Law* 278.

<sup>246</sup> MacKinnon (1991) *Yale Journal of Law and Feminism* 14.

<sup>247</sup> Freedman *Women and the Law* 15.

<sup>248</sup> Wong (1999) *William and Mary Journal of Women and the Law* 280.

<sup>249</sup> MacKinnon *Feminism Unmodified: Discourses on Life and Law* 38.

<sup>250</sup> Wong (1999) *William and Mary Journal of Women and the Law* 280.

<sup>251</sup> MacKinnon (2000) *Chicago-Kent Law Review* 692.

<sup>252</sup> Wong (1999) *William and Mary Journal of Women and the Law* 279.

<sup>253</sup> MacKinnon *Feminism Unmodified: Discourses on Life and Law* 40.

international refugee law was produced using a male perspective and is aimed at protecting individuals from what is a predominantly male experience of persecution, as discussed further in chapter 3. Owing to the differences in persecution as experienced by men and women, the solution that liberal feminists support, namely “simply making sure that female refugees are treated the same as male refugees”, is an inadequate solution.<sup>254</sup> Even though the elimination of legal barriers that women face under the current international legal framework is essential, it is not sufficient. The liberal feminist approach of ‘formal equality’ ignores the reality of power and social structures and of gender domination, and by disregarding these realities it “perpetuates and legitimises them”.<sup>255</sup>

Overall, “gender cannot be reduced to an afterthought”.<sup>256</sup> Bradley is correct to argue that there is a need for “a more radical approach, which recognizes that standards have been historically ‘gendered’ from the start”.<sup>257</sup> Accordingly, in order to provide true protection to all refugees, the standards of the current refugee law framework have to be redesigned to accommodate both sexes.<sup>258</sup> As Kim states, “any novel human rights theory will require both a female and male yardstick to ensure the protection of the human rights of all people”.<sup>259</sup>

### 2 4 3 *The patriarchal structure of international law*

It has been argued that it is not only the specific content of international law, such as the perspectives of international refugee law as presented above, but also the general structures of international law that privilege men.<sup>260</sup> According to Charlesworth et al., “we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic human social and economic needs are not met”.<sup>261</sup> This stance is also supported by Koskenniemi, who argues

<sup>254</sup> Kim (1994) *Journal of Gender and the Law* 117.

<sup>255</sup> Fredman *Women and the Law* 15.

<sup>256</sup> H. Bradley, *Men’s Work, Women’s Work: A Sociological History of the Sexual Division of Labour Employment* (Minneapolis, University of Minnesota Press: 1989) 67 as quoted by Kim (1994) *Journal of Gender and the Law* 117.

<sup>257</sup> 117.

<sup>258</sup> 117.

<sup>259</sup> 117.

<sup>260</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 613.

<sup>261</sup> 615.

that the “international legal notion of statehood operates to permanently privilege particular voices, and to silence others”.<sup>262</sup> These silenced voices belong to women, who “form the largest group whose interests remain unacknowledged in the structure of the state and its sovereignty”.<sup>263</sup> The structure of the state itself is arguably a patriarchal construct as its foundations are anchored in the elite’s concentration and control of power, from which women strikingly continue to be excluded.<sup>264</sup> Power structures in governments worldwide are generally masculine, and with a minority amount of significant positions being held by women.<sup>265</sup>

Overall, as Wright argues, the idea of a ‘state’ is “premised on a patriarchal model of state authority in which male leadership is the ‘norm’ as well as the overwhelming practice”.<sup>266</sup> It is this patriarchal nature of the state that has led Clark to adopt a somewhat radical view of the non-existent relationship between women and the state. According to Clark:

“[T]here is no relationship between women and the state. This is not to say, of course, that women are not affected by the state, that they are not held to be bound to obey the state, or even that they derive no rights under and within the state. But it is to say that the state, and particularly the theory which has been advanced to explain and justify the authority of the state, is in a very fundamental sense irrelevant to women”.<sup>267</sup>

The patriarchal foundation of states is further enforced by international law through the legal principles of sovereign equality, non-intervention, political independence and territorial independence, and by the legitimation of the use of force to defend these principles.<sup>268</sup> All things considered, women are either unrepresented or underrepresented in both domestic and international

<sup>262</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Turku: University of Turku, 1989) 499

<sup>263</sup> H. Charlesworth, “Feminist Critiques of International Law and Their Critics” (1994) *Third World Legal Studies* 1, 3.

<sup>264</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 621.

<sup>265</sup> 622.

<sup>266</sup> S. Wright, “Economic Rights, Social Justice and the State - A Feminist Reappraisal” (1993) *25 Studies in Transnational Legal Policy* 117, 128.

<sup>267</sup> L. Clark, “Women and the State: Critical Theory - Oasis or Desert Island?” (1992) 5 *Canadian Journal of Women and Law* 166, 167-168.

<sup>268</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 622.

decision-making processes.<sup>269</sup> This is a serious concern as, given the longstanding masculine domination of all national and international structures that exercise political power, “the issues traditionally of concern to men become seen as general human rights concerns, while ‘women’s concerns’ are relegated to a special, limited category”.<sup>270</sup>

Furthermore, the traditional assumption of the neutrality and benevolence of the state towards women has been criticised, especially by Third World feminists. For instance, according to Coomaraswamy, entrusting the state with the responsibility of ensuring women’s rights and viewing the state as “active and paternalistic in a benign manner” is highly questionable.<sup>271</sup> According to Coomaraswamy, “the nation-state in the third world does not carry this ‘Scandinavian aura’”.<sup>272</sup> Certainly, there are states that have been quick to adopt a cultural relativist approach to women’s rights and have manipulated “religion and religious codes to undermine international norms”.<sup>273</sup> For example, in certain states, intimate violence is not recognised as a criminal act but rather seen as an acceptable form of social control within the family.<sup>274</sup> As O’Hare concludes:

“The overall picture is, at best neglect, and at worst complicity on the part of the state and the international community for approaching intimate violence not as a political and a human rights issue, but as a private matter – a social or a cultural practice, sporadic and individualistic in nature”.<sup>275</sup>

This becomes a serious concern in the context of the international doctrine of state sovereignty coupled with the principle of non-intervention, which ultimately protects the internal activities of states from international scrutiny.

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<sup>269</sup> 622

<sup>270</sup> 625.

<sup>271</sup> R. Coomaraswamy, “To bellow like a cow: women, ethnicity and the discourse of rights” in R. Cook, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 39, 44.

<sup>272</sup> 51.

<sup>273</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester, Manchester University Press: 2000) 165.

<sup>274</sup> U. O’Hare, “Realizing Human Rights for Women” (1999) 21 *Human Rights Quarterly* 364, 369.

<sup>275</sup> 370-371.

The combination of the traditional construction of human rights as regulating the public sphere together with the doctrine of state responsibility protecting the state from being accountable for the acts of non-state actors “absolve[s] the human rights community from responsibility for this form of abuse, thereby denying women access to international procedures to bring to account the perpetrators of these abuses”.<sup>276</sup> Overall, international legal feminism has rejected the presumed ‘neutrality’ of states. According to Charlesworth and Chinkin:

“[S]tatehood in international law is much more than a formal abstract structure. It is committed to a particular version of sexual difference and is unable to represent the interests of women”.<sup>277</sup>

Ultimately, as a result of its exclusive focus on regulating the relations and behaviour of states, international law has failed to address the violations that affect women the most.<sup>278</sup> The structure of international law not only reflects the male experience but also guarantees its continued dominance.<sup>279</sup> The on-going discrimination of women under international law is manifested both in organisational ways, through “the marginalization or outright exclusion of women from political power”, and in normative ways, through the focus on the relations between states that ignores the violence committed against women by private, non-state actors, who traditionally have not been viewed as being subject to international law.<sup>280</sup> The basis for international law’s disregard for the private actions of individuals is the mistaken assumption that the “impact of international law falls on the state and not directly on individuals”.<sup>281</sup> The international law regime has therefore largely resisted

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<sup>276</sup> 371.

<sup>277</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* 167.

<sup>278</sup> N. Gottschalk, “Twice oppressed; Third world Women and the Prospects of Multi-cultural Feminism” (Law and Development, 2004) 3.

<http://www.lawanddevelopment.org/docs/twiceoppressed.pdf> accessed 28 October 2015.

<sup>279</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 621.

<sup>280</sup> Gottschalk, “Twice oppressed; Third world Women and the Prospects of Multi-cultural Feminism” *Law and Development* 3.

<sup>281</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 625.



feminist analysis,<sup>282</sup> which examines the role of the legal system in creating and perpetuating the unequal position of women.<sup>283</sup>

Overall, the very construction of international law has “made dealing with the structural disadvantages of sex and gender difficult”.<sup>284</sup> Consequently, women’s experiences under international law have a tendency to be silenced or discounted,<sup>285</sup> and the discipline ends up constructing women as a class of outsiders.<sup>286</sup> This exclusion of women in international law is a serious matter, because it not only takes the form of neglecting women or leaving them out but entails the active marginalisation and domination of women.<sup>287</sup>

#### *2 4 4 The public/private dichotomy under international law*

Traditionally, international law has focused on the relations between states or between states and individuals rather than the private actions of individuals.<sup>288</sup> As a result, the international legal regime has largely ignored injustices that occur in the private realm – the realm in which the activities of women are historically centred.<sup>289</sup>

Overall, modern international law rests on and reproduces a separation between the public and private spheres.<sup>290</sup> This dichotomy between the two spheres is connected to the inherently androcentric nature and origins of international law.<sup>291</sup> Especially the Western liberal philosophy has strongly influenced the creation of the public/private division in the international law regime.<sup>292</sup>

The public/private dichotomy under international law defines ‘public’ questions as those falling under its realm, while it leaves the issues of ‘private’ nature to the domestic jurisdictions of the states. Under international law, the international community does not have a recognised legal interest with regard

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<sup>282</sup> 614.

<sup>283</sup> 613.

<sup>284</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* 17.

<sup>285</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 625.

<sup>286</sup> Charlesworth (1994) *Third World Legal Studies* 1.

<sup>287</sup> F. Olsen, “International Law: Feminist Critiques of the Public/Private Distinction” (1993) 25 *Studies in Transnational Legal Policy* 157, 164.

<sup>288</sup> Schmiechen (2003) *Saint Louis University Public Law Review* 483.

<sup>289</sup> 483.

<sup>290</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 625.

<sup>291</sup> Gottschalk, “Twice oppressed; Third world Women and the Prospects of Multi-cultural Feminism” *Law and Development* 3.

<sup>292</sup> S. Qureshi, “Feminist Analysis of Human Rights Law” (2012) 19(2) *Journal of Political Studies* 41.

to 'private' intra-state issues.<sup>293</sup> In addition to the public/private division of international/domestic issues, a deeper level of division exists in international law with regard to gender. Under this public/private dichotomy, the public sphere is dominated by men and regarded as their 'natural' sphere, while women's existence is restricted to the private sphere.<sup>294</sup> This dichotomy has a normative dimension, with the spheres being accorded an uneven value: "greater significance is accorded to the public, male world than to the private, female world".<sup>295</sup> The privileging of the public sphere as the superior one has produced a 'hierarchy of oppression', wherein men are subjected to oppression from the state, and women are subjected to oppression by men in the private sphere.<sup>296</sup> This hierarchy notwithstanding, international law has refused to recognise the "specificity of female life in the private sphere".<sup>297</sup> Consequently, it has been argued that international law's acceptance and reproduction of the public/private dichotomy enhances the primacy of the male world and supports male dominance.<sup>298</sup> Overall, the realities of women's lives "do not fit easily into the categories and concepts of international law".<sup>299</sup> Clark explains the failure of international law to include women's realities in the 'reality' of international law as follows:

"Characterised universally by a set of rules under which men exercise illegitimate authority over women (...) The law (...) functions to both condone and encourage the exercise of this authority".<sup>300</sup>

International law in general has always functioned mainly in the public sphere, with direct state intervention in private sphere considered unsuitable. Consequently, there has been a failure to acknowledge violence against women in the private sphere as political; thus, such violence has been

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<sup>293</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 625.

<sup>294</sup> 626.

<sup>295</sup> 626.

<sup>296</sup> A. Edwards, *Violence against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2011) 66.

<sup>297</sup> N. Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (London: Allen & Unwin, 1990) 20, 32 as quoted in Edwards, *Violence against Women under International Human Rights Law* 65.

<sup>298</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 626.

<sup>299</sup> Charlesworth (2002) *Temple International & Comparative Law Journal* 96.

<sup>300</sup> Clark (1992) *Canadian Journal of Women and Law* 170.

accorded a “different legal significance from violence [in the public sphere]”.<sup>301</sup>

As Bunch argues:

“Female subordination runs so deep that it is still viewed as inevitable and natural rather than as politically constructed reality, maintained by patriarchal interests, ideology and institutions”.<sup>302</sup>

If violence against women was acknowledged as a part of the structure of the universal subordination of women instead of as unconnected and isolated behaviour, it could not be labelled simply as a ‘private’ issue.<sup>303</sup> Engle has made an important remark on the issue by arguing that the language of ‘private sphere’ is often used as a ‘proxy’ to women.<sup>304</sup> These two terms, however, are not equivalent and should not be used interchangeably. Instead of excluding the private sphere, international law excludes women.<sup>305</sup>

It is important not to overlook the fact that besides dominating the public sphere, men also dominate the private sphere.<sup>306</sup> Overall, a majority of ‘private’ issues also have a public dimension, because they are rooted in “public systems of oppression, patriarchy or gender international relations”.<sup>307</sup> Accordingly, some feminist legal theorists have argued that the ‘myth of non-intervention’ is used simply to cover the gendered application of human rights law,<sup>308</sup> and the real reason behind the indifference towards the violence against women is domination. As Bunch argues:

“Contrary to the argument that violence [against women] is only personal or cultural, it is profoundly political. It results from the structural relationships of power, domination and privilege between men and women in the society. Violence against women is central to the

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<sup>301</sup> 170.

<sup>302</sup> C. Bunch, “Transforming Human Rights from a Feminist Perspective” in J. Peters and A. Wolper (eds.) *Women’s Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) 14-15.

<sup>303</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* 235.

<sup>304</sup> K. Engle, “After the Collapse of the Public/Private Distinction: Strategizing Women’s rights”(1993) 25 *Studies in Transnational Legal Policy* 143, 146

<sup>305</sup> 146.

<sup>306</sup> Edwards *Violence against Women under International Human Rights Law* 70.

<sup>307</sup> 71.

<sup>308</sup> O’Hare (1999) *Human Rights Quarterly* 368.

maintenance of those political relations at home, at work and in all public spheres”.<sup>309</sup>

The public/private dichotomy has had a detrimental impact on women, as it privileges men disproportionately.<sup>310</sup> International human rights law, in particular, is guilty of this discrepancy, even though it is seen as “radically challeng[ing] the traditional distinction between international and domestic concerns”.<sup>311</sup> The international human rights regime largely focuses on violations committed and sanctioned by the state and thus leaves violations committed by non-state actors in the private sphere out of its jurisdiction.<sup>312</sup> This limited focus has been highly damaging to women, as a majority of human rights violations and persecution directed specifically at women have no direct link to the state. As MacKinnon argues:

“[T]o act as if [the state is all there is to power] produces an exceptionally inadequate definition for human rights when so much of the second-class status of women (...) is done by men to women prior to express (...) state involvement”.<sup>313</sup>

This is also true with regard to international and regional refugee law, which often deems gender-related persecution to be a ‘private’ issue falling outside of its jurisdiction. As Charlesworth notes, “the non-regulation of the private realm legitimates self-regulation, which translates ultimately into male dominance”.<sup>314</sup> Yet, while the basis for public/private dichotomy has been exposed as a culturally created ideology, it continues to have a strong influence on legal thinking.<sup>315</sup> Ultimately, this ideological construct rationalises the exclusion of women from the sources of power and makes it possible to

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<sup>309</sup> C. Bunch, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Right” (1990) 12 *Human Rights Quarterly* 486, 490-491.

<sup>310</sup> Qureshi (2012) *Journal of Political Studies* 41.

<sup>311</sup> Charlesworth (1993) *Studies in Transnational Legal Policy* 10.

<sup>312</sup> 10.

<sup>313</sup> C. MacKinnon, “On Torture: A Feminist Perspective on Human Rights” in K. Mahoney and P. Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht: Martinus Nijhoff Publishers, 1993).

<sup>314</sup> Charlesworth (1993) *Studies in Transnational Legal Policy* 10-11.

<sup>315</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 627.

maintain repressive systems of control over women without interference from human rights guarantees, which operate in the public sphere.<sup>316</sup>

The situation is, however, changing with regard to certain areas of international law directly impacting individuals, such as human rights law, which have been influenced by feminist perspectives.<sup>317</sup> However, regardless of these developments, the engagement of international law (human rights and refugee law) with the gender-related violence faced by women worldwide remains minimal. It has been argued that despite the international human rights regime's recent efforts to control the private sphere, it has been completely unsuccessful in doing so with regard to matters that specifically impact women.<sup>318</sup> Despite the empirical evidence of violence against women being overwhelming and undisputed, it has not been adequately reflected in the development of international law.<sup>319</sup> The international legal order has started to evolve, albeit slowly, beyond its white, European origins, but "it has never been forced to reflect on its failure to take women seriously".<sup>320</sup> On the whole, as long as international law (and along with it, international and regional refugee law) maintains and supports the public/private dichotomy, it will continue to silence the voices of a majority of women.

#### *2 4 5 The silence regarding gender under the current refugee law framework*

As Charlesworth argues, the silence of international law is as important as its positive rules and rhetorical structures. As Charlesworth states, "permeating all stages of the excavation of international law is the silence of women".<sup>321</sup> This silence is still an "integral part of the structure of the international legal order, a critical element of its stability", as is evident in the discussion about the formation and structure of the refugee conventions in sub-chapters 2 2 and 2 3.<sup>322</sup> According to O'Hare, it is the 'male hegemony' over public life and public institutions that silence women's voices.<sup>323</sup>

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<sup>316</sup> 629.

<sup>317</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 613.

<sup>318</sup> Edwards *Violence against Women under International Human Rights Law* 68.

<sup>319</sup> H. Charlesworth, "What are Women's Human Rights" in R. Cook (ed.) *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 72.

<sup>320</sup> Charlesworth (1993) *Studies in Transnational Legal Policy* 7.

<sup>321</sup> Charlesworth (1999) *American Journal of International Law* 381.

<sup>322</sup> 381.

<sup>323</sup> O'Hare (1999) *Human Rights Quarterly* 367.

Edwards argues that the exclusion of women from any meaningful involvement with the drafting, implementing or enforcing of human rights norms (as in the case of the 1951 and 1969 Conventions) has led to the creation of a legal system that disregards the “rights, interests, concerns, needs and desires of women”.<sup>324</sup> Furthermore, according to MacKinnon, “no woman has had a voice in the design of the legal institutions that rule the social order under which women as well as men live.”<sup>325</sup> Additionally, as Kaufman and Lindquist argue, even in the rare situations where women are engaged in meaningful participation, they are often socially conditioned to accept the “male elite’s norms and interests as their own”, which results in women’s lives being treated from a male-centred perspective.<sup>326</sup>

One of the revealing signs of the inherent masculinity of the international legal system is the language and imagery of the law that highlight its maleness.<sup>327</sup> The unrelenting use of gendered language in international documents reinforces the exclusion of women.<sup>328</sup> As Edwards observes, the constant utilisation of masculine language operates to omit women in both direct and subtle ways.<sup>329</sup>

As an example, despite appearing to be gender-neutral on the surface, the language used in the 1951 Convention has been criticised for being gender-bias.<sup>330</sup> The 1951 Convention, as well as various other international treaties, omits women from its text by using only the male pronoun in reference to a refugee.<sup>331</sup> The exclusive use of the male pronoun creates a situation where “a man is sure that he is included; a woman is uncertain”.<sup>332</sup>

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<sup>324</sup> Edwards *Violence against Women under International Human Rights Law* 44.

<sup>325</sup> C. MacKinnon, “Reflections on Sex Equality Under Law” (1991) 100 *Yale Law Journal* 1281.

<sup>326</sup> N. Kaufman and S. Lindquist, “Critiquing gender-neutral treaty language: The convention on the elimination of all forms of discrimination against women” in J. Peters and A. Wolper (eds.) *Women’s Right, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) 116.

<sup>327</sup> Charlesworth (2002) *Temple International & Comparative Law Journal* 96.

<sup>328</sup> Schmiechen (2003) *Saint Louis University Public Law Review* 484.

<sup>329</sup> Edwards *Violence against Women under International Human Rights Law* 61.

<sup>330</sup> V. Foote, “Refugee Women as a Particular Social Group: A Reconsideration” (1994) 14(7) *Refuge* 8.

<sup>331</sup> Schmiechen (2003) *Saint Louis University Public Law Review* 494.

<sup>332</sup> H. Holmes, “A Feminist Analysis of the Universal Declaration of Human Rights” in C. Gould, *Beyond Domination: New Perspectives on Women and Philosophy* (Totowa: Rowman & Allanheld, 1984) 259.

Furthermore, with the exception of Article 24 governing refugees and labour issues, women's specific situation is omitted from the 1951 Convention.<sup>333</sup> Similarly, the 1969 Convention is silent on refugee women.<sup>334</sup> Overall, international and regional refugee law, amongst many other international human rights law instruments, focuses on the protection of 'family' as the "natural and fundamental group unit of society".<sup>335</sup> This formulation is often used by states as an excuse to "protect the family and ignore discriminatory and degrading actions, such as domestic violence, that hurt women".<sup>336</sup>

The seeming gender neutrality of the 1951 Convention hides "an understanding of persecution, and the grounds upon which it is legally based that has been formulated by a distinctly male conception of what constitutes a fear of persecution".<sup>337</sup> This stance is supported by Kelly, according to whom international refugee law has "developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women".<sup>338</sup>

The international refugee framework is inherently one-sided with "its substance and its practical application neglect[ing] the specific experiences of women refugees."<sup>339</sup> As a result, the current framework continues to maintain the underlying gender biases.<sup>340</sup> According to Kim, the classifications and guidelines establishing the law were formulated by men with men in mind.<sup>341</sup>

The traditional view of the refugee as male, in combination with the narrow and rigid interpretations of what constitutes persecution, "has had the effect of denying women their right to international protection".<sup>342</sup> Nevertheless, the international community has been reluctant to accept that the current refugee law regime is fundamentally gender-biased. According to Valji, "the blanket faith in the inherent justice of law to determine neutral

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<sup>333</sup> 259.

<sup>334</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 375.

<sup>335</sup> Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* 49.

<sup>336</sup> Schmiechen (2003) *Saint Louis University Public Law Review* 484.

<sup>337</sup> Foote (1994) *Refugee* 8.

<sup>338</sup> Kelly (1993) *Cornell International Law Journal* 637, 674.

<sup>339</sup> Harvey (1998) *Journal of Civil Liberties* 160.

<sup>340</sup> A. Johnsson, "The International Protection of Women Refugees – A Summary of Principal Problems" (1989) 1(2) *International Journal of Refugee Law* 221.

<sup>341</sup> Kim (1994) *Journal of Gender and the Law* 112.

<sup>342</sup> Valji, de la Hunt and Moffet (2003) *Agenda* 62.

outcomes has been the largest obstacle to the acknowledgement of [international refugee law's] exclusionary effect on women".<sup>343</sup>

Furthermore, the situation of female asylum seekers is degenerated by the general 'silencing' of refugees and the causes of their flight by history. As Marfleet argues, recently "policy agendas have focused more and more upon management of migration: upon regulating, containment and exclusion. Border issues, including those requiring historical analysis, have rarely been a consideration".<sup>344</sup> The situation has been made worse by the "dominance of national frames of reference and a general reluctance to consider the circumstances of outsider and Others".<sup>345</sup> This has been particularly true with regard to victims of gender-related persecution.

Yet, in order to change the discriminatory nature of the current refugee law regime, simply "adding women [to the current categories of the refugee definition] and mixing" is insufficient, as that would only "obscure the fact that the [international refugee framework] is gendered in itself".<sup>346</sup> As Charlesworth argues:

"The utter failure of the 'liberal' international legal system in responding to the global phenomenon of oppression of women should (...) make us question its foundations. Patriarchy is not a temporary imperfection in an otherwise adequate system; it is part of the structure of the system and is constantly reinforced by it."<sup>347</sup>

## 2 5 Conclusion

The specific events of post-WWII Europe and the contemporaneous Cold War had a deep impact on the drafting process of the 1951 Refugee Convention. The drafters focused especially on the plight of the millions of principally male refugees following the events of WWII and the Holocaust, as well as on the continuing political conflict between the Eastern and Western blocs. As a

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<sup>343</sup> Valji (2001) *Refugee* 26.

<sup>344</sup> P. Marfleet, "Refugees and History: Why We Must Address the Past" (2007) 26(2) *Refugee Survey Quarterly* 138.

<sup>345</sup> 139.

<sup>346</sup> Charlesworth (1993) *Studies in Transnational Legal Policy* 7.

<sup>347</sup> 7.



consequence, the definition of a 'refugee' that emerged at the end of the drafting process is heavily based on the male experience of persecution and places a disproportionate weight on the protection of civil and political rights. This narrow definition poses a particular challenge to women asylum-seekers, whose experiences of persecution often fall outside of the current definition and who are consequently denied any protection awarded by the international refugee regime.

Additionally, the refugee law framework's heavy focus on safeguarding the receiving states' sovereignty has caused severe problems for women asylum-seekers. The Western states have become increasingly protectionist since the collapse of communism and have begun to view refugee procedures as a 'loophole' in immigration control procedures. This approach can increasingly also be located in other parts of the world.

One of the reasons behind the international refugee law's discriminatory nature against women is its disregard of refugee women's experiences, which have been rendered invisible since the very drafting process of the 1951 Convention. During the travaux préparatoires, drafters of the 1951 Convention did not deliberately omit gender-related persecution from the Convention's jurisdiction but did not consider gender to be important enough to be deliberated during the drafting process. The drafters failed to recognise gender as a cause of persecution and ultimately created a framework that offers no real protection to victims of gender-related persecution.

Furthermore, the lack of international instruments safeguarding women's rights at the time of drafting the 1951 Convention had a detrimental effect on the protection of refugee women. However, despite certain developments having taken place in the interpretation of international refugee law since the emergence of women's rights instruments, international refugee law still stands in stark contrast to the rest of the international human rights framework protecting women. The gap between the protection offered by the international refugee law and other human rights law regimes is especially disquieting, because refugee law is often the final option to escape serious human rights violations and only takes effect when all other methods to protect human rights have failed.

The main cause of international law's failure to protect refugee women is its biased and inherently patriarchal nature. Regardless of unprecedented changes in the causes of refugee flows, the regime itself has remained stagnant and has consequently become obsolete. Owing to the out-dated and Eurocentric definition of refugees and persecution, the definition is inadequate and incapable of providing protection to modern-day refugee women. Refugee regime's narrow and restrictive interpretation of grounds of persecution continues to leave thousands outside or beyond protection. Furthermore, despite seeming gender-neutral, the refugee law framework is constructed in a manner that prioritises the male experience of persecution and provides protection from it.

## Chapter 3

### The construction of 'persecution' under the current refugee law framework

#### 3 1 Introduction

Women are targeted with numerous forms of violence linked to their gender, including domestic violence, marital rape, rape during armed conflicts and human trafficking. Women are also subjected to diverse cultural practices due to their gender such as female genital mutilation (FGM), forced sterilisation, forced marriages and honour killings. A further interrelated category of gender-related violence takes the form of violent repercussions for breaking heavily biased social/religious mores and discriminatory customary and/or statutory laws. It is against this backdrop that women's asylum claims based on gender-related persecution take place.

Despite its brutality and prevalence, gender-related violence clearly amounting to persecution is often not recognised as such by domestic courts adjudicating asylum claims by women subjected to such oppression. This has serious consequences for women seeking asylum, as the concept of persecution is essential to the refugee definition under international law and therefore is directly linked to the affordance of protection and a right to non-refoulement.

The lack of a universal definition of what 'persecution' entails in combination with the construction of the existing refugee definition, as discussed in chapter 2, have led to the exclusion of millions of women from the protection that the current refugee law framework profess to offer.<sup>348</sup> As Freedman argues, the diverse definitions of persecution in different jurisdictions have resulted in the strengthening of "gendered inequalities already existing in various countries by failing to acknowledge breaches of women's rights and resulting persecutions".<sup>349</sup> Overall, many states continue

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<sup>348</sup> Macklin (1995) *Human Rights Quarterly* 218.

<sup>349</sup> Freedman *Gendering the International Asylum and Refugee Debate* 75.

to resist the recognition of certain forms of gender-related persecution as sufficient to fulfil the criteria set out in the refugee definition. According to Parekh, this continuing bias is the result of an absence of an appropriate framework under which gender-related persecution can be assessed.<sup>350</sup> In many cases asylum adjudicators fail to treat gender-related persecution with the seriousness it deserves and deem it a private or apolitical matter falling outside the scope of international and domestic refugee law. Alternatively, courts consider gender-related persecution as either something 'natural' resulting from women's 'vulnerability' or a 'cultural' or 'traditional' practice not to be interfered with.<sup>351</sup>

Freedman defines gender-related persecution as "persecution which is done to women because they are women, but also persecution which is carried out for other reasons, but takes a particular form because the victim is a woman".<sup>352</sup> Freedman's definition widens the scope to include cultural practices such as FGM. In contrast the dominant view, as I further present in this chapter through the relevant case law, is that in order for violence to constitute persecution, it has to contain two elements: Firstly, the violence experienced by the asylum-seeker has to be serious enough to amount to 'persecution', and secondly, the claimant's state of origin has to have been unable or unwilling to offer protection to the claimant, as further discussed in chapter 4.<sup>353</sup>

In this chapter, I examine whether the current interpretation of what 'persecution' constitutes can encompass the unique persecution that women face because of their gender. I specifically analyse the gender-bias construction of 'persecution' as referred to in Article 1(A)(2) of the 1951 Convention. The gender bias in the definition of 'persecution' is examined through an analysis of the dominant understanding of what 'persecution' entails which, I argue under sub-chapter 3 2 4, is based mostly on male experiences. I furthermore examine in sub-chapter 3 2 2 the ill-defined nature

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<sup>350</sup> S. Parekh, "Does ordinary injustice make extraordinary injustice possible? Gender, structural injustice, and the ethics of refugee determination" (2012) 8(2-3) *Journal of Global Ethics* 269.

<sup>351</sup> *Crawley Refugees and Gender: Law and Process* 183.

<sup>352</sup> Freedman *Gendering the International Asylum and Refugee Debate* 47.

<sup>353</sup> Macklin (1995) *Human Rights Quarterly* 213. See also Valji, de la Hunt and Moffet (2003) *Agenda* 64.

of ‘persecution’ as a concept under international refugee law, and whether it has had a part to play in the rejection of a large number of gender-related persecution cases by domestic courts. Relatedly, I argue that the courts’ failure to recognise gender-related persecution is in part caused by the normalisation of violence against women that results from the existing universal structural violence against women. Similarly, in sub-chapter 3.4.3, I examine the gender bias caused by the primacy that the current international refugee law framework accords to protection from civil and political persecution. I depart from the assumption that gender-related persecution is part of a larger pattern of structural violence against women, caused by imbalanced and gendered power relations.<sup>354</sup> In sub-chapter 3.4.4 I examine the restrictive standpoints that domestic courts have taken towards various forms of gender-related persecution, including FGM, rape and sexual violence, domestic violence and so-called ‘honour crimes’. In sub-chapter 3.4.5 I also examine persecution taking the form of severe gender discrimination. Additionally, I reflect on a number of issues related to the link between gender-based violence and persecution. This discussion is essential to the analysis in chapter 4 about the states’ responsibility for violent and discriminatory behaviour of non-state actors and the androcentric approach to asylum policy.

This chapter mainly examines asylum jurisprudence and case law from the United States, Canada, the United Kingdom, Australia, France and Israel.<sup>355</sup> As discussed in the introduction the selection of these jurisdictions was influenced by their developed asylum jurisprudence, their approaches to the refugee definition in Article 1A(2) of the 1951 Refugee Convention and the availability of both primary and secondary sources.

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<sup>354</sup> Freedman *Gendering the International Asylum and Refugee Debate* 46.

<sup>355</sup> According to the 2011 UNHCR Statistical Yearbook, Western countries received one-fifth of the world’s asylum-seekers UNHCR Statistical Yearbook 2011 (UNHCR, June 2011) <<http://www.unhcr.org/516285b89.html>> accessed 31 May 2013.

In 2011, the United States of America remained the largest single Western recipient of new asylum claims for the sixth year in a row (74 000), followed by France (51 900), Germany (45 700), Sweden (29 600), Belgium (26 000), the United Kingdom (25 400) and Canada (25 300). In 2011, Australia and New Zealand received 11 800 new asylum claims. Between 2007 and 2011, the United States of America received the largest number of new asylum claims (278 800), followed by France (206 900), Germany (156 000 claims) and Canada (147 000). UNHCR, “Asylum Levels and Trends in Industrialized Countries - Statistical overview of asylum applications lodged in Europe and selected non-European countries” (UNHCR 2011) <<http://www.unhcr.org/4e9beaa19.html>> accessed 9 June 2013.

## 3 2 Construction of persecution under international refugee law

### 3 2 1 Lack of a non-discrimination clause in the 1951 Convention

One of the main failures of the international refugee regime has been the lack of a non-discrimination clause, including sex and gender, as a basic requirement of any international legal instrument. The requirement of non-discrimination vis-à-vis the protection of human rights has been repeated and reinforced by various international human rights instruments, including the UN Charter,<sup>356</sup> UDHR,<sup>357</sup> ICCPR,<sup>358</sup> ICESCR<sup>359</sup> and very importantly, CEDAW.<sup>360</sup>

Even though these instruments recognise and aim to enforce non-discrimination based on sex/gender, they have not been “interpreted and enforced in a manner consistent with the vigorous protection of women that they mandate”.<sup>361</sup> This is specifically reflected in international refugee law, which continues to fail to “target explicitly the more heinous sex-based persecution”.<sup>362</sup> According to Parekh, rather than being gender-neutral, the current refugee definition embedded in the 1951 Convention stresses the forms of persecution “suffered by men and virtually ignore[s] forms of oppression (...) specific to women”.<sup>363</sup> Overall, notwithstanding certain developments with regard to gender-related persecution,<sup>364</sup> the current situation of refugee women is worse than ever before.<sup>365</sup> Ultimately, the narrow construction of the 1951 Convention of what ‘persecution’ entails remains one of the main problems of the current refugee law regime and makes it applicable only to a very limited group of asylum-seekers. As Goodwin-Gill states:

<sup>356</sup> Article 1(3), 1 UNTS XVI, entered into force 24 October 1945.

<sup>357</sup> Article 2, G.A. Res. U.N. Doc A/810 at 71 (1948).

<sup>358</sup> Article 3, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

<sup>359</sup> Article 3, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

<sup>360</sup> Articles 1 and 2, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

<sup>361</sup> Neal (1988) *Columbia Human Rights Law Review* 223.

<sup>362</sup> 206.

<sup>363</sup> Parekh (2012) *Journal of Global Ethics* 271.

<sup>364</sup> Including UNHCR publishing its first gender policy in 1989 and later identifying “refugee women” as a policy priority in 1990’s.

<sup>365</sup> E. Bains, *Vulnerable bodies: Gender, the UN and the global refugee crisis* (Hants: Ashgate, 2004) 1.

“The 1951 Convention may offer basic protection, but it must now be complemented and in due course replaced by an instrument appropriate to present and future needs. 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”.<sup>366</sup>

As discussed in chapter 1, the roots of the refugee law regimes’ failure to specifically acknowledge gender-related persecution can be found in the events surrounding the drafting of the 1951 Convention as well as in the attitudes of the drafters. The situation has changed to some extent, however. As Marouf argues, the overall understanding of persecution has evolved to include certain kinds of gender-related violence, “such as rape, female genital mutilation (FGM), and domestic violence”.<sup>367</sup> This is evidenced in the gender guidelines issued by the UNHCR, including the 1991 Guidelines on the protection of refugee women (1991 Guidelines on Protection),<sup>368</sup> the Guidelines on prevention and response sexual violence against refugees in 1995<sup>369</sup> and again in 2003,<sup>370</sup> the 2002 Guidelines on international protection from gender-related persecution<sup>371</sup> and the 2008 UNHCR Handbook for the Protection of Women and Girls.<sup>372</sup> These guidelines have been supplemented by the introduction of national gender guidelines in various states.<sup>373</sup> In

<sup>366</sup> Goodwin-Gill (1995) *International Journal of Refugee Law* 8.

<sup>367</sup> F. Marouf, “The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm” (2011) 22 *Columbia Journal of Gender and Law* 81, 83.

<sup>368</sup> UNHCR, “Guidelines on the Protection of Refugee Women” (July, 1991) U.N. Doc. ES/SCP/67.

<sup>369</sup> UNHCR, “Sexual Violence against Refugees - Guidelines on Prevention and Response” (UNHCR, 1995) <<http://www.unhcr.org/refworld/pdfid/3ae6b33e0.pdf>> accessed 12 April 2013.

<sup>370</sup> UNHCR, “Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response” (UNHCR, May 2003) <<http://www.unhcr.org/refworld/docid/3edcd0661.html>> accessed 15 April 2013.

<sup>371</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01.

<sup>372</sup> UNHCR “Handbook for the Protection of Women and Girls” (UNHCR, January 2008) <<http://www.unhcr.org/refworld/docid/47cfc2962.html>> accessed 15 April 2013.

<sup>373</sup> These include the Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution of 1993 (the Guidelines have since been updated in 1996 and in 2003),

domestic guidelines, certain forms of gender-related persecution are expressly recognised. Hence the guidelines are an important policy mechanism to guarantee that the gender-related and gender-specific aspects of asylum claims are properly assessed and taken into account in procedures for refugee status determination.<sup>374</sup> Gender guidelines will be further discussed in sub-chapter 6 2.

However, the crux of the matter is that these developments are very seldom reflected in judicial practice, as national courts often continue to view gender-specific forms of harm through a male-centred lens.<sup>375</sup> Furthermore, there has not been a uniform incorporation of UNHCR's gender guidelines into domestic policies.<sup>376</sup> Where this has been done, the application of the gender guidelines has been inconsistent and arbitrary and led to unfair results with regard to the recognition of gender-specific persecution.<sup>377</sup> As Freedman observes, only a small number of states have "officially integrated such directives into their legislation on asylum, and even where the directives have been transposed into national policies and legislations, they are not always adhered to in the asylum decision-making process".<sup>378</sup> This point is further analysed in chapter 6.

Overall, notwithstanding a change in the approach towards persecution and violence faced by women and the existence of various UN and national gender guidelines, gender-related persecution continues to be regarded as less serious than the more traditional forms of persecution.<sup>379</sup> Ultimately, despite having an advisory role, the UNHCR has no control over the

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the United States Immigration and Nationality Service's Memorandum on Considerations for Asylum Officers Adjudicating Asylum Claims From Women of 1995, the Australian Guidelines on Gender Issues for Decision-Makers of 1996, the Norwegian Guidelines for claims based on gender-based persecution of 1998, the South African Gender Guidelines for Asylum Determination of 1999 (originally drafted by the National Consortium on Refugee Affairs), the Swedish Migration Board's *Guidelines for Investigation and Evaluation of the Needs of Women for Protection* of 2001, and the United Kingdom Immigration Appellate Authority's Asylum Gender Guidelines of 2000 and the Home Office's Asylum Policy Instructions of 2004 and 2006.

<sup>374</sup> Crawley and Lester "Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe" *UNHCR Evaluation and Policy Analysis Unit* para. 81

<sup>375</sup> Marouf (2011) *Columbia Journal of Gender and Law* 83.

<sup>376</sup> Freedman *Gendering the International Asylum and Refugee Debate* 90.

<sup>377</sup> Parekh (2012) *Journal of Global Ethics* 271.

<sup>378</sup> Freedman *Gendering the International Asylum and Refugee Debate* 93.

<sup>379</sup> Parekh (2012) *Journal of Global Ethics* 270.



implementation of its guidelines, or the lack of such action, in the states' domestic jurisdictions.<sup>380</sup>

### *3 2 2 Lack of coherent definition of 'persecution' and the effect on gender-based asylum claims*

The undefined nature of 'persecution' allows a "case-by-case determination of whether the given conduct constitutes a persecutory act".<sup>381</sup> Consequently, states have been left with a wide margin of appreciation concerning the interpretation of what constitutes 'persecution'. According to Luopajarvi, this has led to a muddled and inconsistent state practice.<sup>382</sup> Furthermore, as Marouf argues, what is required for violence to amount to persecution, under the current refugee law framework, is decided on a case-by-case basis, without reference to any objective norms or standards, which consequently results in considerable discrepancies between the higher-level domestic courts and "striking inconsistencies at lower levels of adjudication".<sup>383</sup>

As Haines states, in order to amount to persecution, 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".<sup>384</sup> With regard to the level of seriousness of the violence required to constitute persecution, Marouf has argued that the act has to be "more than mere harassment or discrimination" but does not, however, need to amount to torture or life-threatening violence.<sup>385</sup> Overall, asylum adjudicators have often interpreted 'persecution' as linked to serious human rights violations.<sup>386</sup> This has also been the stance of the UNHCR, which has given some guidance on the issue. According to paragraph 51 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook on Procedures), "a threat to life or freedom on account of race, religion, nationality, political opinion or

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<sup>380</sup> Freedman *Gendering the International Asylum and Refugee Debate* 76.

<sup>381</sup> Crawley *Refugees and Gender: Law and Process* 37.

<sup>382</sup> K. Luopajarvi, "Gender-related Persecution as Basis for Refugee Status: Comparative Perspectives" (Åbo Akademi University, Institute for Human Rights, Research Report No 19, 2003) <<http://www.abo.fi/media/24259/report19.pdf>> accessed 15 April 2013.

<sup>383</sup> Marouf (2011) *Columbia Journal of Gender and Law* 82-3.

<sup>384</sup> Haines "Gender-related persecution" *UNHCR* 327.

<sup>385</sup> Marouf (2011) *Columbia Journal of Gender and Law* 91.

<sup>386</sup> T. Spijkerboer, *Gender and Refugee Status* (Hants: Ashgate, 2000) 108-9.

membership of a particular social group is always persecution".<sup>387</sup> Furthermore, "other serious violations of human rights – for the same reasons – would also constitute persecution".<sup>388</sup> The human rights approach is supported by Hathaway, who has defined persecution within the human rights paradigm as "the sustained or systematic violation of basic human rights demonstrative of a failure of State protection".<sup>389</sup> The application of this approach under the international refugee framework is further discussed in chapter 4.

In some situations, the utilisation of the human rights standard to define 'persecution' can be beneficial to women seeking asylum from gender-related persecution. This is especially true in situations where the country of origin has acceded to human rights instruments specifically prohibiting gender-based violence and is therefore committed to the implementation of the standards.<sup>390</sup> Yet, there are some concerns that international human rights law itself is not free of gender bias, despite the numerous non-discrimination clauses included in these instruments, as discussed above under chapter 2. As Charlesworth et al. argue, "[t]he normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined".<sup>391</sup> Furthermore, as Edwards observes, there is a gulf between the aim of international law of being a non-discriminatory and an objective regime applicable to all and the marginalisation of women from its domain caused by the regime's inbuilt public/private dichotomy.<sup>392</sup> Moreover, it has been argued that not all human rights instruments are considered 'equal'. Some international human rights instruments are accorded a lower priority

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<sup>387</sup> UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" para. 51 (1992), U.N. Doc. HCR/IP/4/Eng/REV.1.

<sup>388</sup> Para 51.

<sup>389</sup> Hathaway *The Law of Refugee Status* 104-105.

<sup>390</sup> P. Goldberg and B. Cissé, "Gender Issues in Asylum Law after *Matter of R-A*" (February 2000) Immigration Briefings No. 002, 7.

<sup>391</sup> Charlesworth, Chinkin and Wright (1991) *American Journal of International Law* 265.

<sup>392</sup> A. Edwards, "Age and gender dimensions in international refugee law" in E. Feller, V. Türk, and F. Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 48.

than others.<sup>393</sup> This is especially true of the main human rights instrument concerned with the protection of women's right the CEDAW.<sup>394</sup>

Consequently, it is questionable whether basing the definition of 'persecution' on the human rights standard would be the optimal solution to gender-related persecution. The fundamental problem is that ultimately "the yardstick that has been developed for defining and measuring human rights has been based on the male as the norm".<sup>395</sup> As a result, the current definition of 'persecution' under the human rights standard has led to a situation where the courts have more willingly accepted the so-called 'derivative persecution' of women, based on their family relations, than direct persecution of the asylum-seeking woman, in which case she has to fit her claim under the current criteria of the five persecution grounds.<sup>396</sup> Overall, the lack of an objective standard of 'persecution' has had adverse effects on refugee women, and it is "highly problematic in terms of objective assessment of individual refugee women's claims for asylum".<sup>397</sup> As Foster argues:

"[t]he risk of subjectivity is particularly acute in cases involving gender-related persecution, where decision-makers in many jurisdictions have shown a greater propensity to dismiss claims based on the view that discrimination against women is justified by culture, religion or social norms".<sup>398</sup>

### 3 2 2 *Non-physical harm as persecution*

Another significant issue concerning women's asylum claims is the recognition of non-physical harm as persecution. With regard to the assessment of non-physical harm as a form of persecution, there is a complete lack of guidelines, and the overall situation is unclear.<sup>399</sup> For

<sup>393</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 357.

<sup>394</sup> 357.

<sup>395</sup> R. Eisler, "Human Rights: Toward an Integrated Theory for Action" (1987) 9 *Human Rights Quarterly* 287, 297.

<sup>396</sup> Spijkerboer *Gender and Refugee Status* as cited by Edwards *Violence against Women under International Human Rights Law* 49.

<sup>397</sup> *Crawley Refugees and Gender: Law and Process* 37.

<sup>398</sup> M. Foster, *International Refugee Law and Socioeconomic Rights* (Cambridge: Cambridge University Press, 2007) 38-39.

<sup>399</sup> Marouf (2011) *Columbia Journal of Gender and Law* 93.

example, US courts have reached conflicting conclusions: The Ninth Circuit has stated that “persecution may be psychological or emotional, as well as physical”,<sup>400</sup> while according to the Fourth Circuit ‘persecution’ cannot be based on fear of psychological harm alone.<sup>401</sup> As Marouf observes, the difficulty of objectively assessing whether or not non-physical harm amounts to persecution has resulted in a situation where courts have been inclined to shy away from such assessments by merely disregarding the existence of non-physical harm in asylum claim cases.<sup>402</sup>

Such conduct, however, can have serious consequences on women’s asylum claims, as the cumulative effect of non-physical harm is often a strong element of gender-related persecution. This is the case, for example, with gender-related persecution claims linked to sexual violence such as rape and forced sterilisation. In general, the consequences of sexual violence are deeply traumatic, and they are even further intensified in cases where the patriarchal construction of women’s position places the blame on the victim.<sup>403</sup>

Moreover, in certain cases the non-physical harm related to sexual violence can lead to further physical harm. This is true, for example, in cases where the sexually violated woman is considered to bring ‘shame’ on herself, her family and her community and is consequently rejected or, in more extreme cases, murdered by the family in order to restore ‘honour’.<sup>404</sup> Ultimately, the lack of a clear definition of both physical and non-physical persecution has resulted in a ‘creeping standard’.<sup>405</sup>

### 3 2 3 *The primacy accorded to the protection of civil and political rights*

As Hathaway argues, according to the current dominant view of international refugee law, the latter:

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<sup>400</sup> *Mashiri v Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004).

<sup>401</sup> *Niang v Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007).

<sup>402</sup> Marouf (2011) *Columbia Journal of Gender and Law* 95.

<sup>403</sup> Freedman *Gendering the International Asylum and Refugee Debate* 63.

<sup>404</sup> 63.

<sup>405</sup> Marouf (2011) *Columbia Journal of Gender and Law* 96.

“[O]ught to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard [for persecution]”.<sup>406</sup>

The first part of Hathaway’s argument is widely accepted. However, the second part, and especially Hathaway’s definition of the ‘core human rights’, which he links to the division between derogable and non-derogable human rights, has faced sharp criticism.<sup>407</sup> According to Hathaway’s definition, civil and political rights are the ‘core rights’ and therefore non-derogable.<sup>408</sup> Hathaway’s definition creates a hierarchy of rights in which economic, social and cultural rights are less significant, and consequently their protection is less absolute than the protection of civil and political rights.<sup>409</sup>

However, despite the 1993 Vienna Declaration, Hathaway’s definition closely corresponds to the reality of the current refugee law framework; the strong, inbuilt focus on the primarily male experience of persecution, namely the violation of civil and political rights in the public sphere, has exacerbated the obstacles faced by gender-related persecution claims. This domination is not only limited to legal instruments. As Oloka-Onyango argues, the bias of the narrow understanding of human rights, which only includes civil and political rights and the “artificial and unsustainable demarcation between the public and the private spheres of human existence”, has been “carried over into the work of the UNHCR and finds manifestation in the Handbook on Procedures”.<sup>410</sup>

According to Oloka-Onyango, the distinction made between civil and political rights and other human rights in the 1951 Convention was not an accident but rather “conforms to both the sexist and ethnocentric perceptions that prevail in the formulation of international human rights law”.<sup>411</sup> Charlesworth and Chinkin, in support of this analysis, argue that the

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<sup>406</sup> Hathaway *Law of Refugee Status* 108.

<sup>407</sup> E. Krivenko, “Muslim Women’s Claims to Refugee Status within the Context of Child Custody Upon Divorce Under Islamic Law” (2010) 22 *International Journal of Refugee Law* 48, 67.

<sup>408</sup> Hathaway *Law of Refugee Status* 109.

<sup>409</sup> 111. See also Haines “Gender-related persecution” *UNHCR* 328-9.

<sup>410</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 362.

<sup>411</sup> 362.

importance given to civil and political rights has not been “generally accorded to economic and social rights which affect life in the private sphere, the world of women”.<sup>412</sup>

However, it is important not to undermine the significance of the protection of civil and political rights but to recognise that they are important to women and acknowledge that “much of the abuse against women is part of a larger socioeconomic web that entraps women, making them vulnerable to abuses which cannot be delineated as exclusively political or solely caused by states”.<sup>413</sup> Ultimately, however, the narrow view of only civil and political rights as the ‘core rights’ to be protected can cause serious problems for women’s asylum claims, as Krivenko explains:

“This classification creates in the minds of decision makers a hierarchy of rights and values attached to them, reinforcing the much criticized public/private distinction in human rights law. It also creates an impression that civil and political rights are more important to the protection to the core of human dignity than economic and social rights. This, in turn, places an additional burden on many non-traditional claimants, including women”.<sup>414</sup>

### *3 2 4 The definition of persecution through the male experience*

In practice, the construction of what ‘persecution’ entails heavily reflects the male experience of persecution. Persecution, just like human rights in general, is ultimately defined according to “what men fear will happen to them, those harms against which they seek guarantees”.<sup>415</sup> Women’s experiences, on the contrary, have been mostly disregarded. In its 2002 Guidelines on Gender-Related Persecution, the UNHCR recognised as much. Paragraph 5 of its Guidelines acknowledges that “historically, the refugee definition has

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<sup>412</sup> H. Charlesworth and C. Chinkin, “The Gender of Jus Cogens” (1993) 15(1) *Human Rights Quarterly* 63, 69.

<sup>413</sup> Bunch (1990) *Human Rights Quarterly* 488.

<sup>414</sup> Krivenko (2010) *International Journal of Refugee Law* 67.

<sup>415</sup> Charlesworth and Chinkin (1993) *Human Rights Quarterly* 70.

been interpreted through a framework of male experiences, which has meant that many claims of women (...) have gone unrecognised".<sup>416</sup>

Strongly linked to the masculine definition of persecution is the artificial dichotomy between 'public' and 'private' acts that is used to determine which type of violence falls under the purview of the international refugee law regime. Under the current construction of international refugee law, only 'public' persecution falls under the jurisdiction of the refugee law framework, while 'private' persecution does not.

However, rather than debating whether international refugee law should protect victims from both private and public acts of persecution, the real issue is connected to priorities.<sup>417</sup> As Eisler states:

"[T]he issue is whether violations of human rights within the family such as genital mutilation, wife beating, and other forms of violence designed to maintain patriarchal control should be within the purview of human rights theory and action, particularly in social systems where women have traditionally been confined to the private or familial sphere".<sup>418</sup>

The answer to this question is negative under the current framework of international refugee law. This is evident from the case law, which shows the adjudicators' reluctance to deal with 'private' persecution cases, especially those connected to female sexuality and reproduction, while they concentrate on the type of violence and harm feared by men.<sup>419</sup> Ultimately, in order to respond to the universal epidemic of the brutal and systematic violation of women, the international refugee law framework must evolve to include express protection from persecution related to gender and move beyond its male-defined norms.<sup>420</sup>

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<sup>416</sup> UNHCR, "Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01 para. 5.

<sup>417</sup> Eisler (1987) *Human Rights Quarterly* 297.

<sup>418</sup> 297.

<sup>419</sup> Marouf (2011) *Columbia Journal of Gender and Law* 171.

<sup>420</sup> Bunch (1990) *Human Rights Quarterly* 492.

On the whole, the lack of express recognition of gender-related persecution as such trivialises its importance and evidences that it is taken less seriously than other forms of persecution based on the existing convention grounds.<sup>421</sup> As Freedman argues, the lack of express recognition of gender-related persecution “adds to the process of ‘invisibilisation’ of victims of gender-related persecution”.<sup>422</sup> Ultimately, despite developments in the recognition of gender-related persecution brought about by the introduction of the UNHCR and national gender guidelines, international refugee law is still “a long way from an adequate recognition of the specificity of women’s experiences of persecution”.<sup>423</sup>

### 3 3 Persecution unique to gender

The lack of supportive objective evidence of gender-related persecution in the country of origin further exacerbates the resistance to recognise gender-related persecution.<sup>424</sup> Overall, information relating to women’s status and discriminatory social mores is often elusive and not available.<sup>425</sup> Consequently, courts usually fail to pay attention to the cultural and social context of gender based harm as well as to “the nature of patriarchal societies and the values that facilitate or condone violence against women”.<sup>426</sup>

Gender-specific persecution can be divided into three sub-categories: persecution committed in a ‘gender-specific manner for reasons unrelated to gender’ (e.g. rape), in a ‘non-gender manner due to gender’ (e.g. honour killings) and in a ‘gender-specific manner due to gender’ (e.g. female genital mutilation).<sup>427</sup> As indicated in the introduction in addition to gender-specific persecution, women are also targeted because of their gender and “suffer

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<sup>421</sup> Freedman *Gendering the International Asylum and Refugee Debate* 75.

<sup>422</sup> 75.

<sup>423</sup> Krivenko (2010) *International Journal of Refugee Law* 49.

<sup>424</sup> B. Collier, “Country of Origin Information and Women: Researching gender and persecution in the context of asylum and human rights claims” 11 (*Asylum Aid*, October 2007) <[http://www.asylumaid.org.uk/data/files/publications/68/Country\\_of\\_Origin\\_Information\\_and\\_Women.pdf](http://www.asylumaid.org.uk/data/files/publications/68/Country_of_Origin_Information_and_Women.pdf)> accessed 18 April 2015.

<sup>425</sup> 11.

<sup>426</sup> 12.

<sup>427</sup> R. Wallace, “Non-State Actors in the Context of Refugee Determination Process, with Particular Reference to the Position of Women” (2007) 32 *South African Yearbook of International Law* 180, 187.



social harms exclusively because they are women”.<sup>428</sup> This type of persecution usually takes the form of discriminatory laws and policies directed uniquely at women.<sup>429</sup> Women are persecuted for their transgression of cultural, religious and social mores in societies where women have a subjugated status.<sup>430</sup>

All of these forms of persecution are difficult to fit under the current refugee framework, as none of the existing grounds for persecution adequately correlates to the claims based on gender-related persecution. The consequence of the refugee law regime’s failure to acknowledge and provide protection from the widespread and specific persecution faced by women is exacerbated by the fact that women refugees are in greater need of protection from sexual assault, abuse and institutionalised discrimination than men.<sup>431</sup> The greater need for protection, however, has not been caused by characteristic gender differences but rather by “pervasive gender discrimination and women’s resulting inferior position in most societies”.<sup>432</sup> Overall, as Wallace argues, due to their position and status in the society, women are in fact exposed to “a wider range of human rights abuses than their male counterparts”.<sup>433</sup> Indeed, it has been universally acknowledged that “whatever violations or abuses men fear in an insecure world, women fear [them] doubly”.<sup>434</sup>

With regard to ‘traditional’ persecution, despite similarities in the circumstances and grounds, women experience it differently from men, as women’s experiences of political persecution clearly illustrate. Even though women experience political persecution, it is often difficult for them to claim political asylum. This is because women are predominantly “encouraged to take roles subordinate to men and to do the more care-related tasks, rather than occupying leadership positions”.<sup>435</sup> Consequently, however, women’s ‘low-level’ political activities are frequently considered to be non-political, and

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<sup>428</sup> 187.

<sup>429</sup> 187.

<sup>430</sup> G. Allwood and K. Wadia, *Refugee women in Britain and France* (Manchester: Manchester University Press, 2010), 16.

<sup>431</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 301.

<sup>432</sup> 301.

<sup>433</sup> Wallace (2007) *South African Yearbook of International Law* 183.

<sup>434</sup> Valji, de la Hunt and Moffet (2003) *Agenda* 65.

<sup>435</sup> Parekh (2012) *Journal of Global Ethics* 277.

for that reason their applications for political asylum are denied.<sup>436</sup> Overall, because of women's structural situation and subordinate status, they experience civil and political persecution, such as racial or religious persecution, differently than men do.<sup>437</sup>

An example of such a situation would be the strict religious rules governing the lives of women in some Muslim countries, such as Saudi Arabia, Pakistan, Iran and northern Nigeria, as will be discussed further in sub-chapter 3 4 4. As Parkeh argues, despite the punishment for breaking these religious rules taking a violent form, it is not considered to be religious persecution.<sup>438</sup> This is because of the normalisation of both discriminatory religious rules and violence against women. According to Parkeh, this is because in "the paradigmatic male model, religious persecution tends to be seen as the inability to practice your religion because of state-sponsored policies – not being forced, under threat of physical punishment, to practice it in a certain way because of your gender".<sup>439</sup> Consequently, even with regard to the 'conventional' civil and political persecution, women are forced to fit their experiences into the dominant male standard of what civil and political persecution entails.

Overall, with regard to any type of persecution, women experience a 'gender multiplied' form of it. What this means is that both social and biological factors cause women to suffer more than their male counterparts would from specific acts of violence, and according to Walker, these factors render women vulnerable to further harms.<sup>440</sup> This was also acknowledged by the ECOSOC in March 2013 at the 57<sup>th</sup> Session of the Commission on the Status of Women (CSW), where the CSW noted that "women and girls who face multiple forms of discrimination are exposed to increased risk of violence".<sup>441</sup> Ultimately, as Walker argues, due to 'gender multiplication', the

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<sup>436</sup> Crawley *Refugees and Gender: Law and Process* 5.

<sup>437</sup> Parekh (2012) *Journal of Global Ethics* 277.

<sup>438</sup> 277.

<sup>439</sup> 277.

<sup>440</sup> M. Walker, "Gender Violence in Focus: A Background for Gender Justice in Reparations" in R. Rubio-Marin (ed.) *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009) 52.

<sup>441</sup> United Nations Economic and Social Council, Commission on the Status of Women, 57<sup>th</sup> Session, "Draft agreed conclusions submitted by the Chair of the Commission, Ms. Marjon V. Kamara (Liberia), on the basis of informal consultations: The elimination and prevention of all

original violation experienced by women is “extended, ramified and augmented in multiple ways that significantly alter the women’s physical safety and well-being, social reintegration and status, economic survival, and eligibility for marriage”.<sup>442</sup>

### 3 4 Defining gender-related persecution

While analysing gender-related persecution, it is important to differentiate gender-related persecution from ‘conventional’ persecution and to state clearly that not all violence, discrimination and harm done to women constitute gender-related persecution “simply because it is done to women”.<sup>443</sup> Rather, gender-related persecution is a different type of persecution, in which the form of the persecution, the motivation behind it or both are gendered.<sup>444</sup>

One of the main problems that victims of gender-related persecution face is that courts, as is exemplified in the case law discussed under 3 4 2, often do not take this type of persecution seriously, nor do they consider it to be ‘real’ persecution. Universal, deep-rooted structural injustice underlies this dismissive attitude and the normalisation and trivialisation of the violence that women face.

According to Parekh’s definition, structural injustice can be understood as “the kind of everyday injustice, harm, and violence that women in all parts of the world experience in various ways”.<sup>445</sup> Furthermore, Young has argued that there is structural injustice:

“[w]hen social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable

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forms of violence against women and girls”, para. 12 (19 March 2013) UN Doc. E/CN.6/2013/L.5

<sup>442</sup> Walker “Gender Violence in Focus: A Background for Gender Justice in Reparations” in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* 53.

<sup>443</sup> Parekh (2012) *Journal of Global Ethics* 272.

<sup>444</sup> Freedman *Gendering the International Asylum and Refugee Debate* 47–9.

<sup>445</sup> Parekh (2012) *Journal of Global Ethics* 274.

others to dominate or have a wide range of opportunities for developing and exercising capacities available to them”.<sup>446</sup>

Yet, structural injustice itself is not persecution but rather forms the context that ultimately “prevents gender-related persecution and human rights violations from being seen as such”.<sup>447</sup> It is because of the underlying structural injustice that violence against women has become normative in most modern societies. As Walker argues, because of structural injustice, “it is both normal and in accordance with established social ‘rules’ that women are both unequal to men and dominated by men socially, economically, and civilly, at least within social levels”.<sup>448</sup> As a consequence of structural injustice, men’s domination over women is usually expected and accepted in various areas of life.<sup>449</sup> According to Walker, male domination is explained and legitimised through social, religious and cultural norms and is represented as “proper, divinely ordained, socially functional, natural, inevitable, innate or biologically determined or predisposed”.<sup>450</sup> The widespread existence of structural violence against women and its impact on the regularity of gender-related persecution has been acknowledged by the CEDAW Committee in the General Recommendation 19 on the Convention on the Elimination of all Forms of Discrimination against Women (General Recommendation 19). According to the CEDAW Committee:

“Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender based violence as a form of protection and control of women”.<sup>451</sup>

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<sup>446</sup> I. Young, *Responsibility for justice* (New York: Oxford University Press, 2011) 52.

<sup>447</sup> 52.

<sup>448</sup> Walker “Gender Violence in Focus: A Background for Gender Justice in Reparations” in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* 25.

<sup>449</sup> 24.

<sup>450</sup> 24.

<sup>451</sup> Committee on the Elimination of Discrimination against Women, “General Recommendation Number 9” Eighth session (UN, 1989)

On the whole, universal structural violence against women is a strong factor in the widespread disregard of gender-related persecution. As Freedman argues, rather than being separate from each other, violence against women and gender-related persecution form part of a more universal continuum of violence against women that is structured by “gendered and racialised relations of power”.<sup>452</sup> Gender-related persecution exists because of these gendered power relations and is not simply “a result of individual acts of violence or ‘private matters’ but part of larger structures and ideologies within which women have unequal shares of political, economic and social power”.<sup>453</sup>

Ultimately, the normative sexism found in most modern societies, as created by the structural injustice against women makes it difficult “for both men and women to ‘see’ violence against women as (...) a gross human rights violation worthy of the term ‘persecution’”.<sup>454</sup> With regard to isolated incidents of violence against women, despite seeming brutal, they do not seem serious enough to amount to persecution. It is only when the violence is perceived “within the framework of ‘everyday’ structural and normative violence and injustice” that the true nature of the violence as gender-related persecution becomes clear.<sup>455</sup>

Additionally, structural violence causes the ‘double victimisation’ of women targeted with gender-related persecution. As Parekh argues, due to the normalisation of violence against them, women are not only harmed by the actual perpetrator of the persecution but further victimised by “the state and society that are supposed to enforce the rules, norms, and law that are meant to protect them”.<sup>456</sup>

According to Crawley and Lester, UNHCR has made limited progress since 1985, when the Executive Committee of the High Commissioner’s Programme first acknowledged that “women asylum seekers who face harsh

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<<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom9>>  
accessed 9 June 2015.

<sup>452</sup> Freedman *Gendering the International Asylum and Refugee Debate* 49.

<sup>453</sup> 49.

<sup>454</sup> Parekh (2012) *Journal of Global Ethics* 278.

<sup>455</sup> 278.

<sup>456</sup> 276.

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 1A(2)”.<sup>457</sup> Despite this acknowledgement, the Executive Committee never gave its full support to the recognition of this form of persecution by stating that it was up to the states’ discretion in the exercise of their sovereignty whether or not to do so.<sup>458</sup> As Oloka-Onyang observes, the Executive Committee’s message was clear: “granting asylum on the basis of sexual persecution is permissive (...) states are under no affirmative obligation to take gender into account in the grant of asylum, even if it may be precisely the issue of one’s womanhood that has caused flight in the first instance”.<sup>459</sup>

In 2002 a further development took place when the UNHCR recognised the advancements made under international law with regard to gender-related persecution. According to paragraph 9 of the UNHCR’s Guidelines on Gender-Related Persecution of 2002, “[i]nternational human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution”.<sup>460</sup> This recognition was important, as the conceptual foundation for the recognition of gender-related persecution was to be found in the international human rights instruments.<sup>461</sup>

Furthermore, in 2002 UNHCR expressly recognised that “[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by

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<sup>457</sup> UNHCR Executive Committee, Conclusion No. 39 (XXXVI), 1985, on refugee women and international protection, para k.

<sup>458</sup> Para. k.

<sup>459</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 369.

<sup>460</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01 para. 9.

<sup>461</sup> Neal (1988) *Columbia Human Rights Law Review* 222.

State or private actors”.<sup>462</sup> The European Council has similarly recognised that ‘acts of persecution’ can take the form of sexual violence.<sup>463</sup>

Regardless of the fact that gender-related persecution takes various forms, there is one common denominator amongst them all: women are discriminated against and abused on the basis of their gender. This is demonstrated in case law, which has recognised a wide range of valid claims, including sexual violence, domestic violence, punishment and discrimination for transgression of social mores, sexual orientation, female genital mutilation and trafficking as forms of persecution.<sup>464</sup> As Macklin argues:

“Gender may explain why a woman was persecuted. Gender may also determine the form that persecution takes. Sometimes, it may even be a risk factor that makes a woman’s fear of persecution more well-founded than that of a man in similar circumstances”.<sup>465</sup>

Yet, it is important to make a distinction between women being persecuted as women and because they are women. Despite one or more of the links between gender and persecution being present simultaneously in a gender-related persecution case, “they are not synonymous (...) [t]he idea of women being persecuted as women is not the same as being persecuted because they are women”.<sup>466</sup> Macklin further explains:

“Understanding the ways in which women are violated as women is critical to naming as persecution things that are done only or mostly to women and not to men. To say that the claimant fears persecution because she is a woman addresses a causal relation between gender and persecution”.<sup>467</sup>

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<sup>462</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01 para. 9.

<sup>463</sup> Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] *OJ L304/12*.

<sup>464</sup> Edwards *Violence against Women under International Human Rights Law* 52.

<sup>465</sup> Macklin (1995) *Human Rights Quarterly* 258.

<sup>466</sup> 259.

<sup>467</sup> 259.

### 3 4 1 FGM

Types of persecution falling under the gender-specific persecution for reasons related to gender-category are gendered in both motive and form. This type of persecution can only be inflicted on women, and it is perpetrated because of the victim's gender, such as in the case of FGM.

FGM has been described as representing “one of the most extreme ways in which women are subordinated by men” and has been labelled as “sufficiently horrifying to make men and women question practices which women endure in the name of culture and tradition”.<sup>468</sup> In 2002 UNHCR expressly recognised FGM as a ‘serious harm’ capable of amounting to persecution in Article 9 of the Guidelines on International Protection from Gender-related Persecution.<sup>469</sup> UNHCR re-iterated this stance in 2009 in paragraph 7 of the Guidance Note on Refugee Claims Relating to Female Genital Mutilation.<sup>470</sup>

Since the beginning of the 1990s, there has been a growing trend towards recognition of fear of FGM as a legitimate ground for persecution. In 1991, following the case of *Mlle Aminata Diop*,<sup>471</sup> France became the first country in the world to recognise that FGM could constitute persecution in situations where a woman is forced to undergo FGM against her will, and the practice is officially approved, encouraged or tolerated.<sup>472</sup> The Commission

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<sup>468</sup> E. Dorkenoo, *Cutting the rose: Female genital mutilation - the practice and its prevention* (London: Minority Rights Publications, 1995) as cited by Collier, “Country of Origin Information and Women: Researching gender and persecution in the context of asylum and human rights claims” *Asylum Aid* 11.

<sup>469</sup> According to paragraph 9 of the UNHCR Guidelines on international protection from gender-related persecution: “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, 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”.

<sup>470</sup> According to paragraph 7 of the UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation “UNHCR considers FGM to be a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution”.

<sup>471</sup> Commission des recours des réfugiés (CRR), *Mlle Diop Aminata* Decision No 164078, 17 July 1991 (UNHCR RefWorld, 1991) <[www.refworld.org/docid/3ae6b7294.html](http://www.refworld.org/docid/3ae6b7294.html)> accessed 21 April 2013.

<sup>472</sup> In its judgment, the Commission des recours des réfugiés stated: “Considérant, en premier lieu, qu’il résulte de l’instruction que l’excision - qui constitue une mutilation du corps de la femme - est couramment pratiquée, à titre rituel, dans certaines ethnies composant la population malienne, dont celle à laquelle appartient la requérante;



des recours des réfugiés (CRR) reaffirmed this view in 2001 in the case of *Mlle Kinda*<sup>473</sup> in which the CRR found that:

“[W]omen in Somalia who refused to submit their daughters to FGM risked their daughters’ forced infibulation, as well as persecution with the consent of the general population and of the factions which ruled the country without it being possible for them to claim the protection of a legally constituted public authority”.<sup>474</sup>

In 1994 the Canadian Immigration and Refugee Board (IRB) granted asylum on the basis of FGM in the case of *Khadra Hassan Farah, Mahad Dahir Buraleh and Hodan Dahir Buraleh*<sup>475</sup> and described the practice as a “torturous custom”.<sup>476</sup> According to the IRB, “[i]t is by reason of the fact that she is a female and a minor that the claimant fears persecution in the form of female genital mutilation in Somalia today”.<sup>477</sup>

In Australia, it has also been acknowledged that FGM amounts to persecution. In 1997 in the case of RRT N97/19046,<sup>478</sup> the Australian Refugee Review Tribunal found that a well-founded fear of FGM practised by the Yomba Tribe amounted to gender-related persecution on the basis of membership of a particular social group of “Yomba women in Nigeria”. The tribunal concluded “that the Yoruba practice of female circumcision is the infliction of serious harm with a view to the repression or extirpation of a quality in females which is perceived to be dangerous to the existing order of

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que si l’exigence de cette opération était le fait de l’autorité publique, ou si cette exigence était encouragée ou même seulement tolérée de manière volontaire par celle-ci, elle représenterait une persécution des femmes qui entendent s’y soustraire, au sens des stipulations précitées de la Convention de Genève, à la condition que les intéressées y aient été personnellement exposées contre leur volonté”

<sup>473</sup> Commission des recours des réfugiés (CRR), *Mlle Kinda*, Decision No 366892, 19 March 2001.

<sup>474</sup> T. Aleinikoff, “Protected characteristics and social perceptions: an analysis of the meaning of “membership of a particular social group” in E. Feller, V. Türk, and F. Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 282.

<sup>475</sup> 282.

<sup>476</sup> *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh* IRB Decision T93-12198 (13 July 1994).

<sup>477</sup> *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh* IRB Decision T93-12198 (13 July 1994).

<sup>478</sup> N97/19046 [1997] RRTA 4090 (16 October 1997).

Yoruba society”, while expressly finding that “female genital mutilation amounts to persecution”.<sup>479</sup>

FGM has also been recognised as a form of persecution in the United Kingdom, firstly in the cases of *Yake v Secretary of State for the Home Department*<sup>480</sup> in 2000 and *P and M v Secretary of State for the Home Department*<sup>481</sup> in 2004, and again in 2006 in the leading House of Lords case *Fornah v Secretary of State for the Home Department*.<sup>482</sup> In *Fornah*, Baroness Hale of Richmond found that FGM “is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment”.<sup>483</sup> Lord Bingham supported this view and acknowledged the manner in which “FGM powerfully reinforces and expresses the inferior status of women as compared with men in Sierra Leonean society”.<sup>484</sup> Lord Brown also recognised the link between the gendered relations and FGM by stating that “all Sierra Leonean women suffer discrimination and subjugation of which the practice of FGM constitutes merely an extreme and ghastly manifestation”.<sup>485</sup>

Similarly, in 1996 in the landmark case of *In re Fauziya Kasinga*,<sup>486</sup> the United States’ Board of Immigration Appeals (BIA) recognised FGM as a form of persecution and as a basis for a successful asylum claim. According to the BIA, “the practice of female genital mutilation, which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution”.<sup>487</sup> Furthermore, the BIA took the significant approach of including gender as an attribute of the 1951 Convention’s ‘particular social group’ ground, albeit in a very limited and specific manner that was only applicable to the claimant’s situation. According to the BIA, “[y]oung women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as

<sup>479</sup> N97/19046 [1997] RRTA 4090 (16 October 1997).

<sup>480</sup> 19 January 2000, unreported.

<sup>481</sup> [2004] EWCA Civ 1640.

<sup>482</sup> [2006] UKHL 46.

<sup>483</sup> Para. 94.

<sup>484</sup> Para. 7.

<sup>485</sup> Para. 119.

<sup>486</sup> *In re Fauziya Kasinga*, 211. & N. Dec. 357 (B.I.A. 1996).

<sup>487</sup> 357.

practiced by that tribe, and who oppose the practice, are recognized as members of a ‘particular social group’ within the definition of the term ‘refugee’.”<sup>488</sup>

Overall, since the *Kasinga* case, developments with regard to the acceptance of FGM as a basis for an asylum claim have been encouraging in the United States. The BIA and the circuit courts have adjudicated further asylum cases based on FGM, which has resulted in the expansion of the “groundwork laid in *Kasinga* to offer broader protection to women persecuted by FGM.”<sup>489</sup>

Still, despite the progress made, a worrying fact is the emphasis placed on the severity of FGM required for it to amount to persecution. Disagreement has developed between the various circuit courts in the US on whether all forms of FGM constitute persecution or recognition is limited only to the most severe forms of the practice.<sup>490</sup> The BIA’s position on FGM as a form of persecution also remains unclear. As Marouf observes, given that “all of the BIA’s published cases on FGM involve more extreme forms of FGM and that the BIA emphasizes the atrocious nature of the harm in those cases, it remains unclear how the BIA will treat cases of Type I FGM<sup>491</sup>” (the least severe form of FGM).<sup>492</sup> For example, in 2008 in the case of *In re S-A-K- and H-A-H-*,<sup>493</sup> the BIA granted asylum on humanitarian grounds to the applicants while emphasising that the persecution in the case had taken the form of FGM with aggravated circumstances. As Marouf argues, BIA’s decision in *In re S-A-K- and H-A-H-* suggests that “less extreme facts may not constitute ‘severe’ past persecution meriting a humanitarian grant of asylum.”<sup>494</sup> Overall, the

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<sup>488</sup> 357.

<sup>489</sup> D. Ma, “The Obama Administration’s Policy Change Grants Asylum to Battered Women: Female Genital Mutilation Opens the Door for All Victims of Domestic Violence” 2, (Selected Works, 2009) <[http://works.bepress.com/david\\_ma/1/](http://works.bepress.com/david_ma/1/)> accessed 24 April 2013.

<sup>490</sup> Marouf (2011) *Columbia Journal of Gender and Law* 98.

<sup>491</sup> WHO has defined Type I FGM as “Clitoridectomy: partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris)”. WHO, “Female Genital Mutilation” (WHO, February 2014) <<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 10 February 2014.

<sup>492</sup> Marouf (2011) *Columbia Journal of Gender and Law* 99.

<sup>493</sup> *Matter of S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 465 (BIA 2008).

<sup>494</sup> Marouf (2011) *Columbia Journal of Gender and Law* 20) 105.

circuit court and BIA judgments reveal that immigration judges are not consistently treating the different forms of FGM as persecution.<sup>495</sup>

However, notwithstanding the brutality of the practice and its growing recognition as a form of persecution, FGM still continues to be avoided by adjudicators.<sup>496</sup> Overall, there is only a small number of successful asylum cases based on the fear of FGM, and the obstacles to obtaining protection for women fleeing FGM remain considerable.<sup>497</sup> These obstacles are mainly linked to the “broader debates and concerns about the purpose of asylum”, which often become particularly evident in ‘cultural’ persecution cases such as FGM.<sup>498</sup>

In many cases, courts have been reluctant to acknowledge FGM as an express form of persecution because of concerns about cultural imperialism. Some courts have cited ‘cultural imperialism’ as the ground to “justify the failure to offer protection to women fleeing from harmful practices which are deemed to be ‘cultural’”.<sup>499</sup> As Crawley argues, in these cases “the existence of other normative frameworks is used to undermine the principle of universal human rights”.<sup>500</sup> However, the cultural relativism that is strongly evident in these cases leads to deeply flawed outcomes, especially when the main purpose of the international human rights law framework is taken into consideration.

The most important reason for the recognition of FGM as a form of persecution and as a fundamental violation of women’s human rights lies in the fact that it is directly connected to the ‘philosophical core’ of all international human rights law: “the universal protection of individual autonomy”.<sup>501</sup>

A cultural relativist standpoint was rejected by the US Immigration Court in the case of *In re U-S*,<sup>502</sup> in which the court granted asylum to an applicant who had undergone forced FGM. Furthermore, the court rejected

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<sup>495</sup> 99.

<sup>496</sup> Crawley *Refugees and Gender: Law and Process* 180.

<sup>497</sup> 182-3.

<sup>498</sup> 183.

<sup>499</sup> 183.

<sup>500</sup> 183.

<sup>501</sup> 184.

<sup>502</sup> *Matter of U-S*, redacted (Anchorage, AK, Immigration Court, 19 December 1996) <<http://cgrs.uchastings.edu/law/detail.php>> accessed 23 April 2013.

the INS's arguments that the case should be rejected on policy grounds since such a finding would open the floodgates to refugees or would require granting asylum to circumcised males. With regard to the issue of the cultural dimension of persecution such as FGM, the immigration judge took a bold stance. According to the judge:

“[I]n evaluation of long standing cultural traditions that have existed for hundreds if not thousands of year, we are on a slippery slope trying to, in effect, make determinations based on our standard of values. However, concerns about offending those who, in the words of INS, feel that “they are simply performing an important cultural rite that bonds the individual to society” cannot override statutory enactments and obligations”.<sup>503</sup>

### 3 4 2 Rape and other sexual violence

The trivialisation of sexual violence against women is present in all countries and societies. Generally, rape and sexual violence are considered as a part of universal relations between men and women.<sup>504</sup> The normalisation of sexual violence is especially common with regard to sexual violence taking place during conflict. According to Enloe, widespread rape, especially during conflict, often loses its distinctiveness.<sup>505</sup>

Freedman has challenged the normalisation of sexual violence during armed conflict and argued that “[r]ape in wartime should not be seen as a mere ‘by-product’ of generalised violence, but as a specific consequence of gendered, racialised and nationalist construction of gender and ethnical relations”.<sup>506</sup> Rather than being a ‘private’ act, rape and sexual violence committed during armed conflict are often highly politically motivated, with rape used as means of dehumanising women and denying them their femininity as part of a larger strategy to “undermine the ‘enemy’ and to

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<sup>503</sup> *Matter of U-S.*

<sup>504</sup> Freedman *Gendering the International Asylum and Refugee Debate* 79.

<sup>505</sup> C. Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* (Berkeley, University of California Press: 2000) 108.

<sup>506</sup> Freedman *Gendering the International Asylum and Refugee Debate* 62.

reinforce the power of state or opposing forces”.<sup>507</sup> The normalisation of sexual violence also takes place in the assessment of gender-related persecution applications and can even be described as a common occurrence. For example, according to Ankenbrand, despite rape and sexual violence being one of the least controversial examples of persecution, widespread rape has been dismissed by German asylum courts as the “common fate of women caught in a war zone” and has not been recognised as persecution.<sup>508</sup>

Rape and sexual violence are common forms of gender-specific persecution. Unlike the courts’ usual construction of rape as a common crime triggered by the perpetrator’s individual motives, rape is “an exercise of power of women” that aims to inflict pain and humiliation and is often used for strategic purposes, especially in conflict situations.<sup>509</sup> Rape is also often used as a form of retribution against the victim’s relatives or community, where the victim is punished for an imputed political opinion.<sup>510</sup>

However, despite being one of the least controversial examples<sup>511</sup>, rape has often been disregarded as a form of persecution and is frequently treated in a manner that downplays its gravity. According to Crawley, “the interpretation of sexual violence against women has often differed substantially from the interpretation of other forms of serious harm, including sexual violence experienced by men”.<sup>512</sup> Overall, as Macklin argues, some adjudicators have “proven unable to grasp the nature of rape by state actors as an integral and tactical part of the arsenal of weapons deployed to brutalize, dehumanize, and humiliate women and demoralize their kin and community”.<sup>513</sup> This is evident, for example, in case law from the US where the courts have ignored rape by claiming that it is not serious enough to amount to persecution.

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<sup>507</sup> 63.

<sup>508</sup> See Ankenbrand (2002) *International Journal of Refugee Law* 48-49. Asylum was denied on such basis for example by the Administrative Court of Stuttgart in case number *A 18 K 14880/96* and by the Higher Administrative Court of Berlin in case number *9 B 103/86*.

<sup>509</sup> Freedman *Gendering the International Asylum and Refugee Debate* 47.

<sup>510</sup> C. Bohmer and A. Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (London: Routledge, 2007) 229.

<sup>511</sup> Macklin (1995) *Human Rights Quarterly* 225.

<sup>512</sup> 92-93.

<sup>513</sup> 226.

In *Lazo-Majano v INS*,<sup>514</sup> the asylum claimant was subjected to repeated and continuous rape, as well as brutal physical and psychological violence, by a sergeant of the Salvadorian army, since her husband, a member of a right-wing paramilitary group, had fled El Salvador for political reasons. Owing to the persecutor's links with the armed forces and other authorities, the claimant was unable to seek protection from her country of origin. Ultimately, the claimant fled El Salvador and applied for asylum in the United States.

Despite the violence faced by the asylum-seeker amounting to persecution, BIA held that, while it was not “unsympathetic with this deplorable situation (...) the fact remains that such strictly personal actions do not constitute persecution within the meaning of the Act”.<sup>515</sup> On appeal, the Court of Appeals for the Ninth Circuit overruled the BIA's decision. Yet, the judgment was not unanimous, and Judge Poole supported the BIA's previous decision by stating that despite the claimant probably having “suffered emotional and physical abuse in the course of her personal relationship with Sergeant Zuniga (...) such mistreatment is clearly personal in nature and does not constitute political persecution within the meaning of the immigration laws”.<sup>516</sup>

Similarly, in *Campos-Guardado v INS*<sup>517</sup> the claimant was denied asylum by the immigration judge and BIA. She had witnessed the torture and murder of her male relatives involved in controversial land reform in El Salvador before being brutally raped by guerrillas shouting political slogans. On appeal, rather than acknowledging the persecution experienced by the claimant as such, the Court of Appeals for the Fifth Circuit defined the violence perpetrated as “the random expression of spontaneous sexual impulses by an individual military officer toward a woman, who happened to

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<sup>514</sup> *Olimpia Lazo-Majano v Immigration and Naturalization Service*, A 24 345 083, United States Court of Appeals for the Ninth Circuit, 9 June 1987.

<sup>515</sup> Para. 8

<sup>516</sup> Para. 25.

<sup>517</sup> *Sofia Campos-Guardado v Immigration and Naturalization Service*, 809 F.2d 285, United States Court of Appeals for the Fifth Circuit, 9 March 1987.

be captured while in the company of an uncle suspected of subversive political activities - in other words, a common crime".<sup>518</sup>

Furthermore, in certain jurisdictions women can end up being held responsible for the sexual violence committed against them. For example, in accordance with some interpretations of Islamic sharia law, the concept of zina requires "four male witnesses to support a woman's claim of rape; otherwise a woman may find herself accused of adultery", for which the punishment is physical violence or even death.<sup>519</sup> As Collier argues, violence often "targets a woman's sexuality, which is socially and politically controlled through society".<sup>520</sup> Consequently, sexual violence is often directly linked to the deep humiliation of the victim, caused with the aim to control and subvert the shamed woman more easily.<sup>521</sup> This is a "very deliberate strategy to punish and control, constituting the political use of sexuality in the service of repression".<sup>522</sup>

Generally, gender-specific persecution for reasons unrelated to gender, such as rape, continues to be a grossly neglected form of persecution affecting women. Rape and sexual violence continue to be used as methods of persecution against women, especially in an armed conflict, during which members of the armed forces often perpetrate mass rape with impunity.<sup>523</sup>

Already in its 1991 Guidelines, UNHCR acknowledged the normalisation of sexual violence. Paragraph 56 recognises the trivialisation of sexual violence faced by women and states that "[e]ven victims of rape by military forces face difficulties in obtaining refugee status when the adjudicators of their refugee claim view such attacks as a 'normal' part of warfare".<sup>524</sup>

Overall, rape is often viewed as a sexual act rather than as an act of violence, and the rapist, even in cases where the rapist is a government

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<sup>518</sup> *Sofia Campos-Guardado v Immigration and Naturalization Service* at 289, as quoted by Macklin (1995) *Human Rights Quarterly* 226.

<sup>519</sup> Collier, "Country of Origin Information and Women: Researching gender and persecution in the context of asylum and human rights claims" *Asylum Aid* 38.

<sup>520</sup> 39.

<sup>521</sup> 39.

<sup>522</sup> 39.

<sup>523</sup> 38.

<sup>524</sup> UNHCR, "Guidelines on the Protection of Refugee Women" (July, 1991) U.N. Doc. ES/SCP/67. para. 56.



official, is seen as “acting from personal motivation”.<sup>525</sup> In many asylum application cases, “the sexual nature of the harm (...) serve[s] to personalise the event in the eyes of the adjudicator”.<sup>526</sup> Ian McDonald QC has summed up the deep-rooted bias underlying the lack of recognition of gender-specific persecution by arguing:

“If you don’t recognise that rape can be part of deliberate persecution, then there is an inbuilt bias against the persecution that women face (...) After all, if a man was beaten unconscious during interrogation, it would be seen as part of the political persecution he suffered – but if a woman is raped, it is seen as a separate problem (...) If you can sideline certain abus[ive] acts by saying those acts are just gratuitous lust, you can exclude large numbers of persecuted women from seeking asylum”.<sup>527</sup>

The trivialisation of sexual violence against women has also led to the worrying phenomenon of an increased level of harm being required. According to Marouf, especially in the US, there is a tendency to apply a higher standard for physical harm related to women’s sexual and reproductive functions than for other types of persecution.<sup>528</sup> With regard to FGM, for example, “instead of comparing the harm at issue to an objective standard for persecution, [the adjudicators] compare it to the most extreme form of the relevant cultural practice”.<sup>529</sup>

To explain this phenomenon, Marouf used the theory of ‘anchoring’, which has been described as the “tendency of judgments to be anchored in

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<sup>525</sup> *Crawley Refugees and Gender: Law and Process* 35.

<sup>526</sup> 35.

<sup>527</sup> Ian MacDonald QC quoted by N. Walter, “Rape by soldiers is much more than simple lust” in *The Independent*, 18 July 2002, as quoted by S. Ceneda “Women asylum seekers in the UK: A gender perspective - Some facts and figures” 106-7 (Refugee Women’s Resource Project, Asylum Aid, February 2003) 71  
<<http://www.asylumaid.org.uk/data/files/publications/29/Women%20asylum%20seekers%20in%20the%20UK%20a%20gender%20perspective.pdf>> accessed 1 June 2012.

<sup>528</sup> Marouf (2011) *Columbia Journal of Gender and Law* 85.

<sup>529</sup> 85.

initially presented values”.<sup>530</sup> Consequently, when the ‘anchor’ is an extreme example of a category, it is “less likely that another related event is judged to fall within the same category.”<sup>531</sup> For example, with regard to FGM, the landmark case of *Kasinga* has served as an anchor for assessing persecution in subsequent FGM cases.<sup>532</sup> However, since *Kasinga* involved the most extreme form of FGM, the result is that the courts will require increased severity of harm for subsequent FGM cases to be acknowledged as a form of persecution.<sup>533</sup>

Similarly, with regard to cases that involve the recognition of sexual violence, specifically the involuntary insertion of an IUD (birth control device), as a form of gender-related persecution, US courts have required ‘aggravated circumstances’. For example, in *Zheng v Gonzales*, the BIA found that the “involuntary insertion of an IUD, unaccompanied by any ‘significant degree of pain or restriction’ did not constitute persecution”.<sup>534</sup> Again in 2008 in *In re M-F-W- & L-G-*,<sup>535</sup> the BIA stated that “while having an IUD inserted involuntarily is certainly intrusive and hinders a person’s ability to control procreation, the temporary nature of its effects persuades us that such a procedure does not constitute persecution per se”.<sup>536</sup>

Furthermore, with regard to domestic violence, it seems that the courts require either the violence to be extreme or to be combined with another form of severe gender-related harm in order to amount to persecution. As Mullally observes, there is evidence in asylum jurisprudence of repeated reference being made to “severe forms of domestic violence as persecution or to recognition of domestic violence as amounting to persecution [only] when combined with other more ‘exotic’ claims, such as female genital mutilation or forced marriage”.<sup>537</sup> As an example the reluctance to grant and asylum to the

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<sup>530</sup> P. Slovic, B. Fischhoff, & S. Lichtenstein, “Facts Versus Fears: Understanding Perceived Risk,” in D. Kahneman, P. Slovic and A. Tversky (eds) *Judgment under Uncertainty: Heuristics and Biases* (1982) 481.

<sup>531</sup> Marouf (2011) *Columbia Journal of Gender and Law* 85.

<sup>532</sup> 114.

<sup>533</sup> 114.

<sup>534</sup> *Matter of M-F-W- & L-G-*, 24 I. & N. Dec. 633 (BIA 2008) at 639.

<sup>535</sup> 633.

<sup>536</sup> 640.

<sup>537</sup> S. Mullally, “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?” (2011) 60 *International and Comparative Law Quarterly* 459, 480.

applicant, *In re of R-A*<sup>538</sup> exposes the “continuing requirement of a very high threshold of suffering, below which a failure of State protection can be tolerated”.<sup>539</sup>

These decisions have been heavily criticised by Marouf, according to whom the BIA’s requirement of significant pain, bodily injury or aggravating circumstances for harm to amount to persecution “deviates from the general understanding of the term”.<sup>540</sup> Furthermore, by requiring ‘aggravated circumstances’, the BIA disregards and minimises the “involuntary nature of the procedure and the way that lack of consent prevents women from making their own decisions about their sexual and reproductive functions”.<sup>541</sup> In so doing, the BIA ignores another important aspect of the harm experienced by women, namely the deprivation of the freedom to make reproductive choices.<sup>542</sup> Generally, as Marouf argues, these decisions “both raised the bar for the level of physical harm required to establish persecution and failed to analyze nonphysical forms of harm”.<sup>543</sup> Overall, adjudicators are cautious to acknowledge sexual and reproductive harm as forms of persecution, especially as they are “widespread and when even more extreme forms of the harm exist in the world”.<sup>544</sup>

The normalisation of sexual violence is also evident in US asylum jurisprudence.<sup>545</sup> According to McLaughlin, whenever the persecution contains a sexual element there is a tendency on the part of immigration judges to reduce political oppression to the personal level.<sup>546</sup> As Macklin argues, some of the US asylum adjudicators have been “unable to grasp the nature of rape by state actors as an integral and tactical part of the arsenal of weapons deployed to brutalize, dehumanize, and humiliate women and demoralize their kin and community”.<sup>547</sup>

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<sup>538</sup> *In re R-A*, 22 I. & N. Dec. 908 (B.I.A. 1999).

<sup>539</sup> Mullally (2011) *International and Comparative Law Quarterly* 480.

<sup>540</sup> Marouf (2011) *Columbia Journal of Gender and Law* 125.

<sup>541</sup> 127.

<sup>542</sup> 127.

<sup>543</sup> 128.

<sup>544</sup> 138.

<sup>545</sup> See for example, *Campos-Guardado v INS* 809 F.2d 285 (5th Cir. 1987) and *Klawitter v INS* 970 F.2d 149 (6th Cir. 1992).

<sup>546</sup> D. McLaughlin, “Recognizing gender-based persecution as grounds for asylum” (1994-1995) 13 *Wisconsin International Law Journal* 217, 227.

<sup>547</sup> Macklin (1995) *Human Rights Quarterly* 226.

### 3 4 3 Domestic violence and 'honour crimes'

Persecution falling under this category is gendered not in its form but in its motivation. This type of violence is perpetrated by the immediate family, community and the state. An example of this type of persecution is domestic violence, which often takes place in the 'private' sphere of the domestic setting. In these cases, the actual persecution is committed by a private person, such as a husband, but the resulting harm is often exacerbated by the lack of effective state protection caused by systemic discrimination against women, which results from cultural norms and practices.

Domestic violence is one of the most widespread forms of violence against women,<sup>548</sup> as one out of three women are beaten, coerced or otherwise abused in her lifetime by a family member or someone known to her.<sup>549</sup> In March 2013, the CWS recognised that "domestic violence remains the most prevalent form [of violence against women] that affects women of all social strata across the world".<sup>550</sup> Furthermore, according to the Council of Europe, "domestic violence is the major cause of death and disability for women aged 16 to 44 and accounts for more death and ill-health than cancer or traffic accidents".<sup>551</sup> As with other forms of gender-related persecution, the causes for domestic violence are strongly linked to the global culture of inequality and discrimination against women. As Freedman argues, domestic violence:

"[...] forms part of the continuum of violence structured by unequal relations of power between men and women and by dominant constructions of masculinity and femininity. The reasons why men

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<sup>548</sup> Freedman *Gendering the International Asylum and Refugee Debate* 56.

<sup>549</sup> Amnesty International, "It's in our hands: Stop violence against women" (Amnesty International, 2004) 2  
<<http://www.amnesty.org/en/library/asset/ACT77/003/2004/en/d40502d6-f7a7-11dd-8fd7-f57af21896e1/act770032004en.pdf>> accessed 23 April 2014.

<sup>550</sup> United Nations Economic and Social Council, Commission on the Status of Women, 57<sup>th</sup> Session, "Draft agreed conclusions submitted by the Chair of the Commission, Ms. Marjon V. Kamara (Liberia), on the basis of informal consultations: The elimination and prevention of all forms of violence against women and girls" para. 12.

<sup>551</sup> Amnesty International, "It's in our hands: Stop violence against women" *Amnesty International* 2.

commit violence against women and the reasons why this violence is frequently dismissed by police and other official institutions are linked to the way in which proper or normal behaviours for men and women are constructed and represented”.<sup>552</sup>

The impact of states’ tolerance of gender-related killings and the consequential impunity has been noted by the UN Secretary General. According to the Secretary-General’s report:

“Impunity for violence against women compounds the effects of such violence as a mechanism of control. When the State fails to hold the perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behaviour are normalized”.<sup>553</sup>

In the past few decades there have been considerable developments in the understanding of this type of gender-based violence as a human rights violation under international human rights law. These developments began with the creation of CEDAW in 1979 and have subsequently been strengthened by the CEDAW Committee General Recommendations and the jurisprudence that has emerged under the CEDAW Optional Protocol.<sup>554</sup> For example, in its General Recommendation No 19 of 1992, the CEDAW Committee declared that “family violence is one of the most insidious forms of violence against women”<sup>555</sup> and, among other forms of gender-based violence, it “seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”.<sup>556</sup> The committee went further to assert that

<sup>552</sup> Freedman *Gendering the International Asylum and Refugee Debate* 57.

<sup>553</sup> UN General Assembly, “The Secretary-General’s in-depth study on all forms of violence against women”, 61<sup>st</sup> Session (6 July 2006) UN Doc. A/61/122/Add.1, para. 76.

<sup>554</sup> See for example *Ms AT v Hungary*, Communication No 2/2003, (26 January 2005, thirty-second session) UN Doc A/60/38, *Yildirim v Austria* (2005), UN Doc CEDAW/C/39/D/6/2005 and *Goekce v Austria* (2005), UN Doc CEDAW/C/39/D/5/2005.

<sup>555</sup> UN Committee on the Elimination of Discrimination against Women, “CEDAW General Recommendations No 19”, adopted at the Eleventh Session, UN Doc. A/47/38 1992, para

<sup>556</sup> Para. 1.

state responsibility extended to private acts where they “fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence”.<sup>557</sup> The committee reiterated its stance on violence taking place in the family sphere in its General Recommendation No 21 of 1994, in which the committee again stated that women have the right to be free of gender-based violence in both public and family life.<sup>558</sup>

Other international human rights instruments and institutions have also contributed to the development of the approach towards domestic violence under international human rights law. For example, in 2008 the Committee Against Torture in its General Recommendation No 2 expressly stated that domestic violence may constitute torture or ill treatment under CAT and further recognised states’ obligation to exercise due diligence to intervene, stop, sanction and provide remedies to victims of gender-based violence.<sup>559</sup>

Developments with regard to denunciation of domestic violence have also taken place under regional human rights instruments and bodies. For example, in 2000 the Inter-American Court of Human Rights (IACtHR) found in *Maria Da Penha v Brazil*<sup>560</sup> that the states’ failure to exercise “due diligence to prevent and investigate a domestic violence complaint, violated the applicant’s rights under the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man and the 1994 Inter-American Convention on The Prevention, Punishment And Eradication of Violence Against Women also known as the Convention of Belém do Pará”.<sup>561</sup>

Furthermore, in the landmark case *Caso González y Otras (‘Campo Algodonero’) v México*,<sup>562</sup> IACtHR found that Mexico had violated the 1978

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<sup>557</sup> Para. 9.

<sup>558</sup> UN Committee on the Elimination of All Forms of Discrimination against Women, “CEDAW General Recommendations No 21” adopted at Thirteenth Session, UN Doc. A/47/38 1994, para. 40.

<sup>559</sup> UN Committee against Torture, “CAT General Recommendations No 2” (24 January 2008) UN Doc CAT/C/GC/2, para. 18.

<sup>560</sup> Case 12.051, Rep No. 54/01, Inter-American Court of Human Rights, Annual Report 2000, OEA/Ser.L/V/II.111 Doc.20 rev (2000).

<sup>561</sup> Mullally (2011) *International and Comparative Law Quarterly* 459.

<sup>562</sup> Inter-American Court of Human Rights, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs) (*Comisión Nacional de los Derechos Humanos de México*, November 2009)

<<http://www.cndh.org.mx/sites/all/fuentes/documentos/internacional/casos/4.pdf>> accessed 13 May 2013.

American Convention of Human Rights<sup>563</sup> as well as the 1994 Convention of Belém do Pará<sup>564</sup>. This case concerned the disappearance and death of three women, whose bodies were later found on a property known as ‘Campo Algodonero’ in Ciudad Juárez, Mexico. In its milestone judgment, IACtHR expressly recognised for the first time the affirmative obligations of the state to respond to violence against women by private actors.<sup>565</sup> Furthermore, this was the first time that the court had examined “cases at issue in the context of mass violence against women and structural discrimination” and “found that gender-based violence can constitute gender discrimination”.<sup>566</sup>

Similarly, ECtHR has explicitly addressed states’ obligations with regard to domestic violence. In the 2010 case of *N v Sweden*,<sup>567</sup> the applicant, an Afghan woman, argued that she would face persecution or even be killed if she were returned to Afghanistan following her separation from her husband and her extramarital relationship. By seeking separation, “she had broken with Afghan traditions, which meant that she risked serious persecution if forced to return to her home country”.<sup>568</sup> In its judgment, the court acknowledged that “women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system”.<sup>569</sup> The court also acknowledged the deeper connection between gender inequality and domestic violence:

“[A]uthorities see violence against women as legitimate, so they do not prosecute in such cases. In the vast majority of cases women will not seek help because of their fears of police abuse or corruption, or their fears of retaliation by perpetrators of violence. Low social status and

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<sup>563</sup> American Convention on Human Rights (entered into force 18 July 1978) 1144 UNTS 123

<sup>564</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (entered into force 5 March 1995) 33 ILM 1534.

<sup>565</sup> C. Bettinger-López, “Inter-American Court rules against Mexico on gender violence in Ciudad Juárez” (IntLawGrrls, 18 Jan 2010) <<http://www.intlawgrrls.com/2010/01/inter-american-ruling-on-juarez-gender.html>> accessed 14 May 2013.

<sup>566</sup> Bettinger-López, “Inter-American Court rules against Mexico on gender violence in Ciudad Juárez” *IntLawGrrls*.

<sup>567</sup> Application No. 23505/09, European Court of Human Rights, (20 July 2010).

<sup>568</sup> Para. 10.

<sup>569</sup> Para. 55

social stigmas deter women from going against their families to pursue justice, particularly in cases of domestic abuse”.<sup>570</sup>

The court concluded that the “general risk indicated by statistics and international reports”<sup>571</sup> could not be ignored, and consequently, the applicant faced “various cumulative risks of reprisals”<sup>572</sup> from her husband, his family, her own family and from the Afghan society.<sup>573</sup>

Yet, despite domestic violence no longer being “viewed as a matter essentially within the domestic jurisdiction of the State”, there still remains substantial gaps “between the rhetoric of human rights law and the reality of everyday enforcement and implementation on the ground”, which are most intensely felt by refugee women.<sup>574</sup> This is mainly due to the fact that refugee law is not simply “keeping pace with the inclusion of domestic violence in the panoply of rights and positive obligations now recognized by international human rights law”, as Mullally argues.<sup>575</sup> Despite the recognition of state responsibility with regard to domestic violence under international human rights law, it still “continues to be resisted by States, even where there is strong evidence to suggest that the actions or omissions of the State demonstrate a failure to protect”.<sup>576</sup> As Mullally observes, progressive developments in human rights law “are often slow to cross over into refugee law, reflecting the peculiar challenge to State sovereignty that comes with a request for asylum”.<sup>577</sup> This has led to a situation where the essentially political nature of domestic violence continues to be questioned in asylum application processes.<sup>578</sup>

Notwithstanding its prevalence, domestic violence remains undocumented because of victims’ reluctance to report it, the failure of authorities to take domestic violence seriously and the consequential failure to

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<sup>570</sup> Para. 59.

<sup>571</sup> Para. 58.

<sup>572</sup> Para. 58.

<sup>573</sup> Mullally (2011) *International and Comparative Law Quarterly* 470.

<sup>574</sup> 459.

<sup>575</sup> 460.

<sup>576</sup> 460.

<sup>577</sup> 475.

<sup>578</sup> 475.



record it as a crime.<sup>579</sup> This is also true of the asylum determination process. According to Mullally, the “ambivalence with which domestic violence claims are treated in asylum adjudication reflects the hesitation to affirm the human rights norms and attendant obligations underpinning such claims”.<sup>580</sup> Consequently, despite its brutality and prevalence, domestic violence has been described as one of the most difficult bases on which to request asylum.<sup>581</sup>

The difficulty of securing asylum based on domestic violence stems from various factors, such as the “enormous evidentiary problems, murky legal standards, and the fact that domestic violence claims depart from the usual paradigm for asylum cases”.<sup>582</sup> In other words, the current understanding of what persecution entails is too narrow and gender-biased to include this type of gender-related persecution. Overall, as Mullally argues, while there is a growing number of state practice that suggests greater gender inclusivity and sensitivity in practice, under the current international refugee law, “women fleeing domestic violence continue to face obstacles in making their claims heard”.<sup>583</sup>

In addition to the obstacles mentioned above, another major factor contributing to the undermining of gender-related persecution claims is the normalisation and trivialisation of violence against women. As Freedman observes, refugee women’s asylum applications are often because the violence and discrimination they face in their country of origin “are not regarded as ‘persecution’ within the sense of the [1951] Convention”.<sup>584</sup> This does not mean, however, that women are not persecuted.

The situation is further aggravated by the combination of the trivialisation of the violence and the victims’ silence, as “the women do not speak out about what has happened to them”.<sup>585</sup> A woman’s silence is often a result of the normalisation of gender-related persecution and violence against

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<sup>579</sup> Freedman *Gendering the International Asylum and Refugee Debate* 56.

<sup>580</sup> Mullally (2011) *International and Comparative Law Quarterly* 459.

<sup>581</sup> Bohmer and Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* 227.

<sup>582</sup> M. Heyman, “Protecting foreign victims of domestic violence: an analysis of asylum regulations” (2008) 12 *Legislation and Public Policy* 115.

<sup>583</sup> Mullally (2011) *International and Comparative Law Quarterly* 459.

<sup>584</sup> Freedman *Gendering the International Asylum and Refugee Debate* 45.

<sup>585</sup> 45.

that woman, because women themselves “accept [the violence they have suffered] without questioning whether there is an alternative”.<sup>586</sup>

However, despite (or conceivably because of) the fact that the normalisation of violence against women has its roots in the “devaluation of women and the masculinist power to define abuses against women as cultural, natural or private”<sup>587</sup>, the inequality of the power relations between men and women causing the normalisation of violence against women is often disregarded. For example, with regard to domestic violence, Freedman argues that its normalisation takes place through the “perpetuation of an ideology which treats it as an individual act of violence between two partners and not as a form of violence which is shaped by social relations of inequality between men and women”.<sup>588</sup> The connection between patriarchy and domestic violence was confirmed in 1999 by the South African Constitutional Court in the landmark case of *The State v Baloyi*, in which Judge Sachs described domestic violence as an area “where lawlessness has long been sustained by interlaced notions of patriarchy and domestic privacy”.<sup>589</sup> Furthermore, according to Judge Sachs:

“To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form”.<sup>590</sup>

Yet, despite domestic violence taking place in all societies, and despite some states having enacted legislations making domestic violence illegal, “it is often condoned by the lack of punishment against perpetrators”.<sup>591</sup> The trivialising impact of the failure of states to hold the perpetrators of domestic violence accountable has also been noted by the UN Secretary General’s report, according to which “impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society

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<sup>586</sup> 45.

<sup>587</sup> J. Pettman, *Worlding Women: A Feminist International Politics* (Routledge, 1996) 210.

<sup>588</sup> Freedman *Gendering the International Asylum and Refugee Debate* 56.

<sup>589</sup> *The State v Baloyi*, Constitutional Court of South Africa, Case CCT 29/99, para. 18.

<sup>590</sup> Para. 12.

<sup>591</sup> Para. 12.

that male violence against women is both acceptable and inevitable. As a result, patterns of violent behaviour are normalized”.<sup>592</sup>

Similarly, the 2013 UN Interactive Expert Panel on the Elimination and Prevention of all forms of Violence Against Women and Girls named “[t]he ongoing normalisation of violence against women and girls, which is exacerbated by other social inequalities, militarisation, extreme nationalism and a growth in all forms of religious fundamentalisms”, as one of its key concerns.<sup>593</sup>

The universal normalisation of domestic violence has also permeated Western asylum application jurisprudence. It has been argued that the normalisation of domestic violence is so pervasive that it is often not registered to be a proper ground for claiming asylum.<sup>594</sup> According to Mullally the rife nature of domestic violence in all societies can often “lead to the severity of domestic violence as persecution, in and of itself, being denied”.<sup>595</sup>

This statement is also supported by Spijkerboer, who uses jurisprudence from the Dutch asylum courts as the basis for his argument that the courts “only grant asylum for persecution they consider ‘exceptional’”.<sup>596</sup> According to Spijkerboer, domestic violence, rape and sexual assault “are so normalised that asylum courts do not see them as having any kind of political dimension, and thus for them, these harms do not constitute persecution”.<sup>597</sup>

Ultimately, the widespread structural violence and the rife physical violence against women that it entails are so trivialised that they are “seen by the courts as normal and, as a consequence, unworthy of international redress”.<sup>598</sup>

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<sup>592</sup> UN General Assembly, “The Secretary-General’s in-depth study on all forms of violence against women”, 61<sup>st</sup> Session (6 July 2006) UN Doc. A/61/122/Add.1 para. 76.

<sup>593</sup> UN Interactive Expert Panel on “Elimination and Prevention of all forms of Violence Against Women and Girls” United Nations Commission on the Status of Women, 57th session (New York, 4 - 15 March 2013) (United Nations Commission on the Status of Women, 5 March) <<http://www.un.org/womenwatch/daw/csw/csw57/panels/panel1-paper-marai-larasi.pdf> > accessed 10 February 2014.

<sup>594</sup> Freedman *Gendering the International Asylum and Refugee Debate* 58.

<sup>595</sup> Mullally (2011) *International and Comparative Law Quarterly* 470.

<sup>596</sup> Spijkerboer, *Gender and Refugee Status* 101.

<sup>597</sup> 101.

<sup>598</sup> Parekh (2012) *Journal of Global Ethics* 273.

### 3 4 3 1 United States

Since the BIA's ruling in the Kasinga case and the publication of the Gender Guidelines in 1995, there seemed to be a general development towards a more enlightened understanding of the persecution that women face as a result of their gender.<sup>599</sup> Yet, with regard to asylum cases involving domestic violence, there has until recently been a substantial failure by the BIA to consider this form of gender-related persecution as a basis for asylum. In 1997, the Immigration Court denied asylum to the applicant in the case of *In re G- R-* on the basis that there was a "lack of nexus between domestic abuse and enumerated ground for asylum".<sup>600</sup> In 1998 the Immigration Court again denied the applicant asylum, firstly in the case of *In re A-*, where it stated that the appellant's fear of "a violent attack by the male members of her family based on her defiance of their wishes that she will not to marry her husband" was simply a "personal family dispute", and secondly in the case of *In re D- K*, because the applicant had "simply not shown that the violence against her is related to anything more than evil in the heart of her husband".<sup>601</sup> Furthermore, in 1999 in the case of *In re M- S- M-*, the Immigration Court found that domestic violence "does not constitute persecution because the persecutor had no connection to the Mexican government or local law enforcement".<sup>602</sup> Yet the most notorious example of the difficulties of securing asylum due to domestic violence is the case on *In re R-A-*.<sup>603</sup>

In *In re R-A-*, the asylum applicant, a Guatemalan woman, had been subjected to years of brutal violence by her husband. In addition to raping her, the applicant's husband "dislocated her jaw, nearly pushed out her eye, tried to cut off her hands with his machete, kicked her in the abdomen and vagina, and tried to force her to abort when she was pregnant with her second child by severely kicking her in the spine. He would drag her by the hair, use her head to break windows and mirrors, whip her with pistols and electric cords,

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<sup>599</sup> A. Sinha "Domestic Violence and US Asylum Law: Eliminating the "Cultural Hook" for Asylum Claims involving Gender-related Persecution" (2001) *New York University Law Review* 1562, 1564.

<sup>600</sup> 1564.

<sup>601</sup> 1564.

<sup>602</sup> 1564.

<sup>603</sup> *In re R-A-*, 22 I. & N. Dec. 908 (B.I.A. 1999).

and threaten her with knives”.<sup>604</sup> Yet, notwithstanding her numerous attempts to seek state protection, the authorities refused to intervene. Ultimately, the applicant fled to the US where she applied for asylum.

Despite recognising the “heinous abuse” that the applicant had been subjected to, the BIA ultimately denied asylum to the applicant because the applicant had failed to demonstrate a sufficient nexus between the persecution and one of the convention grounds.<sup>605</sup> With regard to the motive of the persecution, due to the arbitrariness of the persecutor’s pattern of abuse, the BIA found a “total absence” of any motive as defined in the 1951 Convention. However, as Heyman observes, the BIA’s conclusion that the perpetrator did not have the necessary motive for his acts to constitute persecution under international refugee law reflects the court’s “failure to grasp the appalling phenomenon of domestic violence”.<sup>606</sup> The seriousness of the BIA’s failure to acknowledge domestic violence as a form of persecution is reflected by the UNHCR’s release of an Advisory Opinion regarding the matter in 2004 in which it defended the applicant’s position as a refugee.<sup>607</sup> Jurisprudence since the BIA’s decision in the case of *In re R-A-* has been described as “arbitrariness run amuck”.<sup>608</sup>

However, the approach of the US towards domestic violence as a ground of persecution has partly changed since 2009, when the Obama Administration’s policy on domestic violence as a ground for asylum completely reversed the Bush Administration’s strong opposition on the issue.<sup>609</sup> In July 2009, the Department for Homeland Security (DHS) filed a supplemental brief to the BIA in the case of *L-R*, which involved a woman seeking asylum on the basis of being subjected to years of domestic abuse, including being raped at gunpoint, being held captive and being the victim of

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<sup>604</sup> 907.

<sup>605</sup> 907.

<sup>606</sup> Heyman (2008) *Legislation and Public Policy* 125.

<sup>607</sup> UNHCR, “*Matter of Rodi Alvarado Peña (A73 753 922)* Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion” (UNHCR Refworld, 9 January 2004) <<http://www.refworld.org/docid/43e9f6e64.html>> accessed 6 May 2013.

<sup>608</sup> K. Musalo “*Panel One — Empowering Survivors with Legal-Status Challenges*, (2007) 22 *Berkley Journal of Gender, Law and Justice* 304, 309.

<sup>609</sup> Ma, “The Obama Administration’s Policy Change Grants Asylum to Battered Women: Female Genital Mutilation Opens the Door for All Victims of Domestic Violence” *Selected Works* 3.

attempted murder by her husband, who had tried to burn the applicant alive when he learnt she was pregnant.<sup>610</sup> In the brief, the DHS offered “alternative formulations of ‘particular social group’ that could in appropriate cases qualify aliens for asylum”.<sup>611</sup> According to the brief, these alternative formulations “might well be applicable to [domestic violence] cases”.<sup>612</sup> As Musalo states, these developments have “open[ed] the door to the protection of women who have suffered these kinds of violation”.<sup>613</sup> Consequently, following the DHS’s brief, on 10 December 2009, the applicant in *In re L-R-* was granted asylum.

Yet, despite the brief of the DHS having developed the way that the US government views domestic violence asylum cases, many immigration judges have rejected this approach and continue to express “scepticism regarding the viability of domestic violence as a basis for asylum under any circumstances”.<sup>614</sup> As Bullard observes, this shift in the US government’s approach “does not mean applications based on domestic violence will sail through the immigration system”.<sup>615</sup>

For example, in an unreported case of 2010, the court denied asylum to a victim of domestic violence on the basis that not all countries are “as good as the United States on women’s rights, but that does not mean that the United States should grant asylum to all women of the world”.<sup>616</sup> In another unreported case of the same year, the immigration judge denied asylum while refusing to acknowledge PSG in the domestic violence context and stated that

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<sup>610</sup> J. Peterson, “New Policy Permits Asylum for Batter Women” (N.Y. Times, 16 July 2009) <[http://www.nytimes.com/2009/07/16/us/16asylum.html?\\_r=3&](http://www.nytimes.com/2009/07/16/us/16asylum.html?_r=3&)> accessed 24 April 2013.

<sup>611</sup> Department of Homeland Security, “Supplemental Brief” (New York Times, 16 July 2009) <<http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf>> accessed 14 April 2013.

<sup>612</sup> 5.

<sup>613</sup> Statement by K. Musalo, as quoted by Peterson “New Policy Permits Asylum for Batter Women” *N.Y. Times*.

<sup>614</sup> B. Bookey, “Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012” (2013) 24 *Hastings Women’s Law Journal* 107, 141.

<sup>615</sup> E. Bullard “Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases” (2011) 95 *Minnesota Law Review* 1867, 1869.

<sup>616</sup> University of California, Hastings College of Law, Center for Gender & Refugee Studies Database Case #3110, as cited by Bookey (2013) *Hastings Women’s Law Journal* 141. The Center for Gender and Refugee Studies (CGRS) is a clearinghouse and resource centre for gender asylum cases based at the University of California, Hastings College of Law. Through the technical assistance programme, the CGRS is able to obtain consent to track cases as they move through the asylum offices and immigration courts – records that are not published or otherwise publicly accessible.

“nothing had changed since *R-A*”.<sup>617</sup> In a 2012 unreported case, the immigration judge rejected a PSG construct of “Honduran women unable to leave a domestic relationship” and consequently denied the applicant asylum while concluding that “[h]arm resulting from a social problem” does not constitute persecution based on an enumerated convention ground.<sup>618</sup>

### 3 4 3 2 United Kingdom

In 1999, the House of Lords handed down a landmark judgment in the case of *Shah and Islam*,<sup>619</sup> which concerned two women who had been subjected to domestic violence in Pakistan. Both of the appellants claimed that their husbands had falsely accused them of adultery in Pakistan, and if they were returned they would be subject to criminal proceedings for sexual immorality leading to physical punishment or stoning to death. In its judgment, the House of Lords ultimately accepted domestic violence as a ground for persecution and that the appellants were part of a ‘particular social group’ and granted them asylum. With regard to domestic violence, Lord Steyn denied its political nature and dismissed persecution on grounds of political opinion as being “unsustainable”<sup>620</sup>, while Lord Hoffman found discrimination against women to be institutionalised in Pakistan “by the police, the courts and the legal system, the central organs of the State”.<sup>621</sup> As Mullally observes, the findings of the House of Lords in *Shah and Islam* “reveals again the difficulties of capturing women’s human rights claims” within the Convention’s current grounds.<sup>622</sup> Overall, however, the findings of the House of Lords in *Shah and Islam*, which recognised victims of domestic violence as a ‘particular social group’ and consequently as a group entitled to the protection of 1951 Refugee Convention, marked a “significant turning point” in gender asylum law in the UK and elsewhere.<sup>623</sup>

<sup>617</sup> Hastings College of Law, Center for Gender & Refugee Studies Database Case #6550, as cited by Bookey (2013) *Hastings Women’s Law Journal* 141.

<sup>618</sup> Hastings College of Law, Center for Gender & Refugee Studies Database Case #8282, as cited by Bookey (2013) *Hastings Women’s Law Journal* 141.

<sup>619</sup> *Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, [1999] 2 All ER 545.

<sup>620</sup> 12.

<sup>621</sup> 19.

<sup>622</sup> Mullally (2011) *International and Comparative Law Quarterly* 477.

<sup>623</sup> 477.

Nevertheless, despite these developments, the increased usage of the Detained Fast Track (DFT) procedure by the UK Border Authority (UKBA) has put the judicial progress achieved at risk. The DFT is an accelerated procedure for assessing asylum claims that, according to the UK Border Agency, can be decided “quickly”. However, as a report by Human Rights Watch points out, “it is inherently unsuitable for complex cases” such as gender-related persecution cases.<sup>624</sup>

The unreported case of *Fatima H*<sup>625</sup> demonstrates the shortcomings of the DFT procedure with regard to gender-related persecution cases and its failure to provide adequate protection to victims of domestic violence. The applicant in this case was a Pakistani woman, who was a victim of rape and had “sustained domestic violence by her husband, a wealthy and powerful figure in her region of origin”.<sup>626</sup> The applicant was “terrified” to report the abuse to the police, as “she was aware that her husband was close to them” and eventually fled to the UK, where she applied for asylum.<sup>627</sup> The applicant’s asylum claim was decided through the DFT procedure, which ultimately resulted in the rejection of her application due to her lack of credibility and because she “could seek gender specific protection at a women only police station in Pakistan”.<sup>628</sup> The adjudicator, however, failed to analyse the available country information sufficiently.<sup>629</sup> According to available information, there was a very limited number of the special police stations overall and a complete lack of them in the applicant’s region.<sup>630</sup> Ultimately, according to the Human Rights Watch, the main problem with the DFT procedure is its “failure to follow the UKBA’s own Gender Guidelines”.<sup>631</sup> More generally, however, the fundamental problem with the Guidelines is that their implementation is “neither consistent nor universal”.<sup>632</sup>

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<sup>624</sup> Human Rights Watch, “Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK” (HRW, 23 February 2010) < <http://www.hrw.org/reports/2010/02/24/fast-tracked-unfairness-0>> accessed 19 May 2013.

<sup>625</sup> 33.

<sup>626</sup> 33.

<sup>627</sup> 33.

<sup>628</sup> 33.

<sup>629</sup> 47.

<sup>630</sup> 33.

<sup>631</sup> 33.

<sup>632</sup> 33.



### 3 4 3 3 Australia

In 2002, the Australian High Court handed down a judgment in the landmark case of *Minister for Immigration & Multicultural Affairs v Khawar (Khawar)*<sup>633</sup> in which the applicant was a Pakistani woman who had fled the country after suffering years of escalating domestic violence at the hands of her husband. The question before the court, as defined by Judge Gleeson, was “whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention”<sup>634</sup>, which the court answered in the affirmative.

However, despite this positive development, the judgments in post-*Khawar* cases indicate that the area remains complex and challenging in Australian jurisprudence, which puts the progress achieved with *Khawar* at risk. In the 2002 case of *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>635</sup> the Refugee Review Tribunal (RRT) denied asylum to an Iranian applicant who had been physically and sexually assaulted by her husband on numerous occasions.<sup>636</sup> The applicant had fled Iran and applied for asylum in Australia. She feared that if she were returned to Iran her husband would kill her and her son. According to the judgment, the RRT “found that the applicant claimed to have family problems (...) but did not consider this of sufficient seriousness to be regarded as persecution”.<sup>637</sup> The RRT further found that “the social restrictions and type of problems faced by [the applicant] did not extend to the level of harm which could be considered as persecution within the meaning of the Convention”.<sup>638</sup> Moreover, “although the finding was that her husband was violent, there was no consideration [by RRT] of the degree of violence or the detailed incidence of such violence”.<sup>639</sup> Finally, with regard to the applicant’s return to Iran, the RRT simply found that “her ex-husband ‘will be angry with her’”<sup>640</sup> and concluded that “even if her ex-

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<sup>633</sup> *Minister for Immigration & Multicultural Affairs v Khawar* [2002] 210 CLR 1.

<sup>634</sup> 5-6.

<sup>635</sup> *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 565.

<sup>636</sup> Para. 5.

<sup>637</sup> Para. 17.

<sup>638</sup> Para. 17.

<sup>639</sup> Para. 17.

<sup>640</sup> Para. 18.

husband harmed her if she returned, this would not constitute persecution for a Convention reason”.<sup>641</sup> The Federal Court of Australia later found an error of law in the RRT’s judgment with regard to the lack of assessment whether there would be effective protection available from the state if the applicant was threatened with violence by her husband upon her return and remitted the case back to the RRT for reconsideration.<sup>642</sup>

A similar case came before the RTT in 2004, and again the RTT denied the applicant asylum in a similar manner. In *NAIV v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>643</sup> the applicant was a Nepalese woman who had been subjected to domestic violence by her husband because of their different religious views. In its judgment, the RTT accepted that “being a partner in an inter-caste marriage could constitute membership of a particular social group”. However the RRT found that the claim of “low level discrimination to which the [applicant] referred did not amount to persecution”.<sup>644</sup> With regard to the domestic violence, the RTT accepted that the “marital problem” experienced by the applicant “made her vulnerable”, but ultimately the tribunal found that this did not “advance her case in respect of the Convention”.<sup>645</sup>

In 2009, the RTT denied asylum to the applicant in *AZAAR v Minister for Immigration and Citizenship*.<sup>646</sup> In this case, the applicant, a Vanuatuan woman, had been the “subject of significant domestic violence in [Vanuatu] at the hands of her husband, but was not able to be provided with reasonably effective State protection because of systemic discrimination against women resulting from cultural norms and practices”.<sup>647</sup> In its judgment, the RTT agreed that the applicant had been subjected, and if she returned to Vanuatu would continue to be subjected, to serious harm in the form of domestic violence from her husband.<sup>648</sup> The RTT also found that the applicant belonged to a PSG of either “Vanuatu women” or “married Vanuatu women”. However,

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<sup>641</sup> Para. 3.

<sup>642</sup> Para. 48.

<sup>643</sup> *NAIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 457.

<sup>644</sup> Para. 33.

<sup>645</sup> Para. 34.

<sup>646</sup> *AZAAR v Minister for Immigration and Citizenship*, Australian Federal Court [2009] FCA 912.

<sup>647</sup> Para. 1.

<sup>648</sup> Para. 2.

the RTT ultimately denied the applicant asylum on the basis that the harm inflicted on her was not because of her membership of a particular social group and that the RTT was not satisfied that “there was a real chance of her being denied protection by the authorities in Vanuatu should she require it upon her return there”.<sup>649</sup>

Finally, in 2011 the Australian Federal Court handed down judgment in *Minister for Immigration and Citizenship v SZONJ*.<sup>650</sup> In this case, the court overturned a decision of the Federal Magistrate Court, which had found a jurisdictional error in the findings of the RRT with respect to its approach to assessing a domestic violence claim under the 1951 Refugee Convention. The applicant, a Fijian woman, had been the victim of domestic violence carried out by her husband and feared that she would be subjected to further domestic violence if she was returned to Fiji.<sup>651</sup> According to the applicant, the “entrenched discriminatory attitudes within the Fijian courts” had resulted in a failure to prosecute perpetrators and protect victims.<sup>652</sup> Furthermore, the applicant stated that despite the enactment of the Domestic Violence Decree in 2009, the Fijian government has a discriminatory policy towards women’s rights and specifically tolerates or condones the practice of violence towards women.<sup>653</sup> When the applicant had brought her complaints to the attention of the police, little or no effective action was taken against her husband.<sup>654</sup>

Despite having acknowledged these facts, the Federal Court overturned the Federal Magistrate Court’s judgment, according to which the RRT had erred jurisdictionally, as its reasoning lacked “any explicit evaluation of the efficacy of the relevant measures in actually providing protection to a person in the position of the (...) Applicant, in light of the claims made in relation to police attitudes and cultural approaches to resolving domestic

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<sup>649</sup> Para. 2.

<sup>650</sup> [2011] FCAFC 85.

<sup>651</sup> [2011] FCAFC 85.

<sup>652</sup> Immigration Advice and Rights Centre, “Minister for Immigration and Citizenship v SZONJ [2011] FCAFC 85” (Immigration Advice and Rights Centre, 14 September 2011) <[http://www.iarc.asn.au/\\_blog/Immigration\\_News\\_2/post/Minister\\_for\\_Immigration\\_and\\_Citizenship\\_v\\_SZONJ\\_\[2011\]\\_FCAFC\\_85\\_>](http://www.iarc.asn.au/_blog/Immigration_News_2/post/Minister_for_Immigration_and_Citizenship_v_SZONJ_[2011]_FCAFC_85_>) accessed 21 May 2013.

<sup>653</sup> Immigration Advice and Rights Centre, “Minister for Immigration and Citizenship v SZONJ [2011] FCAFC 85” *Immigration Advice and Rights Centre*.

<sup>654</sup> [2011] FCAFC 85, para. 17.

violence by reconciliation”.<sup>655</sup> Ultimately, the RRT had reached the conclusion that it “found no evidence that there would be a selective and discriminatory withholding of state protection” and consequently denied the asylum to the applicant.<sup>656</sup> However, the Federal Court upheld the RRT’s decision. According to the Federal Court, because the domestic abuse “lacked motivation connected to the Convention” and the Fijian state or state agents’ inability to prevent such violence was “for reasons unconnected with the Convention”, asylum could not be granted.<sup>657</sup>

### 3 4 3 4 France

According to Brocard et al., French asylum adjudicators determining refugee status do not take gender-related persecution adequately into consideration when judging the merits of an application.<sup>658</sup> Consequently, women seeking asylum for fear of gender-related persecution are rarely awarded adequate protection.<sup>659</sup> Overall, the testimonies of women asylum-seekers are not found to be credible. Furthermore, the persecution the women, seeking asylum, have experienced or are faced with is often not considered to fall under the protection of refugee law. Brocard et al. argue that the adjudicators often “misunderstand, minimise or deny” asylum-seeking women’s experiences.<sup>660</sup>

The shortfall of the French asylum assessment system with regard to the recognition of gender-related persecution can be attributed to a lack of understanding of the nature of domestic violence as well as ignorance about the reality of women’s positions in their countries of origin.<sup>661</sup>

Furthermore, as the decisions of the Commission des recours des réfugiés (CRR) in the cases of *Mlle EG*<sup>662</sup> and *Mme AM*<sup>663</sup> demonstrate,

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<sup>655</sup> Para. 23.

<sup>656</sup> Para. 26.

<sup>657</sup> Para. 34.

<sup>658</sup> L. Brocard, H. Lamine and M. Gueguen, “Droit d’asile ou victimisation?” (2007) 75 *Plein Droit* (Gisti, December 2007) <<http://www.gisti.org/spip.php?article1052#nb5>> accessed 10 June 2013.

<sup>659</sup> 75.

<sup>660</sup> 75.

<sup>661</sup> 75.

<sup>662</sup> Commission des recours des réfugiés (CRR), *Mlle EG* Decision No 549296, 7 July 2006 (UNHCR RefWorld, 2006) <<http://www.refworld.org/pdfid/45d5cb5e2.pdf>> accessed 10 June 2013.

rather than granting asylum per se, the CRR most commonly grants an alternative form of protection ('protection subsidiaire') to victims of domestic violence. However, with regard to FGM or the threat of an 'honour crime', the CRR has granted asylum to women fearing gender-related persecution.<sup>664</sup>

### 3 4 3 5 Israel

The Israeli refugee jurisprudence has in general been resistant to acknowledging gender asylum. On various occasions, the Court for Administrative Affairs has denied asylum to victims of domestic violence on the basis that the persecution had taken place in the 'private sphere', which makes the claims 'personal', and they consequently fall outside of the realm of the 1951 Refugee Convention. By reaching these conclusions, the court failed to acknowledge the political nature of the domestic violence phenomenon.

In the 2012 case *Xie Guang v The Minister of the Interior*,<sup>665</sup> the Court for Administrative Affairs denied asylum to a Chinese woman living in a lesbian relationship, who had been previously been subjected to domestic violence by her husband. The applicant had fled her abusive husband from China to Israel and had stayed illegally in Israel for two years before applying for asylum. The applicant had been threatened with further violence by her husband and family for having violated the family's honour, if she ever were to return to China.<sup>666</sup> In its judgment, the Court for Administrative Affairs upheld the earlier decision by the Ministry of Interior to deny the applicant asylum and held that as the applicant was not being "persecuted by State authorities or a specific group or organization in her country but by her husband, who had

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<sup>663</sup> Commission des recours des réfugiés (CRR), *Mme AM* Decision No 526541, 19 July 2006 (UNHCR RefWorld, 2006) <<http://www.refworld.org/pdfid/45d5cb5e2.pdf>> accessed 10 June 2013

<sup>664</sup> With regard to FGM, the Commission des recours des réfugiés granted asylum to the applicants in the cases of *Mlle EO*, Decision No 590401, 1 March 2007 and *Mme FGG*, Decision No 587233, 1 February 2007. With regard to 'honour crimes', the Commission des recours des réfugiés granted asylum to the applicants in the cases of *Mme NNS*, Decision No 5687311, 16 November 2006, and *Mlle BJ* Decision No 557320, 11 October 2006.

<sup>665</sup> *Xie Guang v The Minister of the Interior*, Tel Aviv – Jaffa District Court, sitting as the Court for Administrative Affairs, 8 May 2012 (University of Michigan Law School, 8 May 2012) <<http://www.refugeecaselaw.org/CaseAdditionalInfo.aspx?caseid=2179>> accessed 20 May 2013.

<sup>666</sup> *Xie Guang v The Minister of the Interior*, University of Michigan Law School.

been persecuting her in the past”, she was not entitled to recognition as a refugee, as “such family persecution is not one of the grounds for asylum”.<sup>667</sup>

Similarly, in another 2012 asylum application case, *Grace Kappachi v The Minister of the Interior*,<sup>668</sup> the applicant, a Nigerian woman fleeing domestic violence, was denied asylum by the Court for Administrative Affairs. The applicant had been forced by her father to marry a much older man from a rival clan.<sup>669</sup> In 2007, a violent conflict between the applicant’s and her husband’s families led to the murder of her parents and brothers. The applicant fled to Israel where she applied for asylum based on fear of violence from her husband and his family.<sup>670</sup> In its judgment, the Court for Administrative Affairs held that the persecution feared by the applicant was of a ‘personal nature’ and consequently “none of the grounds listed in the Refugee Convention [were] applicable”.<sup>671</sup>

In 2013, another victim of domestic violence was denied asylum in the case of *Jane Doe v The Minister of the Interior*.<sup>672</sup> In this case, the applicant had fled Nigeria following her father’s threat to kill her after she had refused to marry his debtor. The applicant had also been subjected to violence by the suitor’s family.<sup>673</sup> In upholding the decision by the Ministry of Interior to deny the applicant an asylum, the Court for Administrative Affairs held that the applicant “did not establish an objective fear of persecution since her father only threatened her once”.<sup>674</sup> Furthermore, according to the court, “none of the grounds for refugee status listed in the Refugee Convention [were] applicable in this case since it seemed that the applicant was a victim of a family dispute”.<sup>675</sup>

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<sup>667</sup> *Xie Guang v The Minister of the Interior*, University of Michigan Law School.

<sup>668</sup> *Grace Kappachi v The Minister of Interior*, Tel Aviv – Jaffa District Court, sitting as the Court for Administrative Affairs, 6 August 2012, (University of Michigan Law School, 6 August 2012) <<http://www.refugeecaselaw.org/redirectpdf.aspx?caseid=2191>> accessed 20 May 2013.

<sup>669</sup> *Grace Kappachi v The Minister of Interior*, University of Michigan Law School.

<sup>670</sup> *Grace Kappachi v The Minister of Interior*, University of Michigan Law School.

<sup>671</sup> *Grace Kappachi v The Minister of Interior*, University of Michigan Law School.

<sup>672</sup> *Jane Doe v The Minister of Interior*, Jerusalem District Court, sitting as the Court for Administrative Affairs, 12 February 2013 (University of Michigan Law School, 12 February 2013) <<http://www.refugeecaselaw.org/CaseAdditionalInfo.aspx?caseid=2238>> accessed 20 May 2013.

<sup>673</sup> *Jane Doe v The Minister of Interior*, University of Michigan Law School.

<sup>674</sup> *Jane Doe v The Minister of Interior*, University of Michigan Law School.

<sup>675</sup> *Jane Doe v The Minister of Interior*, University of Michigan Law School.

### 3 4 4 Discrimination based on gender as a ground for ‘persecution’

Similarly to the normalisation of violence against women, the normalisation of discrimination against women has had a detrimental effect on refugee women’s asylum applications. Gender discrimination not only obstructs women’s educational and career opportunities but “also places their health and safety in jeopardy”.<sup>676</sup> As McLaughlin argues, “institutionalized gender discrimination is a pervasive reality that permeates every segment of society and culture”.<sup>677</sup> This has also been true of asylum assessment processes, in which gender discrimination is often considered to be part of the status quo of the country of origin and therefore should not be recognised in the context of refugee status determination.

With regard to asylum adjudication, the existence of a discriminatory or sexist environment in the country of origin has actually hindered the granting of asylum because of concerns of the so-called ‘opening of the floodgates’. These unfounded fears of the asylum adjudicators are based on the fears that once gender-related persecution is accepted as a basis for asylum, it will “immediately inundate the [country] with [woman] asylees”<sup>678</sup> because of the universality and prevalence of gender-related persecution and gender-discrimination. However, asylum adjudicators should not take the floodgate concerns into consideration when they assess individual asylum claims. As Musalo et al. argue

“[w]hat is most troubling about the treatment of women’s asylum claims (...) is that a female asylum-seeker is apparently unable to enjoy refugee status simply for the fact that she fears persecution as a woman in a sexist environment. A similar predicament does not face a man or a woman who fears torture or inhuman treatment as a member of a discreet religious or ethnic community in a society characterized by racism, fundamentalism or other kindred ultra-nationalism. In contrast,

<sup>676</sup> McLaughlin (1994-1995) *Wisconsin International Law Journal* 222.

<sup>677</sup> 222.

<sup>678</sup> J. Imbriano, “Opening the floodgates or filling the gap? *Perdomo v Holder* advances the Ninth Circuit one step closer to recognising gender-based asylum claims” (2011) 56 *Villanova Law Review* 327, 350.

his or her claim is more readily and directly assessed on race, religion or nationality grounds”.<sup>679</sup>

In order to amount to gender persecution, the harm does not have to be focused directly at the physical integrity of women but can take the form of discrimination.<sup>680</sup> This is a crucial inclusion, as gender-based discrimination is “practiced universally and is enforced through law, social custom and individual practices”.<sup>681</sup> In many countries, the discrimination and persecution of women is enshrined in the law.<sup>682</sup>

Gender-discrimination is defined in Article 1 of CEDAW, which encompasses both direct and indirect discrimination against women. According to Article 1, gender-discrimination comprises

“[A]ny discrimination, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.<sup>683</sup>

As a consequence, as Charlesworth observes, any practice, notwithstanding its motive, “that results in unequal enjoyment of rights by women” constitutes discrimination.<sup>684</sup> Yet, with respect to international refugee law, it is important to note that the discrimination itself is not enough to warrant asylum, but it must be severe in order to amount to persecution. According to Haines, discrimination alone is “not enough to establish a case for refugee status”, and consequently, “a distinction must be drawn between a breach of human

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<sup>679</sup> K. Musalo, J. Moore and R. Boswell, *Refugee Law and Policy: A Comparative and International Approach* (Durham, Carolina Academic Press: 2011) 623.

<sup>680</sup> Macklin (1995) *Human Rights Quarterly* 228.

<sup>681</sup> 229.

<sup>682</sup> Freedman *Gendering the International Asylum and Refugee Debate* 55.

<sup>683</sup> Article 1, Convention on the Elimination of all Forms of Discrimination against Women, 18 December 1979, UN. Doc. A/34/830 (1979).

<sup>684</sup> H. Charlesworth, “Transforming the United Men’s Club: Feminist Futures for the United Nations” (1994) 4 *Transnational Law and Contemporary Problems* 421, 439.



rights and persecution”.<sup>685</sup> Clayton supports this view by stating that, “the Refugee Convention protects against persecution, but not against discrimination”.<sup>686</sup>

Accordingly, the UNHCR has recognised severe gender discrimination as a form of persecution in various policy documents. In 1990, the UNHCR Executive Committee acknowledged for the first time the connection between a violation of women’s rights guaranteed by CEDAW and gender discrimination amounting to persecution by recognising that;

“[I]n light of the increasingly universal character of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, severe discrimination (...) may justify the granting of refugee status”.<sup>687</sup>

Furthermore, in 1991, the UNHCR published its 1991 Guidelines on Protection<sup>688</sup>, in which it acknowledged that refugee claims brought by women who are subjected to persecution due to having transgressed the laws or customs of the state, “present difficulties under this [current] definition”.<sup>689</sup> Consequently, paragraph 55 of the 1991 Guidelines expanded the notion of persecution by recognising that protection from sexual discrimination is “a basic right of all women” and that “severe sexual discrimination” can constitute persecution under certain circumstances.<sup>690</sup>

Furthermore, paragraph 53 of the 1991 Guidelines on Protection, acknowledges that discrimination, when “combined with other adverse factors [such as a] general atmosphere of insecurity in the country of origin”,<sup>691</sup> can in some cases amount to persecution. The UNHCR confirmed the possibility of discrimination amounting to persecution in its 2002 Guidelines on

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<sup>685</sup> Haines “Gender-related persecution” *UNHCR* 331.

<sup>686</sup> G. Clayton, *Textbook on Immigration and Asylum Law* (Oxford, Oxford University Press: 2006), 444.

<sup>687</sup> UNHCR Executive Committee, Note on Refugee Women and International Protection, EC/SCP/59 (28 Aug 1990), para. 17.

<sup>688</sup> UNHCR, “Guidelines on the Protection of Refugee Women” (July, 1991) U.N. Doc. ES/SCP/67.

<sup>689</sup> Para. 54.

<sup>690</sup> Para. 55.

<sup>691</sup> Para. 53.

International Protection (2002 UNHCR Guidelines).<sup>692</sup> According to paragraph 14, while ‘mere’ discrimination is not to be perceived as persecution, “a pattern of discrimination (...) could, on cumulative grounds, amount to persecution and warrant international protection”.<sup>693</sup>

Moreover, the 2002 UNHCR Guidelines clarify that “gender-related persecution encompasses a wide range of treatments”<sup>694</sup> and recognise that a discriminatory law or policy that has a gender dimension and carries a disproportionate punishment for non-compliance can amount to persecution.<sup>695</sup> According to the 2002 Guidelines:

“[t]here is no doubt that rape and other forms of gender-related violence, such as dowry related violence, female genital mutilation, domestic violence and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by the State or private actors”.<sup>696</sup>

Furthermore, as the 2002 UNHCR Guidelines state, “[s]evere punishment for women who, by breaching a law, transgress social mores in a society could [also] amount to persecution”.<sup>697</sup>

Various national Gender Guidelines, such as the Canadian Guidelines issued by the IRB Chairperson on Women Refugee Claimants Fearing Gender-Related Persecution (Canadian Guidelines),<sup>698</sup> also acknowledge that severe gender-based discrimination may amount to persecution for reasons of the 1951 Refugee Convention. The Canadian Gender Guidelines not only acknowledge “persecution resulting from circumstances of severe

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<sup>692</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/0.

<sup>693</sup> Para. 14.

<sup>694</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit* 33.

<sup>695</sup> 2002 UNHCR Guidelines para. 12.

<sup>696</sup> Para. 9.

<sup>697</sup> Para. 12.

<sup>698</sup> Immigration and Refugee Board of Canada, “Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution” (IRB, 13 November 1996) <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx#AllI>> accessed 4 April 2015.

discrimination on grounds of gender”<sup>699</sup> in general but also more specifically persecution taking place “as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin (...) [which] singl[e] out women and plac[e] them in a more vulnerable position than men”.<sup>700</sup> These guidelines will be further discussed in sub-chapter 6 2.

With regard to the severity of discrimination required for it to amount to persecution, there is no uniform definition. According to the UNHCR Gender Guidelines, “[w]hile the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution under certain circumstances, the dividing line between discrimination and persecution is not a clear one”.<sup>701</sup> According to the definition in the Canadian Gender Guidelines, ‘severe’ gender-discrimination “may amount to persecution if it leads to consequences of a substantially prejudicial nature for the claimant and if it is imposed on account of any one, or a combination, of the statutory grounds for persecution”.<sup>702</sup> Macklin, by contrast, argues the presumption is that “if the law discriminates by selectively abrogating fundamental human rights of designated groups, the law itself persecutes”.<sup>703</sup> According to Macklin, it should not matter that “it would be relatively ‘easy’ for the claimant to obey the [discriminatory] law (and thus avoid prosecution) (...) if in so doing she must forsake a protected freedom”.<sup>704</sup> Edwards further argues that “severe community ostracism or discrimination” may also reach the level of persecution.<sup>705</sup>

Discriminatory laws amounting to persecution are often connected to religious tenets and created to uphold certain social mores. As Neal argues, religious doctrines, when given legal force, “can be used first to discriminate against and then to persecute women”.<sup>706</sup> Gender-discriminatory laws as a whole were denounced by the ECOSOC in March 2013 at the 57<sup>th</sup> Session of

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<sup>699</sup> Para A(I)(3).

<sup>700</sup> Para A(I)(4).

<sup>701</sup> UNHCR, “Guidelines on the Protection of Refugee Women” (July, 1991) U.N. Doc. ES/SCP/67. para. 55.

<sup>702</sup> Para. A(I)(3).

<sup>703</sup> Macklin (1995) *Human Rights Quarterly* 230.

<sup>704</sup> 230.

<sup>705</sup> Edwards *Violence against Women under International Human Rights Law* 61.

<sup>706</sup> Neal (1988) *Columbia Human Rights Law Review* 210.

the CSW, with the commission reaffirming that “women and men have the right to enjoy, on an equal basis, all their human rights and fundamental freedoms” and urging “States to (...) devote particular attention to abolishing practices and legislation that discriminate against women and girls, or perpetuate and condone violence against them”.<sup>707</sup>

The gender-discriminatory laws often regulate the private sphere, including discriminatory family, social and criminal laws. Examples of such laws can be found in post-Islamic Revolution legislation in Iran. As Neal argues, the ‘official discrimination’ against women taking place in Iran is rooted in the post-Islamic Revolution constitution’s “pronouncement on the proper place of women”.<sup>708</sup>

According to the Constitution of the Islamic Republic of Iran, “women are to return to their ‘natural role’ of child-bearer and mother”.<sup>709</sup> According to the Preamble of the Constitution, before the Islamic Revolution, women were “drawn away from the family unit” while being part of the workforce but are now expected to re-assume the “serious and precious duty of motherhood”.<sup>710</sup> As Neal observes, the Iranian constitution implies that the return to traditional gender roles is necessary for the functioning of society and consequently, “the welfare of the nation implicitly requires the regulation of women’s status and position”.<sup>711</sup> As a result, women have become “inescapably subordinate” to men within the confines of the family.<sup>712</sup> According to Neal, the deeply discriminatory and subordinate status of women is clear from the “breadth of powers” conveyed exclusively to the men under Iranian family law, which includes the right to have multiple wives, the right to divorce their wives at will,

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<sup>707</sup> United Nations Economic and Social Council, Commission on the Status of Women, 57<sup>th</sup> Session, “Draft agreed conclusions submitted by the Chair of the Commission, Ms. Marjon V. Kamara (Liberia), on the basis of informal consultations: The elimination and prevention of all forms of violence against women and girls” (19 March 2013) UN Doc. E/CN.6/2013/L.5 para. 12.

<sup>708</sup> Para 211.

<sup>709</sup> The Constitution of Islamic Republic of Iran – Women in the Constitution (Iran Chamber Society, 25 May 2013) <<http://www.iranchamber.com/government/laws/constitution>> accessed 25 May 2013.

<sup>710</sup> The Constitution of Islamic Republic of Iran, *Iran Chamber Society*.

<sup>711</sup> Neal (1988) *Columbia Human Rights Law Review* 211.

<sup>712</sup> 211.

the right to forbid their wives from fulfilling religious observances and the right to prohibit their wives from working.<sup>713</sup>

In addition to family laws, various other discriminatory laws exist in Iran, which govern the social sphere and “exclude women from life outside the home”.<sup>714</sup> Amongst other restrictions, these laws severely restrict women’s educational and career opportunities and are “manifestly designed to subjugate women”.<sup>715</sup> An example of such a discriminatory social and ‘moral law’ is the law compelling women to veil themselves. As Neal argues, this law ultimately “oppresses women both physically and psychologically” with women who refuse to wear the veil or hejab being branded as prostitutes who are considered to be “corrupt, seditious, dangerous, and destructive of public honor”.<sup>716</sup> Furthermore, the punishments for the failure to comply with the social laws are “disproportionately severe”, with the punishment for refusal to wear the veil being “seventy-four lashes, administered immediately and without formal review”.<sup>717</sup>

Iranian criminal law also treats women as inferior to men, which leads to their “victim[isation] without legal protection or redress”.<sup>718</sup> One of the most gender-discriminatory laws in Iran is related to murder where the victim is a woman. In these cases, the punishment is “conditioned upon the payment of compensation by the victim’s family to the family of the murderer or assailant for their loss”.<sup>719</sup> With regard to situation where a woman is murdered by her husband, the chances of any retribution are even slimmer. As Afshar argues, women are so subordinate to men under Iranian laws that husbands may “virtually murder [their wives] without any fear of legal consequences”.<sup>720</sup>

Furthermore, under Iran’s shari’a laws, sexual violence cases are especially problematic for the women victims because of the practice of equating one male witness to two female witnesses.<sup>721</sup> As a consequence, it

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<sup>713</sup> 213.

<sup>714</sup> 213.

<sup>715</sup> 217.

<sup>716</sup> 218.

<sup>717</sup> Macklin (1995) *Human Rights Quarterly* 231.

<sup>718</sup> Neal (1988) *Columbia Human Rights Law Review* 214.

<sup>719</sup> 214.

<sup>720</sup> H. Afshar, “The Legal, Social and Political Position of Women in Iran” (1985) 13 *International Journal of the Sociology of Law* 47, 59.

<sup>721</sup> Neal (1988) *Columbia Human Rights Law Review* 215.

is extremely difficult to secure a conviction in a rape case, for example, as “a lone woman does not constitute a witness – even when she is the victim”.<sup>722</sup> This is also the case under Pakistan’s Hudood laws, according to which a woman alleging rape must “corroborate her complaint with the testimony of four male witnesses. Failure to prove that sexual contact occurred without consent leaves the complainant vulnerable to criminal prosecution herself for adultery or fornication”.<sup>723</sup> According to the Human Rights Watch:

“[T]he Hudood laws affect all citizens of Pakistan, but are applied to women with particularly disastrous effect. Women are discriminated against by law [and] they find it extremely difficult to prove rape and may face criminal prosecution if they fail to do so”.<sup>724</sup>

As a consequence of escalating national and international criticism to the Hudood laws, there was an attempt to reform the laws in 2006. However, following “massive opposition” to the reform, “the most discriminatory aspects of the legislation” were left in place.<sup>725</sup>

Similar discriminatory laws also exist in Saudi Arabia. In Saudi Arabia, in addition to laws compelling them to veil themselves, women “are not allowed to drive, must sit at the back of public buses, are limited in their educational and employment opportunities and may not travel without the consent of a male relative”.<sup>726</sup> As Macklin argues, these restrictions “may be understood as strand[s] in a web of oppression that cumulatively amounts to persecution of Saudi women”.<sup>727</sup> Ultimately, the various restrictions aimed at women under Saudi legislation result in “consequences of a substantially prejudicial nature for the claimant” with regard to women’s “ability to access educational facilities, to earn a livelihood, and to function as an autonomous and independent individual”.<sup>728</sup>

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<sup>722</sup> 216.

<sup>723</sup> Macklin (1995) *Human Rights Quarterly* 231.

<sup>724</sup> Human Rights Watch, “Double Jeopardy – Police Abuse of Women in Pakistan” (Human Rights Watch, 1992) <<http://www.hrw.org/legacy/reports/1992/pakistan>> accessed 25 May 2015.

<sup>725</sup> Freedman *Gendering the International Asylum and Refugee Debate* 56.

<sup>726</sup> Macklin (1995) *Human Rights Quarterly* 230.

<sup>727</sup> 230.

<sup>728</sup> 230.

The shari'a laws of northern Nigeria have also been a cause for concern due to their discriminatory and persecutory nature. As Freedman argues, the implementation of these laws "can be seen to reinforce the discrimination that was already existent towards women (...) and to create a political climate within which discriminatory behaviour is encouraged and given a legislative framework".<sup>729</sup>

Yet, it is important to acknowledge that gender discrimination and violence against women are not limited to developing countries or countries implementing shari'a laws but is a universal occurrence that also takes place in countries that have traditionally been considered 'non-refugee producing'.<sup>730</sup> According to Randall, "women's subordination vis-à-vis men continues to characterize virtually all known societies, while the degrees, extent and manifestations of the phenomena differ, sometimes profoundly".<sup>731</sup>

### 3 5 Conclusion

Already in the early 1990s, Bunch argued that if any group other than women were subjected to similar routine torture, starvation, terrorism, humiliation, mutilation and murder, it would "be recognized as a civil and political emergency as well as a gross violation of the victims' humanity".<sup>732</sup> With regard to women, however, violence is often normalised and belittled as demonstrated in this chapter. To this day, the situation has not changed.

This is also true of the international refugee law regime. Despite the non-discrimination requirement being solidly embedded in international human rights law, the practice under international refugee law continues to fail to meaningfully implement the principle. The failure of the international refugee law regime, and the domestic courts applying it, to provide adequate protection for women asylum-seekers fleeing gender-related persecution is demonstrated in the construction of 'persecution' as the detailed discussion in this chapter have shown.

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<sup>729</sup> Freedman *Gendering the International Asylum and Refugee Debate* 56.

<sup>730</sup> Macklin (1995) *Human Rights Quarterly* 264.

<sup>731</sup> M. Randall, "Refugee Law and State Accountability for Violence against Women: a Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution" (2002) 25 *Harvard Women's Law Journal* 281, 283.

<sup>732</sup> Bunch (1990) *Human Rights Quarterly* 486.

In this chapter I examined whether the current interpretation of what constitutes 'persecution' can encompass the unique form of persecution that women often face because of their gender. In this regard I demonstrated how violence against women is often normalised and belittled in asylum adjudication processes due to underlying deep-rooted structural injustices.

Overall, the general construction of what 'persecution' entails has been unclear at best. Yet, to some extent this is understandable, as the main aim behind leaving the description of the term undefined was to allow a case-by-case determination of whether the given conduct constitutes a persecutory act. A further rationale behind leaving the definition of term open-ended was to ensure that it would accommodate future forms of persecution, unseen at the time of drafting.

Furthermore, under the current dominant construction of 'persecution', primacy is given to the protection of civil and political rights. This narrow construction has been detrimental to women applying for gender asylum, as the persecution they face is part of a "larger socioeconomic web that entraps women, making them vulnerable to abuses which cannot be delineated as exclusively political or solely caused by states".<sup>733</sup> Similarly, the lack of recognition of non-physical harm amounting to persecution has put women refugees at a disadvantage.

Because the international statutory definition of 'persecution' is heavily biased in favour of the male experience, women's experiences of persecution may not seem true to the male adjudicators, whose "realms of experience differ so greatly from that of the female claimants".<sup>734</sup> Furthermore, the manner in which the evidence of domestic violence is presented can adversely affect the applications of refugee women. According to Mullally, "narrative inconsistencies, calm demeanour or late disclosure of evidence are often viewed negatively" by the adjudicators assessing the credibility of victims of domestic violence.<sup>735</sup> As Love notes, women who are fleeing alone, without male family members, from persecution directed at them because of

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<sup>733</sup> 488.

<sup>734</sup> E. Love, "Equality in Political Asylum Law: For Legislative Recognition of Gender-Based Persecution" (1994) 17 *Harvard Women's Law Journal* 133, 139.

<sup>735</sup> Mullally (2011) *International and Comparative Law Quarterly* 481.



their gender “often face greater obstacles proving their eligibility for refugee, and thus asylum, status”.<sup>736</sup>

Overall, women are often subjected to double persecution. In addition to facing ‘traditional persecution’, women are often subjected to unique persecution based solely on their gender. Gender-related persecution takes various forms, ranging from physical and sexual violence to severely discriminatory laws that severely limit women’s rights and freedoms. Despite its variety, the element common in all of the forms of this type of persecution is that the motive or the form – or in certain cases, both the motive and the form – is gendered.

Despite overwhelming evidence of the violence against women in various states amounting to persecution, domestic courts have been reluctant to recognise it as such as. Rather than assessing the violence experienced by refugee women on its face, Western domestic courts often trivialise the violence. The normalisation takes place with regard to all forms of persecution that women are uniquely subjected to: physical and sexual violence, as well as severe gender discrimination.

The Western states’ vigilant protection of their sovereignty, manifested by attempts to eliminate any possible asylum ground leading to the possible ‘opening of the floodgates’, has been one of the main causes behind the gap between their human rights rhetoric and the lack of protection they offer to victims of domestic violence.<sup>737</sup> As Mullally argues, the Western states’ “preoccupation with immigration control continues to limit the willingness of States to grant asylum, particularly when faced with a human rights violation that is both familiar and endemic”.<sup>738</sup> Yet at the same time, as Indra observes, “a strong international resistance to the inclusion of gender as an explicit criterion for refugee status exists, most particularly on the part of those states which fear that this might result in a critique of their national gender relations”.<sup>739</sup>

Women fleeing gender-related persecution face various obstacles in applying for asylum under the current construction of international refugee

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<sup>736</sup> Love (1994) *Harvard Women’s Law Journal* 139-140.

<sup>737</sup> Mullally (2011) *International and Comparative Law Quarterly* 479.

<sup>738</sup> 478.

<sup>739</sup> D. Indra “Gender: A Key Dimension of the Refugee Experience” (1989) 6(3) *Refugee* 3, 1.

law. Ultimately, both the definition of a ‘refugee’ under international law and the wide discretion given to the courts to adjudicate asylum claims “fail to account for the unique problems facing women asylum-seekers”.<sup>740</sup> Overall, the process of determining ‘well-founded fear of persecution’ is deeply subjective. The adjudicator subjectively decides whether the fear of persecution exists, whether it is credible and well-founded and whether it is based on one of the five categories of persecution recognised under international refugee law.<sup>741</sup>

The situation is made especially difficult for asylum-seeking women, as none of the existing five categories are adequate to protect victims of gender-related persecution consistently, and the courts are often reluctant to expand these categories to include gender-related claims.<sup>742</sup> As Love argues, “the strong reliance on judicial discretion combine[d] with the structural biases against female refugees (...) undermines many gender-based persecution claims”.<sup>743</sup>

Furthermore, difficulties in communication and credibility problems often contribute to the denial of women’s asylum claims.<sup>744</sup> Ultimately, even if the women applying for asylum appropriately communicate their claims, and there are no issues of credibility, “harms they have suffered may be dismissed by (...) judges as personal abuse, rather than the political persecution which may lead to a grant of asylum”.<sup>745</sup>

With regard to the problems of communication, these often take place when the asylum application is based on sexual violence amounting to persecution. As Love observes, the situation is complicated by the fact that matters of a sexual nature are considered taboo in various cultures and because asylum-seeking women “often react to sexual violence with feelings of guilt, isolation and fear, [they] commonly resist attributing their flight to sexual violence”.<sup>746</sup> This behaviour often leads to situations where women fail

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<sup>740</sup> Love (1994) *Harvard Women’s Law Journal* 133.

<sup>741</sup> 145.

<sup>742</sup> 145.

<sup>743</sup> 151.

<sup>744</sup> 137.

<sup>745</sup> 137.

<sup>746</sup> 138.

to accurately convey the nature and severity of the sexual violence they have experienced and are consequently denied asylum by the adjudicators.<sup>747</sup>

Domestic violence, in particular, is often linked to the perceived 'proper role' of a woman in society and frequently takes place when the social or religious mores that define 'proper behaviour' are broken. This is especially true of so-called 'honour crimes', where women are subjected to brutal violence, or in the worst case, murdered when they are viewed as having transgressed the norms of acceptable behaviour for women and consequently having 'brought shame' on their families and societies.<sup>748</sup>

Honour crimes, instead, are strongly linked to the control women's sexuality in particular and have been described as "powerful means through which men exert their dominance over women".<sup>749</sup> The male dominance over women's sexual expression and reproductive rights is further reinforced by the condoning attitudes and acts of the states in which honour crimes and domestic violence takes place regularly.<sup>750</sup> As the special rapporteur on violence against women, Rashida Manjoo, has observed: "globally, the prevalence of different manifestations of [gender-related] killings is increasing, and a lack of accountability for such crimes is the norm".<sup>751</sup> Furthermore, the special rapporteur has highlighted that rather than being a new or isolated form of violence, gender-related killings are the extreme manifestation of existing forms of violence against women and are in fact "the ultimate act of violence which is experienced in a continuum of violence".<sup>752</sup> ECOSOC has also expressed concern about violent gender-related killings of women and girls in particular with respect to "countries where the concept of femicide or feminicide has been incorporated in national legislation".<sup>753</sup>

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<sup>747</sup> 138.

<sup>748</sup> Freedman *Gendering the International Asylum and Refugee Debate* 48.

<sup>749</sup> Amnesty International, "It's in our hands: Stop violence against women" *Amnesty International* 4.

<sup>750</sup> 4.

<sup>751</sup> UN Human Rights Council, "Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo" 20<sup>th</sup> Session (23 May 2012) UN Doc. A/HRC/20/16, para. 14.

<sup>752</sup> Para. 15.

<sup>753</sup> United Nations Economic and Social Council, Commission on the Status of Women, 57<sup>th</sup> Session, "Draft agreed conclusions submitted by the Chair of the Commission, Ms. Marjon V. Kamara (Liberia), on the basis of informal consultations: The elimination and prevention of all forms of violence against women and girls" (19 March 2013) UN Doc. E/CN.6/2013/L.5 para. 24.

Some commentators, as well as the UNHCR, have suggested the adoption of Gender Guidelines as a solution to the inclusion of gender-related persecution to the realm of international refugee law. This suggestion, however, has proved to be inefficient as well as problematic, as Gender Guidelines “have been adopted only in a minority of jurisdictions worldwide, and their effectiveness, where adopted, continues to be disputed”.<sup>754</sup> This will be further discussed in sub-chapter 6 2.

Ultimately, the dominant construction of ‘persecution’ under the current international refugee law regime does not ensure adequate protection of women refugees fleeing gender-related persecution. As discussed above, with regard to the protection of refugee women, the main downfall of the current regime is its failure to recognise gender as a cause of persecution. Until the current refugee regime is adequately modernised to include gender, thousands of women will continue to struggle to fit their asylum applications into the current refugee framework, and in the worst-case scenario, will continue to be left out of the international protection they so desperately need and legitimately deserve.

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<sup>754</sup> Mullally (2011) *International and Comparative Law Quarterly* 479.

## Chapter 4

### Gender persecution and the nexus requirement in the 1951 Refugee Convention

#### 4 1 Introduction

Thus far I have presented two different perspectives on the framework within which women fleeing gender-based persecution are forced to attempt to fit their asylum claims; the drafting perspective where the foundation for international refugee law was constructed without women fleeing gender-based violence in mind and the persecution perspective where the gendered nature of persecution that women suffer from was added and explored from the perspective that it does not fit under either of the two existing legally binding frameworks. In this chapter I focus my attention on exploring the nexus requirement i.e. the link between persecution and one of the five grounds established in Article 1(A)(2) of the 1951 Convention as replicated in the 1969 OAU Convention. The following chapter adds another layer to this discussion by presenting further context to gender based persecution considering the location where most gender-based persecution takes place, non-state actors as persecutors, the concept of utility in the refugee status assessment process and the culturalist approach in portraying of third-world women as 'cultural others'.

Some of the most difficult issues in current international refugee law jurisprudence arise over whether a gender-related asylum claim involves persecution owing to one of the five enumerated grounds.<sup>755</sup> As I have highlighted in the previous chapters, Article 1(A)(2) of the 1951 Convention stipulates that in order to be afforded protection, the applicant must prove that her/his fear of persecution is "for reasons of race, religion, nationality, membership of a particular social group or political opinion".

However, based on the foregoing discussions these five grounds are arguably no longer adequate or appropriate, in general, with respect to contemporary claims of refugee status, as they were not, as I pointed out in

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<sup>755</sup> *Crawley Refugees and Gender: Law and Process* 62.

chapter 2, developed as criteria that would be applicable to “all people in all places for all times”.<sup>756</sup> As Heyman observes, regardless of the seriousness of the persecution experienced, if the ground for persecution is not included in the existing five enumerated grounds, a proper asylum application cannot be made.<sup>757</sup> In this regard there is an increasing recognition that in a majority of asylum applications based on gender persecution, women face barriers to protection due to the issue of ground, despite the fact that the violence they have experienced amounts to persecution.<sup>758</sup>

The subsequent sub-sections examine the efforts of various jurisdictions to include gender asylum cases under the existing international refugee law framework. One of the most commonly used grounds in gender asylum cases is the PSG, which will be analysed in the second sub-section. The first sub-section will discuss the problems arising from the unsuitable fit of gender-based persecution cases under the PSG category, with a specific focus on the inconsistency of the cases’ outcomes as well as the inherent problem of the claims’ circularity. Ultimately it is the intrinsic legal uncertainty that renders PSG an unworkable category in relation to gender asylum claims.

The second sub-section examines the option of including gender persecution claims under the ‘political opinion’ category. As this sub-section demonstrates, there has been some success in applying this category to cases where the form of persecution is gendered, but the motivation behind the persecution is based on the victim’s political opinion. However, similarly to the PSG category, this category is ill-suited to a majority of gender asylum claims, specifically those cases where gender is the motivation for persecution. Furthermore, the political opinion category has proved to be unreliable in cases where the gendered form of persecution is sexual. Various Western courts have failed to acknowledge the political element in sexual violence against women and simply view it as a ‘private harm’. Overall, Western asylum adjudication system’s depoliticisation of women’s

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<sup>756</sup> C. Doyle, “Isn’t “Persecution” Enough? Redefining the refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution” (2009) 15 Washington and Lee Journal of Civil Rights and Social Justice 519, 556.

<sup>757</sup> M. Heyman “Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations” (2005) 17 (4) International Journal of Refugee Law 729, 730.

<sup>758</sup> Crawley *Refugees and Gender: Law and Process* 62.

experiences of persecution is particularly manifest in cases involving sexual violence.

The final sub-section focuses on the attempts to include gender persecution cases under the religion category. Yet again, even though a few gender-based persecution cases have been successfully brought under this category, it does not cover the whole array of gender persecution cases, as discussed. Overall, similarly to the other existing categories of persecution, trying to fit a gender persecution case under the religion category in order to include it in the existing refugee law framework is a profound misinterpretation of the actual motivation behind the persecution and ultimately renders persecution experienced exclusively by women due to their gender invisible.

#### **4 2 Inclusion of gender persecution cases under the PSG category**

Owing to the numerous problems that women asylum-seekers face when they submit their asylum applications on 'traditional' persecution grounds, various asylum adjudicators have attempted to ameliorate the situation by including claims of gender persecution to the "empirically vexing"<sup>759</sup> category of PSG. As a consequence, this has led to highly inconsistent results. This approach was first adopted by the European Parliament in 1984, when it passed a resolution calling upon states to "recognise that women who face harsh or inhuman treatment for having transgressed social mores constitute a 'particular social group' within the meaning of the definition of refugee in the 1951 Convention relating to the Status of Refugees".<sup>760</sup> The following year, the UNHCR Executive Committee made its first declaration concerning the position of women asylum-seekers and passed Conclusion No. 39 on Refugee Women and International Protection, which recognised that:

"States (...) are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having

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<sup>759</sup> Bosi (2004) *New York Law School Law Review* 792.

<sup>760</sup> European Parliament Document 1-112/84, adopted 13 April 1984.

transgressed the social mores of the society in which they live in may be considered as a particular social group”.<sup>761</sup>

In its Conclusion No. 39, the UNHCR addressed two of the main obstacles to gender-related persecution claims; firstly the lack of characterisation of cultural and social norms as persecution and secondly the lack of causal relation to a convention ground.<sup>762</sup>

In 2002, the UNHCR reiterated this approach in its Guidelines, according to which “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men”.<sup>763</sup>

However, the inclusion of gender in the existing legal framework under the PSG ground has been highly problematic in practice, as the category does not afford apt protection to victims of all forms of gender persecution.<sup>764</sup> Furthermore, the use of the PSG category in gender-related claims has led to an arbitrary standard of adjudication, as is evident from the case law presented below.<sup>765</sup> The inconsistencies in the outcomes of the gender-related persecution cases can be attributed to the unclear definition of the category, which has been described as “ambiguous, narrow and contrived”.<sup>766</sup> As Justice McHugh observed in *A v Minister for Immigration and Ethnic Affairs*<sup>767</sup> (A) “[c]ourts and jurists have taken widely differing views as to what constitutes ‘membership of a particular social group’ for the purposes of the

<sup>761</sup> UNHCR Executive Committee, “Report of 36<sup>th</sup> Session” (1985), UN Doc. A/AC.96/673, para. 115(4)(k).

<sup>762</sup> K. Musalo, “A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women’s Claims” (2010) 29(2) Refugee Survey Quarterly 46, 49.

<sup>763</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 30.

<sup>764</sup> P. Tuitt, *False Images – The Law’s Construction of the Refugee* (London: Pluto Press, 1996) 34.

<sup>765</sup> S. Dasgupta, “Can Women Flee? The Curious Case of the Survivors of Domestic Violence” 10, (SSRN, 20 November 2010) <<http://ssrn.com/abstract=1962352>> accessed 26 January 2015.

<sup>766</sup> Chan (2011) *Boston University International Law Journal* 180.

<sup>767</sup> (1997) 142 ALR 331.



Convention”.<sup>768</sup> Overall, no uniform interpretation of what constitutes a PSG has emerged among the Western jurisdictions.

One of the most difficult aspects of defining PSG as a ground for gender-related persecution applications is the issue of circularity. This problem arises when the application is based on a PSG comprising “persecuted women” or “previously abused women”.<sup>769</sup> By basing the definition of the PSG on the actual persecution experienced, the essential two-step requirement embedded in the 1951 Refugee Convention (a well-founded fear of persecution based on one of the grounds of the convention) becomes a one-step requirement.<sup>770</sup> As Schenk observes, in these cases “the claimant effectively argues that she is persecuted due to membership in a persecuted social group”.<sup>771</sup> The circularity of the argument makes the success of the claim highly unlikely, as the case of *A*<sup>772</sup> demonstrates. In its judgment in *A*, the Australian High Court held that the “characteristics defining a social group [cannot] be a common fear of persecution as this would negate the purpose of linking the refugee definition to civil or political status”.<sup>773</sup> Overall, the dominant international legal sentiment is to preserve the structure and integrity of the 1951 Convention. The leading view is that the drafters of the 1951 Convention intended the concept of PSG “to apply to social groups which exist independently of the persecution”.<sup>774</sup> Consequently, PSG cannot be based solely on the persecution experienced.<sup>775</sup> The UNHCR affirms this approach in its 2002 Guidelines, according to which “[i]t is well-accepted that it should be possible to identify the group independently of the persecution”.<sup>776</sup> However, arguably in complete contradiction, the 2002 UNHCR Guidelines

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<sup>768</sup> 355.

<sup>769</sup> 335.

<sup>770</sup> 335.

<sup>771</sup> 335.

<sup>772</sup> *A v Australia (MIEA)* (1998) INLR 1.

<sup>773</sup> *Crawley Refugees and Gender: Law and Process* 155.

<sup>774</sup> 141.

<sup>775</sup> E. Nilsson, “The “refugee” and the “nexus” requirement: The relation between subject and persecution in the United Nations Refugee Convention” *Women’s Studies International Forum* (not published at the time of writing) (Women’s Studies International Forum, 2014) <<http://dx.doi.org/10.1016/j.wsif.2013.12.008>> accessed 6 April 2014, p. 5.

<sup>776</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 31.

further state that “discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context”.<sup>777</sup>

The ambiguity in the 2002 UNHCR Guidelines can be taken as an indicator of the complexity and difficulty of defining the PSG category. It also demonstrates the UNHCR’s struggle to find a balance between preserving the existing structure of the 1951 Refugee Convention and confronting the obvious need to amend and modernise international refugee law in order to provide adequate protection to victims of gender-based persecution.

The problem of circularity has been dealt with, especially in US courts, by requiring ‘internal cohesion’ within the proposed PSG. However, the requirement of ‘internal cohesion’ has created an “often mechanistic and reductive classification problem” when there is an attempt to fit gender-related persecution under the PSG category.<sup>778</sup> This problem is caused by the delimiting construction of “artificial and ossified sub-categories of women who are recognized as subjected to persecution” in the absence of a more suitable category on which to base gender claims.<sup>779</sup>

Eventually, the requirement of ‘internal cohesion’ within the PSG, combined with as narrow a construction of the PSG as possible, has led to the removal of external cohesion as a way of defining PSG.<sup>780</sup> This has caused various problems, specifically for the gender persecution cases, as the definition of PSG solely on gender is considered too wide. The fear of the refugee-receiving jurisdictions is that, with the relaxation of the requirements of internal cohesion, the PSG category could “subsume the entire framework of the asylum law”<sup>781</sup> and cause a flood of asylum-seekers.

The fear of widening the definition has also been noted in paragraph 31 of the 2002 UNHCR Guidelines, according to which “[t]he size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group”.<sup>782</sup> However, the 2002 UNHCR

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<sup>777</sup> Para. 31.

<sup>778</sup> Randall (2002) *Harvard Women’s Law Journal* 290.

<sup>779</sup> 290.

<sup>780</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 335.

<sup>781</sup> 336.

<sup>782</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 31.

Guidelines dismiss this argument and state that it “has no basis in fact or reason, as the other grounds are not bound by this question of size”.<sup>783</sup>

Nevertheless, in practice it is arguably because of this fear that European states are loath to accept a more general recognition of gender as a PSG.<sup>784</sup> On the whole, the fear of a massive influx of refugees being able to build feasible claims, combined with the absence of a universal definition of PSG, has led to Western jurisdictions defining PSG as narrowly as possible.<sup>785</sup> This has led to reluctance by Western courts to recognise ‘women’ as a group under the PSG ground, especially in cases where gender-related persecution in the country of origin is widespread.<sup>786</sup>

Owing to the reasons mentioned above, the qualification of gender-related asylum claims under PSG category and the outcome of gender asylum cases in which PSG is used as a ground are increasingly inconsistent across Western jurisdictions. The discrepancy has been especially problematic in the US.<sup>787</sup>

Despite there being a growing body of case law accepting gender at least as a part of PSG, numerous US courts continue to refuse to do so. For example, the initial success of the pioneering case of *In re Kasinga*<sup>788</sup>, discussed in sub-chapter 3 4 1, in which the BIA accepted gender as a component of PSG for the first time, was followed by a severe backlash caused by the BIA’s decision in *In re R-A*.<sup>789</sup> As Randall argues, this case demonstrated “a blatant unwillingness (...) to recognize gender as the basis of persecution”.<sup>790</sup> Overall, as Bosi argues, despite BIA’s decision to include gender in the meaning of PSG in *Kasinga*, the inconsistent rulings post-

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<sup>783</sup> Para 31.

<sup>784</sup> J. Freedman “Taking Gender Seriously in Asylum and Refugee Policies” in K. Khory (ed) *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan, 30 Oct 2012) 54.

<sup>785</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 335.

<sup>786</sup> Freedman “Taking Gender Seriously in Asylum and Refugee Policies” in *Global Migration: Challenges in the Twenty-First Century* 54.

<sup>787</sup> S. Siddiqui, “Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify” (2010) 52 *Arizona Law Review* 505, 511.

<sup>788</sup> *In re Fauziya Kasinga*, Int. Dec. 3278 (B.I.A. 1996).

<sup>789</sup> See discussion in chapter 3 4 3.

<sup>790</sup> Randall (2002) *Harvard Women’s Law Journal* 297.

*Kasinga* have demonstrated that women who base their asylum claims on gender as a PSG “fight a new battle with each case”.<sup>791</sup>

In *In re R-A-*, even though it acknowledged that the applicant had been subjected to severe gender-related physical and sexual persecution committed by her husband over decades, the BIA rejected the applicant’s asylum claim, because the persecution had not taken place on the account of the existing convention grounds.<sup>792</sup> The BIA rejected the applicant’s assertion of belonging to a PSG comprising “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”.<sup>793</sup> According to the BIA, this definition lacked ‘a voluntary association’ among the members of the group, which is required by the PSG.<sup>794</sup> Despite this requirement contradicting the existing standard of PSG as defined in the earlier case of *In re Acosta*,<sup>795</sup> the BIA held that ‘voluntary association’ was of “central concern”.<sup>796</sup> However, the introduction of the element of ‘voluntary association’ as a requirement has made it very difficult to fit gender-related persecution cases under the PSG category and has received widespread international criticism. For example, in the case of *Re ZWD*,<sup>797</sup> the RSAA New Zealand criticised “the tendency of some jurisdictions to impose a requirement of voluntary association”<sup>798</sup> while stating that by doing so “the Court[s] fail to recognize the importance of the persecutor’s perception in defining a social group”.<sup>799</sup> According to the RSAA,

<sup>791</sup> Bosi (2004) *New York Law School Law Review* 797.

<sup>792</sup> *In re R-A-*, 22 I. & N. Dec. 906 (BIA 1999)

<sup>793</sup> 22 I. & N. Dec. 906

<sup>794</sup> The requirement of “voluntary association” was first introduced by the United States Court of Appeals for the Ninth Circuit in 1986 in *Sanchez-Trujillo v INS* (801 F.2d 1571 (9th Cir. 1986)). In *Sanchez-Trujillo*, the Ninth Circuit defined PSG as “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group”. This decision has been heavily criticised, as it departed from the earlier standard of PSG as defined by the BIA in 1985 in *In re Acosta* (19 I. & N. Dec. 211 (B.I.A. 1985)) and led to a situation where there were two conflicting definitions of PSG. According to BIA’s definition in *Acosta*, a member of PSG is an individual who is a “member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship”.

<sup>795</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>796</sup> *In re R-A-*, 22 I. & N. Dec. 906 at 917.

<sup>797</sup> *Re ZWD* Refugee Appeal No 3/91, New Zealand Refugee Review Board.

<<http://www.refworld.org/docid/3ae6b71a8.html>> accessed 6 April 2014.

<sup>798</sup> *Crawley Refugees and Gender: Law and Process* 156.

<sup>799</sup> Refugee Appeal No 3/91, New Zealand Refugee Review Board.

“the existence of a voluntary associational relationship, an internally-defining factor, has no origin in the Refugee Convention”.<sup>800</sup> Similarly, the ‘voluntary association’ requirement has been rejected in the UK by the House of Lords in *Islam and Shah*<sup>801</sup> and by the High Court of Australia in *A v Minister for Immigration and Ethnic Affairs*.<sup>802</sup> Furthermore, according to the 2002 UNHCR Guidelines, “[t]here should (...) be no requirement that the particular social group be cohesive or that members of it voluntarily associate”.<sup>803</sup>

Despite the later vacation of the BIA’s decision by the attorney general in 2001 and the decision in 2009 by the Immigration Judge (IJ) to grant asylum to the applicant in *In re R-A-*, there is still no conclusive decision on gender as a component in the PSG category.<sup>804</sup> The US asylum adjudicators continue to resist the inclusion of gender as a component of PSG, especially in asylum applications by victims of domestic violence. For example, in 2010, in an unreported case, a US asylum court stated that “nothing had changed since R-A-”.<sup>805</sup> Similarly in 2011, US asylum adjudicators denied asylum to victims of gender-related persecution by rejecting the notion that “Indian women in a domestic relationship and unable to free themselves from their partners and viewed as property by nature of their position in a domestic relationship”<sup>806</sup> and “women in abusive relationships in El Salvador who escape the country in order to flee their abuser”<sup>807</sup> form a PSG. As Bookey observes, in recent years various US courts have reached similar conclusions in several other gender-related persecution cases brought under the PSG category.<sup>808</sup>

Furthermore, in cases where victims of gender-related persecution have been granted asylum on a PSG ground, the courts have had to resort to

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<sup>800</sup> Refugee Appeal No 3/91, New Zealand Refugee Review Board.

<sup>801</sup> (1998) 1 WLR 74.

<sup>802</sup> (1997) 190 CLR 225.

<sup>803</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 31.

<sup>804</sup> Bookey (2013) *Hastings Women’s Law Journal* 117.

<sup>805</sup> 141.

<sup>806</sup> CGRS Database Case number 7607 (2011) as cited by Bookey (2013) *Hastings Women’s Law Journal* 141.

<sup>807</sup> CGRS Database Case number 8644 (2011) as cited by Bookey (2013) *Hastings Women’s Law Journal* 142.

<sup>808</sup> See for example CGRS Database Case numbers 6626 (2010), 6667 (2011), 8491 (2011) and 8282 (2012) as cited by Bookey (2013) *Hastings Women’s Law Journal* 141-2.

legal manipulation. This has led to a complex and constricted construction of the PSG. For example, in *Kasinga*, rather than acknowledging that the persecution in question (female genital mutilation) was based solely on gender and consequently defining the PSG as women in general, the BIA defined the relevant PSG as comprising “young women of the Tchamba-Kunsuntu tribe who had not undergone female genital mutilation and who were opposed to the practice”.<sup>809</sup>

There have however, been some advances regarding the utilisation of the PSG ground in gender-related asylum claims in the recent years. For example, in a 2005 case entitled *Ali v Ashcroft*,<sup>810</sup> the Ninth Circuit granted asylum to a Somali woman “whose brother-in-law was shot and killed in her home while she was being raped by members of a militia group of a rival clan who opposed Ali’s political beliefs”.<sup>811</sup> In this progressive decision, the Ninth Circuit reversed IJ and BIA’s decisions branding the gender-related persecution in question as private harm and instead held that the appellant was persecuted based on her political opinion as well as her membership in a PSG that encompasses her clan.<sup>812</sup> However, what makes the situation problematic and is a cause for serious worry is that as a result of persistent uncertainty and inconsistency in case law, the decision reached might have been very different “if [it] had been brought in circuits other than the Ninth Circuit Court of Appeals”.<sup>813</sup> For example, despite the asylum-warranting facts of the case, the application would most likely have been refused if it had been heard by the Fifth Circuit, which additionally requires the persecution having been “performed with a ‘punitive intent’”.<sup>814</sup>

Furthermore, in 2009 the Obama Administration published a brief that the Department of Homeland Security (DHS) submitted in the *In re L-R* case. In this brief, the DHS acknowledges that groups comprising “Mexican women in domestic relationships who are unable to leave” and “Mexican women who

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<sup>809</sup> *In re Fauziya Kasinga*, Int. Dec. 3278 (B.I.A. 1996).

<sup>810</sup> 394 F.3d 780 (9th Cir. 2005).

<sup>811</sup> L. Birdsong, ““Give me your gays, your lesbians and your victims of gender violence, yearning to breathe free of sexual persecution...”: The new grounds for grants of asylum” (2008) 36 *Nova Law Review* 357, 361.

<sup>812</sup> *Ali v Ashcroft*, 394 F.3d 780, 787 (9th Cir. 2005)

<sup>813</sup> Birdsong (2008) *Nova Law Review* 361.

<sup>814</sup> 385.

are viewed as property by virtue of their positions within domestic relations” could form a PSG.<sup>815</sup> In general, according to the DHS brief, PSG for victims of domestic violence could be formed by taking into account “the way in which the abuser and society perceive their position in a domestic relationship”.<sup>816</sup> As the DHS further stated, “in some cases, a victim of domestic violence may be a member of cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership”.<sup>817</sup> Yet, despite the DHS having proposed a new legal justification for granting asylum to victims of domestic violence, it still “stopped short of advocating a full grant of protected status”.<sup>818</sup>

Notwithstanding these developments, many US immigration judges continue to reject the wider approach towards gender asylum cases and express “scepticism regarding the viability of domestic violence as a basis for asylum under any circumstances”.<sup>819</sup> As Lobo observes, “the lower US courts rarely recognize ‘women’ as a particular social group; they either deny gender asylum claims or grant relief via a more narrowly-defined particular social group”.<sup>820</sup> Overall, while the US has recognised a limited amount of cases in which the PSG is at least partly constructed on gender, including some cases involving FGM and domestic violence, there are still large problems that can only be remedied by broadening the definition of refugee to include gender.<sup>821</sup>

By comparison, the Canadian Supreme Court highlighted the element of immutability in the construction of a PSG in one of the most progressive cases with regard to gender-related persecution, namely *Canada (Attorney General) v Ward (Ward)*.<sup>822</sup> In *Ward*, Justice La Forest identified three

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<sup>815</sup> Brief of Department of Homeland Security (13 April 2009) <[http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf)> accessed 7 April 2014.

<sup>816</sup> J. Blake “Welcoming Women: Recent Changes in US Asylum Law” (2010) 109 *Michigan Law Review First Impressions* 71.

<sup>817</sup> Brief of Department of Homeland Security (13 April 2009) <[http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf)> accessed 7 April 2014.

<sup>818</sup> Blake (2010) *Michigan Law Review First Impressions* 71.

<sup>819</sup> Bookey (2013) *Hastings Women's Law Journal* 141.

<sup>820</sup> B. Lobo, “Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and in the United Kingdom” (2012) 26 *Georgetown Immigration Law Journal* 361, 362.

<sup>821</sup> A. Heitz, “Providing a Pathway to Asylum: Re-interpreting “Social Group” to Include Gender” (2013) 23(2) *Indiana International and Comparative Law Review* 213, 219.

<sup>822</sup> [1993] 2 S.C.R. 689.

categories for defining a social group within the meaning of the refugee definition of the 1951 Refugee Convention. These categories include innate or unchangeable characteristics, voluntary association for reasons so fundamental to human dignity that the applicant should not be forced to forsake the association and association by a former voluntary status, unalterable due to its historical permanence.<sup>823</sup> Furthermore, Justice La Forest acknowledged ‘gender’ itself, without any qualification, as a basis for PSG, because it is an ‘innate characteristic’.<sup>824</sup>

Despite the Canadian Supreme Court’s ruling in *Ward*, there is still confusion in Canada as to whether or not gender alone can constitute a PSG. According to the Canadian Gender Guidelines, PSG cannot be “based solely on the common victimization of its members”.<sup>825</sup> Yet, the Guidelines also state that PSG is “not defined solely by common victimization if the claimant’s fear of persecution is also based on her gender”.<sup>826</sup> As Adjin-Tettey argues, this seems to suggest that PSG will be defined by “reference to gender and some other characteristic, usually the common victimization which confronts group members”.<sup>827</sup> This approach has been used before, for example in the cases of *Narvaez v M.C.I.*<sup>828</sup> and *Diluna v M.E.I.*, in which the PSG was defined as “women subject to domestic abuse”,<sup>829</sup> and in *Cheung v M.E.I.*, in which the PSG was defined as “women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to come within the meaning of the definition of a Convention refugee”.<sup>830</sup>

Despite the positive impact that the definition above of a PSG has had, especially on the success rate of gender-based persecution claims, this approach is problematic because of its underlying circularity. As Adjin-Tettey argues, “naming a particular harm feared as the basis of defining the group deviates from the focus on immutability as the foundation of gender-based

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<sup>823</sup> 739.

<sup>824</sup> E. Adjin-Tettey, “Defining a Particular Social Group Based on Gender” (1997) 16(4) *Refuge* 22.

<sup>825</sup> Immigration and Refugee Board of Canada “Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution” *IRB*.

<sup>826</sup> Immigration and Refugee Board of Canada “Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution” *IRB*.

<sup>827</sup> Adjin-Tettey (1997) *Refuge* 23.

<sup>828</sup> (1995) 2 F.C. 55 (T.D.)

<sup>829</sup> (1995) 29 Imm. L.R. (2d) 156 (T.D.).

<sup>830</sup> (1993) 3 F.C. 314 (F.C.A.) at 87.



social groups (...) The common victimization is of course not innate, and is clearly not the basis upon which the harm is feared".<sup>831</sup> This was noted by the IRB in *America Torres*,<sup>832</sup> where the Immigration and Refugee Board (IRB) found the applicant's assertion that she belonged to a PSG consisting of "abused women who do not receive any effective protection from their home state" to be circular. In rejecting the PSG, the IRB stated that a "claimant must fear persecution for a Convention reason. The Convention reason must pre-exist the persecution. To argue that someone is persecuted for the reason that she is persecuted is [irrational]".<sup>833</sup>

In order to eliminate the problem of circularity, PSG has to be defined with regard to the vulnerability in general caused by an innate character (such as gender) rather than "by reference to particular forms of vulnerability".<sup>834</sup> Adjin-Tettey argues that it is logical to base PSG on gender alone, as:

"Women constitute a particular social group both because of an innate characteristic that they share (gender), and because of their susceptibility to serious human rights violations. The fact that not all women are targets of gender-related serious human rights abuses at any one particular time does not affect the designation of women as a particular social group".<sup>835</sup>

Like the Canadian jurisprudence, the UK House of Lords has recognised gender as a component of PSG, in *Islam and Shah*.<sup>836</sup> In its judgment, the House of Lords rejected the Court of Appeals' finding that there was "no common uniting attribute which could entitle the appellants to the status of 'membership of a particular social group'".<sup>837</sup> In construing the PSG category, the House of Lords identified three required elements, namely a common immutable characteristic, a social perception test (as proposed by Lord Hope as an alternative test to the common immutable character test) and

<sup>831</sup> Adjin-Tettey (1997) *Refuge* 23.

<sup>832</sup> IRB Decision T92-03227 (18 November 1992).

<sup>833</sup> 6.

<sup>834</sup> Adjin-Tettey (1997) *Refuge* 23.

<sup>835</sup> 23.

<sup>836</sup> (1998) 1 WLR 74.

<sup>837</sup> (1998) 1 WLR 74.

a prohibition of persecution experienced. The latter was the defining element of the PSG, because of the circularity of the argument. Furthermore, the House of Lords noted that there was no need for every one of the members to fear persecution in order for them to compose a PSG.<sup>838</sup> Despite accepting that gender constituted a part of a PSG, the House of Lords was divided in its judgment on whether the PSG should comprise “Pakistani women” or “Pakistani women accused of adultery”. Consequently, similarly to the situation in Canada, it is unclear whether or not the House of Lords ruled that gender alone constitutes a PSG.

Undeniably, the lack of express acceptance of gender alone as the basis of a PSG is one of the biggest obstacles for a woman asylum-seeker fleeing gender-based persecution to overcome. With the exception of Ireland,<sup>839</sup> Germany,<sup>840</sup> Sweden<sup>841</sup> and Spain,<sup>842</sup> European countries have taken a more restrictive approach to the interpretation of this ground.<sup>843</sup> For example, according to a 2012 report by the European Parliament (2012 European Parliament Report), in France “authorities are reluctant to consider gender as a Convention ground”.<sup>844</sup> Furthermore, in cases where PSG is used, the French asylum authorities “tend to limit the definition of a PSG by adopting a cumulative approach to PSG and requiring that applicants ma[k]e their opinion/behaviour public, resulting in a non-gender-sensitive approach

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<sup>838</sup> (1998) 1 WLR 74.

<sup>839</sup> Under the 1996 Irish Refugee Act (Act No. 17/1996) membership of a PSG includes “membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.

<sup>840</sup> Under §60(1) of the 2005 Immigration Act (Zuwanderungsgesetz) persecution “solely on account of sex” was included in the definition of PSG. According to §60(1) “Eine Verfolgung wegen der Zugehörigkeit zu einer bestimmten sozialen Gruppe kann auch dann vorliegen, wenn die Bedrohung des Lebens, der körperlichen Unversehrtheit oder der Freiheit allein an das Geschlecht anknüpft”.

<sup>841</sup> Following the 2009 Act amending the Aliens Act (2005:716), Sweden has included “gender” expressly as a PSG.

<sup>842</sup> The 2007 Amendment to the Organic Law for the Effective Equality of Women and Men (Ley Orgdnica Para la Igualdad Efectiva de Mujeres y Hombres (B.O.E. 1984, 74)) includes an amendment to the Spanish asylum legislation that declares that refugee protection “applies to foreign women who have fled their countries on account of a well-founded fear of suffering gender-based persecution”.

<sup>843</sup> S. Kuttner, “Gender-Related Persecution as a Basis for Refugee Status: The Emergence of an International Norm” (1997) 16(4) *Refugee* 17, 18.

<sup>844</sup> H. Cheikh Ali, C. Querton and E. Soulard “Gender related asylum claims in Europe” 46 (European Parliament, 2012)

<[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM\\_ET\(2012\)462481\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf)> accessed 9 June 2014.

and leaving some women applicants unprotected”.<sup>845</sup> The report also observed that in the UK, “if more than one Convention ground was engaged in, only the non-gender-related Convention ground was given appropriate consideration in women’s asylum cases”.<sup>846</sup>

Overall, rather than including gender persecution in the domestic asylum legislation, various European states have opted to make the asylum process more gender-sensitive by publishing legally non-binding Gender Guidelines. For example, neither Dutch nor Norwegian legislation “include any mention of gender-based persecution”.<sup>847</sup> However, Norway’s Ministry of Justice issued gender guidelines in 1998 that recognised persecution committed by non-state agents and the possibility of gender constituting a convention ground for the granting of refugee status.<sup>848</sup> Asylum guidelines in the Netherlands (Vreemdelingen-circulaire) further “advocate a ‘gender-inclusive approach to asylum’”,<sup>849</sup> and it is the official policy of the Dutch government that:

“[p]ersecution for reasons of membership of a particular social group may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection”.<sup>850</sup>

Similarly, Lithuania, which has no binding asylum legislation with regard to gender persecution, has issued a non-binding electronic manual that “incorporates a number of gender-related persecution points, including a

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<sup>845</sup> 49.

<sup>846</sup> 46.

<sup>847</sup> Doyle (2009) *Washington and Lee Journal of Civil Rights and Social Justice* 546.

<sup>848</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit* 26

<sup>849</sup> Doyle (2009) *Washington and Lee Journal of Civil Rights and Social Justice* 546.

<sup>850</sup> Spijkerboer *Gender and Refugee Status* Annex 7.

definition of a Particular Social Group [with] reference to gender as one possible PSG".<sup>851</sup>

According to the 2012 European Parliament Report, PSG in Europe is "disproportionally used in gender-related cases compared to the other Convention grounds".<sup>852</sup> However, possibly due to the restrictive approach adopted by the European states, the report concluded that while PSG is almost exclusively the ground used in gender persecution cases, it is often neither properly analysed nor defined.<sup>853</sup>

The rejection of gender alone as a ground for PSG has led to the emergence of the 'gender +' standard, which requires refugee women to identify themselves "more narrowly as a part of a particular subset of the female population".<sup>854</sup> This is one of the main difficulties that arise when PSG is used as a ground in gender persecution cases. As the 2012 European Parliament Report observes:

"One of the difficulties [of using the PSG category] is that gender alone may not be enough for the applicability of the particular social group, which means that international protection is not granted. Unless the reasons for persecution include gender in addition to another ground, there is a restrictive interpretation".<sup>855</sup>

Consequently, at worst, the incorporation of gender as a sub-division of PSG can turn out to be nothing more than pseudo-inclusion, leaving victims of gender-related persecution without real protection. Even in jurisdictions where 'gender' alone is accepted as a PSG, such as Sweden, studies suggest that the inclusion of gender as a sub-category of PSG has "had little impact on practical applications".<sup>856</sup> This is caused by the hidden gender bias in the

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<sup>851</sup> Crawley and Lester "Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe" *UNHCR Evaluation and Policy Analysis Unit*.

<sup>852</sup> Cheikh Ali, Querton and Soulard, "Gender related asylum claims in Europe" *European Parliament* 45.

<sup>853</sup> 45.

<sup>854</sup> Siddiqui (2010) *Arizona Law Review* 517.

<sup>855</sup> Cheikh Ali, Querton and Soulard, "Gender related asylum claims in Europe" *European Parliament* 46.

<sup>856</sup> Nilsson, "Persecution on Account of One's Gender: Refugee Status or Status Quo?" *feminists@law* 5.

actual inclusion of gender itself in the legislative framework.<sup>857</sup> As Nilsson explains:

“In the investigation that the Government bill is based on there is also a discussion about ‘wife-battering’, where it is declared that there may be many reasons for a woman to be exposed to serious battering; for instance, because she has been unfaithful, or accused of being unfaithful – the primary or driving force normally being seen to be jealousy. According to the investigation, it would be far-fetched to say that the action of the man in these cases is due to her “membership of a particular social group”.<sup>858</sup>

Owing to the hidden gender bias, the aforementioned investigation makes a majority of domestic violence cases out to be ‘private harm’, while it completely ignores the root cause: ongoing structural violence against women. It is this larger framework of structural violence, which takes the form of domination and control and of which domestic violence is a manifestation that is aimed at women solely because of their gender.

The inclusion of gender as a mere sub-category of PSG has a detrimental impact overall on gender-related asylum claims. As Kandt argues:

“[G]ranting women refugees asylum under the ‘social group’ category lessens the importance of gender-based persecution in comparison to the other four categories of persecution recognized in the UN Convention definition, such as race or national origin. This is the case because gender is still not on par with the other four categories because it is hidden under the social group rubric”.<sup>859</sup>

Treating the inclusion of gender in the PSG as a solution to the exclusion of women from the current refugee framework has received serious

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<sup>857</sup> 5.

<sup>858</sup> 5. See also Statens Offentliga Utredningar, “Flyktingskap och könsrelaterad förföljelse” (Statens Offentliga Utredningar, 2004) p. 31.

<http://www.regeringen.se/content/1/c6/01/14/84/c9abb83e.pdf> accessed 6 April 2014.

<sup>859</sup> K. E. Kandt, “United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison” (1995) 9 Georgetown Immigration Law Journal 137, 169.

criticism. According to Bosi, this approach has created a “mechanistic and reductive classification problem by creating artificial sub-categories that are arbitrarily either denied or granted asylum”.<sup>860</sup> Similarly, Doyle argues that the incorporation of gender in the ‘particular social group’ category is simply unsatisfactory.<sup>861</sup> Tuitt has further criticised the inclusion of gender under the ‘particular social group’ by stating that the category is, like other grounds of the 1951 Refugee Convention, “Eurocentric and gender-partisan”.<sup>862</sup> According to Tuitt, relying upon PSG compromises women’s status as refugees. Ultimately, “by denying women a gender-specific identity within the Convention definition, the morality of the Convention is reasserted”.<sup>863</sup> Crawley echoes this sentiment by stating that the inclusion of ‘women’ under PSG should be treated as a last resort. She concludes that the framework for asylum determination has to be transformed in order to include women “not as a special case deviating from the norm, but as one of many groups (...) in a heterogeneous universe”.<sup>864</sup>

Although there have been some positive legal developments, Western asylum adjudicators generally continue to fail to provide adequate protection to victims of gender persecution, because they do not incorporate the cases under the PSG category. As Birdsong argues, the lack of precedent and the wide discretionary powers of the domestic courts have led to judicial uncertainty with regard to the PSG category and have made it “difficult to readily predict how such cases may be decided before filing”.<sup>865</sup> Even though the utilisation of the PSG category has been successful in some types of gender-related persecution cases, its applicability to gender-based persecution cases is very limited. Thus, PSG continues to be a tremendously uncertain nexus for the majority of gender-based persecution cases in which women seeking refugee status on that basis receive inadequate protection.<sup>866</sup>

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<sup>860</sup> Bosi (2004) *New York Law School Law Review* 792.

<sup>861</sup> Doyle (2009) *Washington and Lee Journal of Civil Rights and Social Justice* 537.

<sup>862</sup> Tuitt *False Images – The Law’s Construction of the Refugee* 34.

<sup>863</sup> 35.

<sup>864</sup> Crawley *Refugees and Gender: Law and Process* 9.

<sup>865</sup> Birdsong (2008) *Nova Law Review* 381.

<sup>866</sup> Bosi (2004) *New York Law School Law Review* 791.

### 4 3 Inclusion of gender persecution cases under the political opinion category

Besides the attempt to construct a PSG as discussed in the preceding sub-chapter, Western courts have taken additional approaches in their attempts to accommodate asylum applications based on gender-based persecution. One of them is trying to fit these claims under the ‘political opinion’ category, as indicated in Article 1(A)2 of the 1951 Refugee Convention. This has been done by construing ‘political opinion’ to include a woman’s attitude towards her government or her opinion about the treatment of women in her country.<sup>867</sup> Political opinion has also been attributed to women based on “the perception of members of the established socio-political structure that she holds inappropriate views because of her deviation from prescribed roles”.<sup>868</sup> The use of political opinion as a ground for persecution in gender asylum claims has also been sanctioned in the 2002 UNHCR Gender Guidelines. According to the Guidelines:

“Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her”.<sup>869</sup>

The utilisation of the ‘political opinion’ category has, however, proved to be problematic for victims of gender-related persecution. While overt expression of political opinion through conventional means has traditionally been accepted as a basis for political asylum, “the less conventional forms of political resistance [often applied by women], such as a refusal to abide by discriminatory laws or to follow prescribed rules of conduct, are often wrongly

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<sup>867</sup> J. Linarelli, “Violence against Women and the Asylum Process” (1997) 60 Albany Law Review 977, 983.

<sup>868</sup> 983.

<sup>869</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 32.

categorised as personal conduct”.<sup>870</sup> The less traditional forms of women’s political resistance have also been recognised in the 2002 UNHCR Gender Guidelines, according to which “direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies”.<sup>871</sup> According to the 2002 UNHCR Guidelines “women are less likely than their male counterparts to engage in high profile political activity and are more often involved in ‘low level’ political activities that reflect dominant gender roles”.<sup>872</sup> The Guidelines further state that, “these factors need to be taken into account in gender-related claims”.<sup>873</sup>

Yet, in practice this is rarely the case. As Crawley observes, “women’s political activities have typically been seen as marginal, peripheral or non-existent”.<sup>874</sup> There is also a tendency in Western courts to “depoliticise the experiences of women seeking asylum” and a failure to acknowledge the “gendered forms that political participation and resistance may assume”.<sup>875</sup> Case law reflects this tendency.<sup>876</sup> Furthermore, in cases where Western courts have accepted women’s activities as political, they are often viewed as being so ‘low-level’ that the applicant’s fear of persecution is considered to be unfounded.<sup>877</sup>

The inherent gender bias in the interpretation of what constitutes a political opinion has been also demonstrated by several Western courts that “grant[ed] male refugees asylum while female refugees were denied asylum in similar cases”.<sup>878</sup> Kandt argues that such occurrences are fairly common.<sup>879</sup>

In addition, what makes the use of the political opinion nexus in gender asylum cases problematic is that, in a similar manner to the PSG ground, the results of the cases in which it has been used are rife with inconsistencies.

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<sup>870</sup> Crawley *Refugees and Gender: Law and Process* 5.

<sup>871</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 32.

<sup>872</sup> Para. 32.

<sup>873</sup> Para. 32.

<sup>874</sup> Crawley *Refugees and Gender: Law and Process* 22.

<sup>875</sup> 97.

<sup>876</sup> See, for example, the British cases Appeal No HX75299/95 23 March 1996 (unreported) and Appeal No HX/70343/95 19 June 1995 as cited by Crawley *Refugees and Gender: Law and Process* 99.

<sup>877</sup> Crawley *Refugees and Gender: Law and Process* 98.

<sup>878</sup> Kandt (1995) *Georgetown Immigration Law Journal* 144.

<sup>879</sup> 144.



This is particularly true of US jurisprudence. In the first successful case in the US in which gender-related persecution was brought under the ‘political opinion’ ground, *Lazo-Majano*<sup>880</sup> the Ninth Circuit reversed the BIA’s decision to reject the claim and granted asylum to the applicant who had been sexually and physically abused over an extended period of time by an army officer for whom she worked. According to the BIA’s earlier finding, the harm that the applicant had experienced and feared “was strictly personal and did not constitute persecution”.<sup>881</sup>

In its innovative judgment, the Ninth Circuit found that the applicant was eligible for asylum based on her actual political opinion as well as the political opinion imputed on her by her persecutor.<sup>882</sup> With regard to the imputed political opinion, the Ninth Circuit stated that “a person does not have to be politically active or aware to suffer persecution on account of political opinion. It is sufficient that the persecutor thinks that the person is guilty of a political opinion”.<sup>883</sup> While analysing the asylum claim, the Ninth Circuit took an expansive approach to the interpretation of ‘political opinion’ and came to the conclusion that if the circumstances of the case were seen in a social context, the persecutor was:

“[...] asserting the political opinion that a man has a right to dominate and he has persecuted [the applicant] to force her to accept this opinion without rebellion. [The persecutor] told [the applicant] that in his treatment of her he was seeking revenge (...) His statement reflects a (...) generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it. [The applicant] was not permitted by [the persecutor] to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion”.<sup>884</sup>

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<sup>880</sup> 13 F.2d 1432 (9th Cir. 1987).

<sup>881</sup> *Lazo-Majano v INS*, 813 F.2d 1432 (9th Cir. 1987) at 1439.

<sup>882</sup> Kelly (1993) *Cornell International Law Journal* 637.

<sup>883</sup> Bahl (1997) *Cardozo Women’s Law Journal* 52.

<sup>884</sup> *Lazo-Majano v INS*, 813 F.2d 1432 (9th Cir. 1987) at 1435.

The Ninth Circuit's decision indicates that where a woman "demonstrates a resistance to male domination, or to the state's refusal or inability to protect victims from gender-based violence and/or repression, she expresses a political opinion and can provide the grounds for a claim to asylum and a well-founded fear of persecution".<sup>885</sup>

The Ninth Circuit's wide interpretation of the political opinion nexus has been contradicted, however, in various post-*Lazo-Majano* cases, causing judicial uncertainty and confusion about the current state of the law. For example, in *Campos-Guardado*<sup>886</sup> the Fifth Circuit denied the applicant's claim for asylum based on an imputed political opinion. In *Campos-Guardado*, the applicant had been forced to watch the political assassination of her uncle and her cousins by a group of guerrillas and was then raped while the guerrillas shouted political slogans.<sup>887</sup> One of the guerrillas had later threatened to kill the applicant on numerous occasions if she revealed his identity. Believing that she would not be protected by the state in El Salvador, the applicant fled to the US and applied for asylum. In its judgment, the Fifth Circuit denied asylum and upheld the BIA's ruling according to which the sexual violence that the applicant had experienced was private harm and took place as a result of a 'personal relationship' rather than an imputed political opinion.<sup>888</sup>

The Fifth Circuit's decision in *Campos-Guardado* has been criticised specifically for not detecting the political undertone of the violence inflicted on the applicant. As Bahl argues, while the type of violence inflicted "was clearly delineated by gender (...) the reason for assaulting [the applicant and her uncle and cousins] was probably the same".<sup>889</sup> The decision has also been widely criticised for contradicting the earlier case of *Lazo-Majano* and for missing the opportunity to "explore and define gender-specific persecution claims".<sup>890</sup>

One of the main failures of the court, however, was to view sexual violence as a private act while ignoring its political nature. As Bahl argues, the ambivalent attitude of Western courts in general "is typical when the abuse is

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<sup>885</sup> Bahl (1997) *Cardozo Women's Law Journal* 55.

<sup>886</sup> 809 F.2d 285 (5th Cir. 1987).

<sup>887</sup> 287.

<sup>888</sup> Bahl (1997) *Cardozo Women's Law Journal* 54.

<sup>889</sup> 54.

<sup>890</sup> 54.

sexual, reflecting a reluctance to consider rape and other sexual assaults as violent acts constituting persecution (...) It is indeed easier to consider such acts as being personally motivated, and confining them to the private domain”.<sup>891</sup> This sentiment is echoed by Crawley, who argues that the depoliticisation of women’s experiences of persecution is “particularly evident in cases involving sexual violence”.<sup>892</sup>

In *Klawitter v INS*,<sup>893</sup> the Sixth Circuit upheld the BIA’s denial of asylum in a case where the applicant had been blacklisted and sexually assaulted by the Chief of Security and Internal Affairs in the Polish government due to her refusal to join the Communist Party. In rejecting the asylum application, the Sixth Circuit found that sexual violence experienced by the applicant was premised on the persecutor’s personal interest in her rather than “any interest on his part to ‘persecute’ her”.<sup>894</sup> As Kandt observes, the Sixth Circuit failed to recognise the violence against the applicant committed by the Chief of Security and Internal Affairs as persecution because the court viewed it as a romantic gesture.<sup>895</sup>

One of the most recent rejections of the ‘imputed political opinion’ approach utilised by the Ninth Circuit in *Lazo-Majano* was in the case of *In re R-A-* as discussed in 3 4 1.<sup>896</sup> Contradicting *Lazo-Majano*, the BIA rejected the applicant’s assertion that the physical and sexual violence that the applicant’s husband subjected her to was motivated by an actual or imputed political opinion (mainly the applicant’s resistance to the belief that women are to live under male domination). The BIA dismissed the applicant’s opinion simply as “the common human desire not to be harmed or abused”.<sup>897</sup> Similarly, in *In re Kuna*,<sup>898</sup> the BIA rejected the assertion that the applicant, a woman from the Democratic Republic of the Congo subjected to domestic violence by her husband, was persecuted because of her imputed political

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<sup>891</sup> 55.

<sup>892</sup> Crawley *Refugees and Gender: Law and Process* 99.

<sup>893</sup> 970 F.2d 149 (6th Cir. 1992)

<sup>894</sup> 152.

<sup>895</sup> Kandt (1995) *Georgetown Immigration Law Journal* 150.

<sup>896</sup> 22 I. & N. Dec. 906

<sup>897</sup> 915.

<sup>898</sup> A76491421 (unpublished) (BIA 2000)

opinion. According to BIA, the applicant was subjected to persecution simply because “her husband was a despicable person”.<sup>899</sup>

There have since been positive developments with regard to the use of political opinion as a ground for certain types of gender asylum claims, including domestic violence. In 2002, political opinion was accepted as a ground for gender-related persecution in the US in a string of unreported cases. In the first case, the IJ characterised the applicant’s belief that she should free from abuse by her husband as ‘feminism’ and consequently awarded the applicant asylum on the grounds of political opinion.<sup>900</sup> In the second unreported case involving domestic violence, the BIA constructed the opinion as a “belief in the right to live independently and free of male dominance”,<sup>901</sup> while in the third case, the board defined the political opinion in question as the applicant’s “refusal to conform to the societal norm of being subservient”.<sup>902</sup>

Despite the positive outcomes of the abovementioned cases, the discrepancy of the results in the use of political opinion as a ground, especially in cases involving domestic violence, corrodes the credibility of the political opinion ground as being able to provide adequate protection to victims of gender-related persecution. More importantly, however, as Macklin argues:

“[D]omestic violence is not about what a woman believes, but about her gender identity—and the sexist beliefs of the man who abuses her. This cannot be captured under the rubric of political opinion because (...) political opinion refers to the victim’s beliefs, and not those of the

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<sup>899</sup> *Crawley Refugees and Gender: Law and Process* 141.

<sup>900</sup> Immigration Court in San Antonio, Texas (8 March 2002), CGRS Database Case number 195 as cited by K. Musalo and S. Knight “*Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*” (2003) *Immigration Briefings* 1.

<sup>901</sup> CGRS Database Case number 503 as cited by Musalo and Knight (2003) *Immigration Briefings* 1.

<sup>902</sup> Immigration Court in San Antonio, Texas (13 September 2001) CGRS Database Case number 1043 as cited by Musalo and Knight (2003) *Immigration Briefings* 1.

persecutor. Contorting resistance to domestic violence into a political opinion is both awkward and unnecessary”.<sup>903</sup>

Similarly, according to Randall, while the strategy of fitting gender asylum claims under political opinion category “has succeeded for some individual women seeking asylum”, in the process “it has (...) produced contorted legal reasoning to support such claims”.<sup>904</sup>

Some cases have, however, been relatively successful in bringing gender-based persecution claims under the political opinion category. This has been the case especially with regard to claims involving forced sterilisations and forced abortions. Specifically with regard to gender asylum claims involving fear of forced sterilisation due to the Chinese government’s one-child policy, Western courts have seen the gender-related persecutory act as effectively constituting “punishment for refusal to abide by Government policies”.<sup>905</sup> By means of forced sterilisations, the Chinese government is imputing a political opinion on the victims, “because it brands [the victim] as an opponent of the regime and punishes her on this basis”.<sup>906</sup> With regard to forced sterilisation/forced abortions, there have been a variety of successful claims under political opinion across Western jurisdictions, including the US,<sup>907</sup> the UK<sup>908</sup> and New Zealand.<sup>909</sup>

Correspondingly, the use of political opinion as a ground for gender-related persecution claims has been quite successful in claims involving women’s opposition to extreme institutionalised forms of discrimination and oppression. For example, there have been several cases in which women have refused to succumb to strict religious dress codes or have “expresse[d] views of independence from social or cultural dominance of men in [their]

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<sup>903</sup> A. Macklin, “Cross-Border Shopping *For Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims*” (1999) 13 Georgetown Immigration Law Journal 25, 59.

<sup>904</sup> Randall (2002) *Harvard Women’s Law Journal* 298.

<sup>905</sup> *Crawley Refugees and Gender: Law and Process* 156.

<sup>906</sup> 156.

<sup>907</sup> See for example *In re Chang* Int Dec 3107 (BIA 1989), *Guo Chun Di v Carroll* US Virginian District Court 842 F. Supp. 858 and *In re C-V-C* Int Dec 3319 (BIA 1997).

<sup>908</sup> See for example *Chen v SSHD* (unreported) 29 October 1997 (CC/55095/97) IAT and *Cheng v SSHD* (unreported) 29 July 1999 (G00101) IAT.

<sup>909</sup> Refugee Appeal No 71131/98 (17 December 1998).

society”,<sup>910</sup> and where the courts have construed this to be an expression of their political opinion. For instance, in the Canadian case *Namitabar v Canada (Namitabar)*<sup>911</sup> the Court of Appeal recognised that “laws of general application – such as a dress code – could be persecutory”<sup>912</sup> and linked the Iranian applicant’s fear of persecution (74 lashes with a whip for her refusal to wear a chador) to a political opinion. According to the court, “in a country where the oppression of women is institutionalized any (...) act opposed to the imposition of a clothing code will be seen as a manifestation of opposition to the established theocratic regime”.<sup>913</sup> As MacIntosh argues, in *Namitabar* “the court recognized that what may appear as an inconsequential act—a woman’s decision about what to wear—may be categorized as a political statement that puts a women’s safety at risk and that this political statement is of a character to trigger international protection obligations”.<sup>914</sup> This approach has been supported by Macklin, according to whom “identifying women’s resistance to gender subordination as political opinion [is] profoundly feminist, if indeed one believes that “the personal is political,” and that patriarchy is a system constituted primarily through power relations, not biology”.<sup>915</sup>

However, there have also been contradictions in the results, even in these types of gender-asylum cases, as demonstrated by the British Immigration Appellate Authority’s (BIAA) decision in *Mahshid Mahmoudi Gilani v The Secretary of State for the Home Department (Gilani)*.<sup>916</sup> Despite recognising that “women in particular in many instances suffer horrendous treatment” as a result of “minor infringements of the Islamic faith”,<sup>917</sup> the BIAA nevertheless found that “failing to conform with social mores did not amount to an expression of political opinion”.<sup>918</sup>

According to a 2012 report by the European Parliament, while some European countries such as Belgium, Hungary, Italy and Malta have

<sup>910</sup> Crawley *Refugees and Gender: Law and Process* 100.

<sup>911</sup> *Namitabar v Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 42 (T.D.).

<sup>912</sup> MacIntosh (2005) *Canadian Journal of Women and Law* 146.

<sup>913</sup> *Namitabar v Canada* para. 23.

<sup>914</sup> MacIntosh (2005) *Canadian Journal of Women and Law* 147.

<sup>915</sup> Macklin (1995) *Human Rights Quarterly* 260.

<sup>916</sup> *Mahshid Mahmoudi Gilani v The Secretary of State for the Home Department* (TH/9515/85/(5216) 3 June 1987.

<sup>917</sup> (TH/9515/85/(5216) 3 June 1987.

<sup>918</sup> Tuitt, *False Images – The Law’s Construction of the Refugee* 34.

occasionally included gender-based persecution under the political opinion category, asylum adjudicators in France, Spain and Sweden “generally fail to implement a broad gender-sensitive definition of political opinion”.<sup>919</sup> With regard to France, the report found that there had been a “worsening of practice in this type of claims”.<sup>920</sup> Similarly, with reference to Sweden, the report found that despite the domestic preparatory works outlining examples of gender-sensitive interpretation of the concept of political opinion, the “decision-makers at all instances almost systematically fail to encompass a broad gender-sensitive definition of political opinion and religious opinion which includes opinions on gender roles expressed verbally or by transgression of gendered social norms or laws”.<sup>921</sup> Furthermore, according to the report, the existing Swedish Gender Guidelines “do not observe the need for a gender-sensitive interpretation of political opinion”.<sup>922</sup>

In addition, according to the report, in France, Hungary, Sweden and the UK, women who base their asylum claim on the political opinion category have experienced serious obstacles especially if their political involvement was low-level or not viewed as “organised political activity”.<sup>923</sup> The report further concluded that theoretical acknowledgement of women being less likely to hold high-profile political positions due to traditional gender roles “is not reflected in the asylum practice” of the aforementioned countries.<sup>924</sup> Overall, despite catering (to some extent) to certain types of gender-based persecution claims, such as domestic violence and forced sterilisation, the ‘political opinion’ category effectively excludes many other gender-based claims.<sup>925</sup> The inclusion of gender-based persecution claims under the ‘political opinion’ category has been further criticised for “fundamentally misconstruing the underlying purpose of the [Refugee] Convention”.<sup>926</sup> Political opinion as a ground is a particularly difficult fit with regard to the majority of sexual violence cases amounting to persecution. As Chan argues,

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<sup>919</sup> Cheikh Ali, Querton and Soulard, “Gender related asylum claims in Europe” *European Parliament* 56.

<sup>920</sup> 56.

<sup>921</sup> 57.

<sup>922</sup> 57.

<sup>923</sup> 57.

<sup>924</sup> 57.

<sup>925</sup> Chan (2011) *Boston University International Law Journal* 183.

<sup>926</sup> 184.

“the fundamental harms of rape and sexual violence are far from the political opinions that the Convention originally envisioned in the form of political dissidents, but rather much more closely tied to gender”.<sup>927</sup>

Using the political opinion category to define gender-based persecution “denies the real cause of persecution” and thus, makes a “poor substitute for an independent gender nexus”.<sup>928</sup> Ultimately, the political opinion category cannot cater to the wide range of claims based on gender-related persecution and “fundamentally mischaracterises” the experiences of women refugees.<sup>929</sup>

#### **4 4 Inclusion of gender persecution cases under the religion category**

The third option is to include gender claims under the existing international refugee law framework through the ‘religion’ category. According to paragraph 72 of the UNHCR Handbook, persecution for religious reasons can take various forms, including “measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community”.<sup>930</sup>

The 2002 UNHCR Guidelines acknowledge in Section 25 that “[w]here a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion”.<sup>931</sup> The 2002 UNHCR Guidelines further recognise that “[a] woman may face harm for her particular religious beliefs or practices, or those attributed to her, including her refusal to hold particular beliefs, to practise a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion”.<sup>932</sup> In Section 26, the UNHCR 2002 Guidelines also state that there is often overlap between “the grounds of religion and political opinion in gender-related claims,

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<sup>927</sup> 184.

<sup>928</sup> 185.

<sup>929</sup> 185.

<sup>930</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1992), U.N. Doc. HCR/IP/4/Eng/REV.1, paragraph 72.

<sup>931</sup> UNHCR, “Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01.

<sup>932</sup> Section 25.



especially in the realm of imputed political opinion”.<sup>933</sup> According to the Guidelines, “[w]hile religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion”.<sup>934</sup>

Similarly, the Australian Department of Immigration and Multicultural Affairs’ Guidelines on Gender Issues for Decision Makers acknowledge in paragraph 4(30) that “in certain societies, the role ascribed to women may be attributable to requirements of state or official religion”.<sup>935</sup> According to the same paragraph, “the failure of women to conform to this role or model of behaviour may (...) be perceived by authorities or other agents of persecution as a failure to practice or hold certain religious beliefs and as such an attempt to corrupt the society or even as a threat to the religion’s continued power”.<sup>936</sup>

Moreover, the Canadian Immigration and Refugee Board’s Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution<sup>937</sup> recognise that a woman might be persecuted for religious reasons. According to the Canadian Guidelines, a woman who “chooses not to subscribe to or follow the precepts of a state religion may be at risk of persecution for reasons of religion”.<sup>938</sup> The Canadian Guidelines further include the right not to hold a particular belief system and the right not to practise a prescribed religion to be part of freedom of religion.<sup>939</sup>

With regard to Europe, the 2012 European Parliament Report, as referred to in 4 2, found that there is often “some overlap between the grounds of political opinion and religion in gender-related claims for asylum”.<sup>940</sup> However, in some countries, such as France, Sweden and

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<sup>933</sup> Section 26.

<sup>934</sup> Section 26.

<sup>935</sup> The Australian Department of Immigration and Multicultural Affairs, “Guidelines on Gender Issues for Decision makers” (1996), para. 4(30) <[http://cgrs.uchastings.edu/documents/legal/guidelines\\_aust.pdf](http://cgrs.uchastings.edu/documents/legal/guidelines_aust.pdf)> accessed 10 May 2012.

<sup>936</sup> Para. 4(30).

<sup>937</sup> Immigration and Refugee Board of Canada, “Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution” (1996), A(II). <<http://www.irb.gc.ca/Eng/brdcom/references/pol/guidir/Pages/women.aspx#All>> accessed 10 May 2012.

<sup>938</sup> Immigration and Refugee Board of Canada “Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution” *IRB*.

<sup>939</sup> Immigration and Refugee Board of Canada “Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution” *IRB*.

<sup>940</sup> Cheikh Ali, Querton and Soulard, “Gender related asylum claims in Europe” *European Parliament* 59.

Hungary, gender persecution cases are rarely mainstreamed into the concept of religion.<sup>941</sup> Similarly in Austria, the recognition of a transgression of religious or social mores is rare,<sup>942</sup> and various cases have been rejected due to the view that “there is no Convention ground”.<sup>943</sup> The 2012 European Parliament Report further found that there had been a worsening of practice especially in France.<sup>944</sup> According to the report, women face major difficulties in the recognition of religion as a convention ground in gender-related asylum claims, because the “French authorities [fail] to apply a gender-sensitive interpretation of the Convention ground of religion”.<sup>945</sup> Generally, the practice is inconsistent across all countries.<sup>946</sup>

Overall, as with the inclusion of gender under the ‘political opinion’ category, the problem with including gender under the ‘religion’ category is its very limited applicability. Despite potentially being advantageous in certain specific gender-related claims, the religion category still leaves the majority of gender-related persecution cases outside the scope of the 1951 Convention. More importantly, trying to fit gender-related claims under the religion category once again fundamentally misconstrues the actual reason for persecution and ultimately reduces persecution experienced uniquely by women due to their gender undetectable.

## 4 5 Conclusion

As demonstrated above, one of the most difficult hurdles faced by women applying for asylum under the existing international refugee law regime is the requirement of nexus between the persecution experienced and one of the five grounds embedded in the 1951 Convention. The reason behind the difficulties that women experience is not the legitimacy of the persecution experienced but clearly the lack of gender as an explicit ground for persecution under the current refugee definition. As a consequence, victims of

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<sup>941</sup> 59.

<sup>942</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit 72*.

<sup>943</sup> 72.

<sup>944</sup> Cheikh Ali, Querton and Soulard, “Gender related asylum claims in Europe” *European Parliament 59*.

<sup>945</sup> 59.

<sup>946</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit 73*.

gender related persecution have been forced to try to fit their claims under the existing grounds, namely PSG, political opinion and religion, but these attempts have resulted in mixed outcomes, as discussed above. None of the existing grounds are capable of providing appropriate protection for women fleeing persecution due their gender.

Overall, by attempting to fit gender-related persecution claims under the existing but ill-fitting grounds rather than acknowledging gender as an independent ground for persecution, the current international refugee law framework provides an insufficient, “patchwork-like [and] individualized micro-level solution to a complex macro level social (...) problem”.<sup>947</sup> More worryingly, because of the unsuitable use of the current persecution grounds, an inappropriate focus has been placed on these highly fabricated and often logically questionably grounds, rather than on the real cause of the persecution experienced by women: their gender. As Stevens argues, “merely incorporating gender-based violations into the already existing categories is an insufficient approach to removing the inherent biases women currently must overcome in order to obtain refugee status”.<sup>948</sup>

Without a radical modernisation of the current international refugee law framework and the inclusion of ‘gender’ as an independent ground of persecution, women seeking refuge on the basis of gender-related crimes have “no proper outlet to seek such sanctity”.<sup>949</sup> Without a complete transformation of the refugee law framework with regard to gender as a ground for asylum, millions of women will continue to be denied the protection that they deserve, which will be a setback for the fundamental humanitarian purpose of the international refugee law regime.

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<sup>947</sup> Randall (2002) *Harvard Women’s Law Journal* 299.

<sup>948</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 214.

<sup>949</sup> Randall (2002) *Harvard Women’s Law Journal* 299.

## Chapter 5

### The complex context of gender-based persecution

#### 5 1 Introduction

In chapter 3 I presented an in-depth analysis of the problems and shortcomings of the current refugee definition with regard to gender-related persecution. In chapter 4 I subsequently engaged with the issues of linking persecution with any of the five grounds set out in Art 1(a) of the 1951 Convention and Art 1(1) which is the nexus requirement and the related problems. Before presenting some of the solutions in chapter 6, a handful of issues relating to the context of gender-related persecution, the actors commonly involved in gender-related persecution and the implications of underlying policies will be highlighted in this chapter.

The aim of this chapter is to create further context and understanding of gender-based persecution by examining whether the dichotomous construction of persecutory acts as 'public' and 'private' has aggravated the gender inequality under the current refugee law framework. I deliberate on this question by using the feminist method of analysing the 'gendered coding' in the deep-rooted public/private dichotomy embedded in the current interpretation of persecution, as discussed under 1 4 above.

The first sub-chapter discusses the deep-rooted public/private dichotomy in the currently dominant definition of 'persecution' and its detrimental effects on women's asylum applications based on gender-related persecution. The issue is analysed through an examination of the gender-bias construction of 'public acts' and an exploration of the political dimension of gender-related persecution building on the important conclusions drawn in the previous chapter.

Next, Western asylum adjudicators' gender-bias approach to persecution perpetrated by non-state actors is discussed in the second sub-chapter. In this discussion, the emerging 'bifurcated approach' is examined, and accordingly I argued that gender-related violence escalates to the level of

direct persecution when the violence is either directly linked to the state or “condoned by the tacit silence and passivity displayed by the state”.<sup>950</sup>

The additional requirement of ‘utility’, which many receiving developed states place on refugee women, is discussed in the third sub-section of the chapter. The policy of highlighting the ‘utility’ of the asylum-seekers ultimately results in favouring ‘easily assailable’ refugees, who are almost exclusively male. Women, by contrast, are often considered to be more difficult to assimilate, due to their lack of education and work experience, which is caused by their limited access to social and economic opportunities in their countries of origin, as was highlighted in sub-chapter 1 6. Furthermore, the various types of discrimination many that women asylum-seekers face is analysed. Besides discrimination based on gender, women asylum-seekers from other developing countries often face discrimination based on their race. Refugee women, in particular, have become targets of ‘othering’ in the selection process for resettlement. This has eventually led to a situation where refugee women’s migration from the Third World to Western countries has virtually ceased<sup>951</sup> and women are increasingly forced to seek asylum in neighbouring developing countries, which places a heavy burden on these host countries.

The fourth sub-chapter discusses the rapidly increasing xenophobic attitudes towards refugees that has emerged as a further obstacle for asylum-seeking women. The more and more xenophobic, racist atmosphere is particularly detrimental to women asylum-seekers, as it often causes them to “remain silent about their experiences of gender discrimination and violence within their own communities”.<sup>952</sup>

Finally, the impact of the ‘culturalist approach’ will be discussed in the final sub-chapter. Under this approach, women asylum-seekers are constructed either ‘culturally’ or ‘socially’, which results in the diminishment of their experiences as refugees. By attributing persecution experienced by women refugees to culture alone, the adjudicators deploying the ‘culturalist approach’

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<sup>950</sup> Asthana (2011) *Georgetown Journal of Gender and the Law* 1.

<sup>951</sup> W. Giles, ‘Aid Recipients or Citizens?’ in H. Moussa, W. Giles and P. van Esterik (eds.) *Development and Diaspora: Gender and Refugee Experience* (Toronto: Artemis Enterprises, 1996), 49.

<sup>952</sup> E. Pittaway and L. Bartolomei, ‘Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women’ (2000) 19 *Refuge* 21, 27.

fail to recognise violence against women as a global phenomenon and as the “most pervasive abuse of human rights”.<sup>953</sup>

## 5 2 Public/private dichotomy

The majority of violence experienced by women takes place in a domestic or family setting, which international (and domestic) law has traditionally viewed as a ‘private sphere’.<sup>954</sup> Violence and/or discrimination in the private sphere is often considered to fall outside the jurisdiction of international law and more importantly, in the context of the present research, outside the scope of both international and domestic refugee law.<sup>955</sup> Despite international human rights law being commonly regarded as a “radical development of international law”, because it contests the traditional public/private dichotomy between states and individuals embedded in the international law discipline, “it has retained the deeper, gendered, public/private distinction”.<sup>956</sup>

As I discussed under 3 2 3 above primacy is often given to the protection of civil and political rights, and protection is often directed towards protection of men facing persecution within their public life.<sup>957</sup> As important as this protection may be, it does not address the “special ways in which women need legal protection to be able to enjoy their right to life”.<sup>958</sup>

On the whole, owing to the legal system’s focus on ‘public’ actions by the state, there is a high level of violence against women around the world that international law does not address, even though such violence often amounts to persecution.<sup>959</sup> As Goodwin-Gill argues, “the problem with much of the violence against women is precisely that it is perceived either as ‘domestic’ or as individual and non-attributable to the State or [an]other political structure. It is ‘private’, unlike the ‘public’ dimension to so much political, ethnic or religious persecution”.<sup>960</sup>

<sup>953</sup> J Kerr, ‘Introduction’ in Kerr J (ed) *Ours by Right: Women’s Rights as Human Rights* (London: Zed Books, 1993) 4.

<sup>954</sup> Asthana (2011) *Georgetown Journal of Gender and the Law* 1.

<sup>955</sup> 1.

<sup>956</sup> Charlesworth and Chinkin (1993) *Human Rights Quarterly* 69.

<sup>957</sup> 69.

<sup>958</sup> 69.

<sup>959</sup> 69.

<sup>960</sup> G. Goodwin-Gill, *The Refugee in International Law*, (Oxford: Oxford University Press, 1996) 362.

The ‘dichotomous construction’ of acts into ‘public’ and ‘private’ has further aggravated the inequality of the current refugee law framework, as this construction focuses on society from a male perspective and disregards the political nature of the private sphere.<sup>961</sup> It allows “theorists and practitioners alike to ignore the political nature of family, the relevance of justice in personal life and, as a consequence, a major part of the inequalities of gender”.<sup>962</sup>

### *5.2.1 Common conception of gender-related violence amounting to persecution as a ‘private’ act*

As a result of the public/private division, as shown above, a majority of the persecution faced by women refugees is often deemed to be ‘private’ and consequently is not considered to fall under the jurisdiction of the international refugee regime. As Parekh argues, “legal systems as a whole continue to operate under the assumption that we can neatly separate private, gender-based violence from more serious public, political persecution”.<sup>963</sup>

One of the main causes behind the failure to treat gender-related persecution with the same seriousness as other forms of persecution is that it has been understood “either as something private and hence not serious or as something resulting from women’s ‘natural’ vulnerability and thus not connected to deeper structural barriers”.<sup>964</sup> Generally, gender-related persecution is viewed as apolitical and being in direct contrast to the kind of political persecution that is privileged in the Refugee Convention.<sup>965</sup>

This is especially true of sexual violence, which the international community only very recently began to accept as persecution as discussed in sub-chapter 3.4.2. Until recently, the assumption that rape is an arbitrary act of harm, not persecution, was fatalistically accepted.<sup>966</sup> As Indra observes, under the current refugee framework, “state oppression of a religious minority

<sup>961</sup> I. Sengupta, ‘Becoming a Refugee Woman: Gender-based persecution and Women Asylum Seekers under International Refugee Law’ 4 (SSRN, 5 January 2009) <<http://ssrn.com/abstract=1649996>> accessed 16 April 2015.

<sup>962</sup> Crawley *Refugees and Gender: Law and Process* 17.

<sup>963</sup> Parekh (2012) *Journal of Global Ethics* 273.

<sup>964</sup> 272.

<sup>965</sup> 272.

<sup>966</sup> Valji, de la Hunt and Moffet (2003) *Agenda* 65.

is political, while gender oppression at home is not".<sup>967</sup> Similarly, domestic violence is not merely a 'personal abnormality', as it is often understood in the assessment of asylum cases, but rather entrenched in universal structural violence against women.<sup>968</sup> As Charlesworth and Chinkin argue, violence against women is never a 'purely' private issue.<sup>969</sup> Nonetheless, violence that takes place at home has been described as 'frivolous' and is considered to be less grave and less worthy of official consideration than other forms of violence.<sup>970</sup>

Indeed, as Parkeh observes, the gender-bias public-private dichotomy continues to have such a solid grip in the asylum adjudicators' legal thinking that even "state-enforced sterilization and abortion, 'heinous' spousal violence that is not responded to by the state, and rape by soldiers in the context of civil war do not count as persecution and, as such, do not qualify the women who experience them for asylum".<sup>971</sup> Ultimately, if the persecution experienced by the woman asylum applicant is something that men could also experience, the application has a stronger chance of succeeding than if the persecution faced by the woman applicant is unique to women. In such cases, the persecution is seen as trivial or private.<sup>972</sup>

### 5 2 2 *The political/public dimension of gender-related persecution*

The way in which women are often perceived during the asylum procedure demonstrates aspects of discrimination.<sup>973</sup> Often women's reasons for fleeing are rejected "because women are attributed a dependent, apolitical, caring, family role".<sup>974</sup> This gender bias in the interpretation of the scope of refugee law is evident from case law that demonstrates the unwillingness of asylum adjudicators to recognise the prevailing political nature of gender-related violence.<sup>975</sup> As McLaughlin observes, notwithstanding the fact that many victims of gender-based persecution can "legitimately demonstrate that their

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<sup>967</sup> Indra (1989) *Refuge* 3.

<sup>968</sup> Charlesworth and Chinkin (1993) *Human Rights Quarterly* 73.

<sup>969</sup> 73.

<sup>970</sup> Freedman *Gendering the International Asylum and Refugee Debate* 78-9.

<sup>971</sup> 78-9.

<sup>972</sup> Spijkerboer, *Gender and Refugee Status* 128.

<sup>973</sup> Mascini and van Bochove (2009) *International Migration Review* 113.

<sup>974</sup> 113.

<sup>975</sup> McLaughlin (1994-1995) *Wisconsin International Law Journal* 219.



abuse contains a political element (...) immigration judges will routinely ignore these political aspects, preferring instead to classify such abuse as a private matter between the oppressor and his victim".<sup>976</sup>

Yet, the main problem with the public/private dichotomy is not whether "human rights standards should apply to private as well as public acts" but rather what should be prioritised.<sup>977</sup> As Eisler argues, the real issue is "whether violations of human rights within the ['private' sphere] such as genital mutilation, wife beating, and other forms of violence designed to maintain patriarchal control should be within the purview of human rights theory and action".<sup>978</sup> So far, asylum adjudicators have seemed reluctant to answer in the affirmative.

Nonetheless, despite so frequently being defined as 'private', gender-related persecution often has a highly political dimension. For example, rape is not merely a personal crime of sex but rather a crime of power, as I set out under sub-chapter 3 4 2 above.<sup>979</sup> As Schulman argues, by raping a woman, a man is essentially expressing his dominance over her.<sup>980</sup> Ultimately, rape is a way to "demonstrate a belief in a society powered by males" and therefore leaves "the realm of personal abuse and [enters] the public sphere".<sup>981</sup>

Similarly, domestic violence has a strong political dimension to it. Ultimately, domestic violence is yet another type of weapon that is used in the expression of a belief in a male-dominated society.<sup>982</sup> Sinha, for example, argues that domestic violence has its roots in "both power structures of inequality and gender-biased social norms".<sup>983</sup> Far from being individual, random acts, "violence against women at the hands of their partners is a pervasive and systemic exercise of patriarchal power".<sup>984</sup>

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<sup>976</sup> 227.

<sup>977</sup> Eisler (1987) *Human Rights Quarterly* 297.

<sup>978</sup> 297.

<sup>979</sup> B. Schulman, 'Opening Eyes and Saving Lives: A New, Justice and Peace Studies Perspective on Gender-Based Political Asylum' (Georgetown University, senior dissertation, 5 March 2010) 39

<[http://www1.georgetown.edu/departments/justice\\_peace/research/theses/theses2010/Brittany\\_Dissertation\\_Final.pdf](http://www1.georgetown.edu/departments/justice_peace/research/theses/theses2010/Brittany_Dissertation_Final.pdf)> accessed 31 May 2014.

<sup>980</sup> 39.

<sup>981</sup> 39.

<sup>982</sup> 39.

<sup>983</sup> Sinha (2001) *New York University Law Review* 1588.

<sup>984</sup> 1588.

Aliaskari argues that women who resist and report domestic violence are in fact expressing a political opinion against a male-dominated society. According to Aliaskari, “even though the woman is only requesting assistance to stop the physical abuse, her society and her peers may view her as someone who opposes the government and its laws, or holds political beliefs contrary to the current system”.<sup>985</sup>

Nonetheless, the victims of domestic violence seeking asylum based on gender-related persecution often struggle to prove the political motivation behind domestic violence. For example, in *In re R-A-* as discussed in sub-chapter 3 4 3, in denying the asylum to the applicant, the BIA found that the applicant had “failed to show that her husband’s motivation to harm her fell within any of the statutory protected grounds”.<sup>986</sup>

Similarly, the political nature of ‘honour crimes’ is unambiguous. By refusing to abide by the social rules imposed on them, women ‘dishonour’ their families, which at worst can cost them their lives at the hands of their family members. By rejecting the social mores and the ‘proper’ role of a woman, women “are portraying their belief in a different value system, and are subsequently persecuted for it”.<sup>987</sup> However, all of the forms of gender-related persecution labelled as ‘cultural practices’ stem from the “devaluation of women and the masculinist power to define abuses against women as cultural, natural or private, not political”.<sup>988</sup>

However, notwithstanding the fact that the public/private distinction has been acknowledged as a ‘culturally constructed ideology’, it continues to have a strong impact on the refugee law framework.<sup>989</sup> As Indra observes, the “dichotomy of private and public spheres remains deeply grounded in discourse about refugees and leads to many ironies concerning notions of rights, privacy and culture”.<sup>990</sup>

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<sup>985</sup> M. Aliaskari, ‘U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries’ (2000) 8 *American University Journal of Gender, Social Policy and Law* 231, 245.

<sup>986</sup> M. Annitto, ‘Asylum for Victims of Domestic Violence: Is protection possible after *In re R-A-*?’ (1999) 49 *Catholic University Law Review* 785, 803.

<sup>987</sup> Schulman, ‘Opening Eyes and Saving Lives: A New, Justice and Peace Studies Perspective on Gender-Based Political Asylum’ *Georgetown University* 42.

<sup>988</sup> Pettman *Worlding Women: A Feminist International Politics* 210.

<sup>989</sup> Crawley *Refugees and Gender: Law and Process* 19.

<sup>990</sup> D. Indra, ‘Some Feminist Contributions to Refugee Studies’, (Presented at joint plenary session of Gender Issues and Refugees: Development Implications, York University, Toronto,

### *5.2.3 Representation of women as 'vulnerable' and the consequent erosion of the political nature of the persecution women experience*

The inbuilt dichotomy of the refugee law framework not only disregards the persecution that women face in the private sphere but also ignores the persecution they face in the public sphere. Owing to the entrenched dichotomy, there is a general assumption that “women are less likely to participate in politics than men”.<sup>991</sup> Consequently, women’s political participation, such as challenging discriminatory laws and policies, is often misinterpreted as ‘personal conduct’.<sup>992</sup> As Refugee Women’s Resource Project already observed in 2003, women’s activities are often interpreted as being too ‘low-level’ to be considered political and to result in persecution.<sup>993</sup> The danger of dismissing women’s political participation as insignificant was further highlighted by the UK Border Agency’s in its 2010 Guidelines on Gender Issues in the Asylum Claim (UKBA Guidelines),<sup>994</sup> which warns against “equating [women’s] lower-profile political activities with low risk”.<sup>995</sup> According to the UKBA Guidelines, “[t]he response of the state to such activity may be disproportionately persecutory because it may be considered inappropriate for women to be involved at all”.<sup>996</sup> However, despite the UKBA Guidelines, in practice the ‘political opinion ground’ is often unsuccessfully applied in women’s asylum applications because of the assumption that “women’s political participation would not be seen as important, or significant enough to be persecuted by the police in their home country”.<sup>997</sup>

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9-11 May 1993) <[repository.forcedmigration.org/pdf/?pid=fmo:1057](http://repository.forcedmigration.org/pdf/?pid=fmo:1057)> accessed 19 March 2012.

<sup>991</sup> Sengupta, ‘Becoming a Refugee Woman: Gender-based persecution and Women Asylum Seekers under International Refugee Law’ *SSRN* 4.

<sup>992</sup> Valji, de la Hunt and Moffet (2003) *Agenda* 62.

<sup>993</sup> Ceneda, “Women asylum seekers in the UK: A gender perspective - Some facts and figures” *Asylum Aid* 71.

<sup>994</sup> UK Border Agency, ‘Gender Issues in the Asylum Claim’ (24 September 2010) <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/gender-issue-in-the-asylum.pdf?view=Binary>> accessed 9 February 2014.

<sup>995</sup> 12.

<sup>996</sup> 12.

<sup>997</sup> Human Rights Watch, “Fast-Tracked Unfairness - Detention and Denial of Women Asylum Seekers in the UK” *HRW*.

Furthermore, women are less likely to be recognised as refugees due to the social and political framework of their asylum claims.<sup>998</sup> As Valji, et al. state, the absence of recognition of women’s political involvement prevents them from seeking asylum on political grounds.<sup>999</sup>

As Mascini and van Bochove observe, under asylum law women are mainly considered as family members.<sup>1000</sup> Rather than independent individuals, they are seen through these gender-roles as women who are subordinate to men.<sup>1001</sup> Such stereotyping has had a detrimental effect on the success of women asylum-seekers’ applications.<sup>1002</sup> Furthermore, as Mascini and van Bochove observe, women protesting against the disappearance or execution of missing family members, resisting persecutory reproduction politics or deviating from expected social mores are viewed as being prompted by emotions rather than political ideas.<sup>1003</sup>

Ultimately, as Kneebone argues, the representation of refugee women as ‘vulnerable’, submissive and dependent will enhance chances of success of refugee women’s claims the most. According to Kneebone, a “Refugee Woman’s claim is most likely to be accepted when it is a ‘good woman’ claim. That is, if it occurs whilst she fulfils her role as wife/mother/sister”.<sup>1004</sup> This construction, however, has a deeply damaging effect on asylum. Ultimately, the stereotype of refugee women is actively being constructed as one of ‘defenseless victims’ of a cruel anti-female culture more often than that of ‘dissidents’ who actively resist against the political and religious oppression of women.<sup>1005</sup>

The UNHRC has recognised this problem. In the 2002 UNHCR Guidelines, the UNHCR strongly supported the interpretation of ‘political opinion’ in the broadest sense, as well as the inclusion of “opinion about gender roles” and “non-conformist behaviour that leads the persecutor to

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<sup>998</sup> Sengupta, ‘Becoming a Refugee Woman: Gender-based persecution and Women Asylum Seekers under International Refugee Law’ *SSRN* 4.

<sup>999</sup> 4.

<sup>1000</sup> Mascini and van Bochove (2009) *International Migration Review* 117.

<sup>1001</sup> 117.

<sup>1002</sup> 117.

<sup>1003</sup> 117.

<sup>1004</sup> Kneebone (2005) *International Journal of Refugee Law* 10.

<sup>1005</sup> Spijkerboer, *Gender and Refugee Status* 151- 162.

impute political opinion to their victims' under the category".<sup>1006</sup> However, only a very limited number of countries comply with the guidelines. One of the countries that have incorporated these guidelines is the United Kingdom. According to section 6.17 of the UK Border Agency's 'Instructions Considering Asylum Claims and Assessment of Credibility',<sup>1007</sup> the "experiences of women in their countries of origin can often differ from those of men, and [their] protest, activism and resistance may manifest themselves in different ways".<sup>1008</sup> Furthermore, the Swedish Gender Guidelines recognise that "the political activity of women can be expressed in different way to men, but give rise to much larger risk and vulnerability".<sup>1009</sup> Despite the recognition of women's different form of political activity in the national gender guidelines, in practice the asylum authorities often have a very traditional way of looking at the concept of political activity.<sup>1010</sup>

### 5 3 Persecution by non-state actors

As has been alluded to in sub-chapters 2 5 3, 2 4 5 and 4 2 above the refugee law framework has traditionally ignored persecution by non-state actors, because these acts take place in the 'private sphere' and are carried out by private actors without any state culpability.<sup>1011</sup> This approach, however, ignores the states' positive obligations, or due diligence, towards its citizens to protect their broader human rights. A state's failure to protect women from gender-based violence perpetrated by non-state actors "represents an uncoordinated, yet highly efficient matrix of inertia, consolidated at all loci of the criminal justice system"<sup>1012</sup> and results in a breach of the state's positive obligation to protect. Furthermore, the refusal of a state to interfere in

<sup>1006</sup> Crawley and Lester "Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe" *UNHCR Evaluation and Policy Analysis Unit* para. 68.

<sup>1007</sup> UK Border Agency, 'Considering Asylum Claims and Assessing Credibility' (13 February 2012)

<<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary>> accessed 1 June 2015.

<sup>1008</sup> 36.

<sup>1009</sup> Crawley and Lester "Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe" *UNHCR Evaluation and Policy Analysis Unit* para. 71.

<sup>1010</sup> Para 71.

<sup>1011</sup> Valji, de la Hunt and Moffet (2003) *Agenda* 65

<sup>1012</sup> 234.

violations taking place in the 'private' sphere has wider consequences, as it "insulates abuse of pre-existing patriarchal power within that sphere, perpetuating and justifying the patriarchal organisation of the 'public' sphere".<sup>1013</sup> As Heyman argues:

"[I]t is uncertain when the state's failure [to prevent the persecution] rises to an unacceptable level and warrants an asylum grant. It is uncertain how rampant the abuses must be, how persistent they must remain, how ineffective the government must be in combating them, to justify the dramatic intervention of the asylum state".<sup>1014</sup>

It is important to acknowledge that under the current refugee definition there is no requirement that the state itself be the violator.<sup>1015</sup> As indicated by Haines, persecution committed by non-state actors would also fall under this definition.<sup>1016</sup> This view is further echoed in the UNHCR Guidelines, according to which "[w]here serious discriminatory or other 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 effective protection".<sup>1017</sup> The European Council has equally recognised persecution by non-state actors.<sup>1018</sup>

With regard to the international and regional human rights frameworks in general, a strong acceptance of state responsibility is emerging in cases where non-state actors have committed serious gender-related violence, and in this regard there is more and more case law concerning cases of domestic violence. For example, in a number of cases the European Court of Human Rights (ECtHR) has confirmed that the state's inability to protect the applicant from domestic violence has amounted to a violation of the European

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<sup>1013</sup> 235.

<sup>1014</sup> Heyman (2005) *International Journal of Refugee Law* 788.

<sup>1015</sup> Haines "Gender-related persecution" *UNHCR* 332.

<sup>1016</sup> 332.

<sup>1017</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1992), U.N. Doc. HCR/IP/4/Eng/REV.1, para. 65.

<sup>1018</sup> European Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9

Convention on Human Rights (ECHR). In the 2008 case of *Bevacqua and S. v Bulgaria*,<sup>1019</sup> the applicant, who had been subjected to years of domestic violence by her husband, ultimately filed for divorce and escaped with her son to a shelter for abused women. Following the divorce, the applicant was battered by her ex-husband again. The applicant's requests for criminal prosecution were rejected on the ground that it was a 'private matter' requiring a private prosecution.<sup>1020</sup>

In its judgment, the ECtHR found a violation of Article 8 of ECHR following the Bulgarian authorities' failure to "impose sanctions or otherwise enforce [the husband's] obligation to refrain from unlawful acts".<sup>1021</sup> According to the court, this failure "amounted to a refusal to provide the immediate assistance the applicant needed".<sup>1022</sup> The court went further to stress that the authorities' view "that no (...) assistance was due as the dispute concerned a 'private matter'" was incompatible with their positive obligations to secure the enjoyment of the applicant's Article 8 rights.<sup>1023</sup>

Similarly, in the case of *Opuz v Turkey*<sup>1024</sup> (*Opuz*) the applicant and her mother were assaulted and threatened over a number of years by the applicant's husband. Despite the applicant and her mother filing various complaints with the Public Prosecutor's Office, the husband was not prosecuted, because they withdrew their complaints after the husband had "harassed them into doing so, threatening to kill them".<sup>1025</sup> In 2001, the applicant's husband stabbed the applicant numerous times and was consequentially imposed a nominal fine.<sup>1026</sup> Following the incident, both the applicant and her mother again filed numerous complaints with the Public Prosecutor's Office stating that their lives were threatened.<sup>1027</sup> The applicant's husband was questioned and released with the public prosecutor stating that there was "no concrete evidence to prosecute [the applicant's husband] apart

<sup>1019</sup> *Bevacqua and S. v Bulgaria*, App No 71127/01 (ECtHR, 12 June 2008).

<sup>1020</sup> European Court of Human Rights, "Violence against women" (ECtHR, July 2013) <[http://www.echr.coe.int/Documents/FS\\_Violence\\_Woman\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf)> accessed 9 February 2014.

<sup>1021</sup> *Bevacqua and S. v Bulgaria*.

<sup>1022</sup> para. 83.

<sup>1023</sup> para. 83.

<sup>1024</sup> *Opuz v Turkey*, App No 33401/02 (ECtHR, 9 June 2009).

<sup>1025</sup> European Court of Human Rights, "Violence against women" *ECtHR 2*.

<sup>1026</sup> *Opuz v Turkey*, App No 33401/02 (ECtHR, 9 June 2009) paras. 37-44.

<sup>1027</sup> paras 47-52.

from the allegations made by the applicant”.<sup>1028</sup> Ultimately, in March 2002, following the applicant’s attempt to leave her husband, the husband shot the applicant’s mother arguing that “he had lost his temper and had shot [the applicant’s mother] for the sake of his honour”.<sup>1029</sup> The applicant’s husband was convicted of murder and illegal possession of a firearm and sentenced to imprisonment<sup>1030</sup> but was later released pending his appeal, at which point he continued to threaten the applicant.<sup>1031</sup> In its judgment, the ECtHR found a violation of Article 2 (right to life) concerning the murder of the applicant’s mother and a violation of Article 3 (prohibition of inhuman or degrading treatment) concerning the state’s failure to protect the applicant. According to the ECtHR, Turkey had “failed to set up and implement a system for punishing domestic violence and protecting victims”.<sup>1032</sup> Furthermore, the court found that overall, with regard to claims of domestic violence, “police officers do not investigate [the] complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint”.<sup>1033</sup> Finally, in a pioneering move, the ECtHR found “violations of Article 14 (prohibition of discrimination), in conjunction with Articles 2 and 3, as the violence suffered by the two women was gender-based”.<sup>1034</sup> The ECtHR concluded that the applicant had been able to demonstrate “the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence”.<sup>1035</sup>

In 2013, the ECtHR reached a similar decision in *Valiulienė v Lithuania*.<sup>1036</sup> The applicant had lodged an application with the Panevėžys City District Court for private persecution with regard to the domestic violence she had suffered at the hands of her partner. The authorities, however, failed to investigate her allegations of domestic violence. In its judgment, the ECtHR found a violation of Article 3 (prohibition of torture and of inhuman or

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<sup>1028</sup> para. 45.

<sup>1029</sup> paras 53-56.

<sup>1030</sup> para. 57.

<sup>1031</sup> European Court of Human Rights, “Violence against women” *ECtHR 2*.

<sup>1032</sup> 2.

<sup>1033</sup> 2.

<sup>1034</sup> 2.

<sup>1035</sup> *Opuz v Turkey* App No 33401/02 (ECtHR, 9 June 2009) para. 198.

<sup>1036</sup> *Valiulienė v Lithuania*, App No 33234/07 (ECtHR 26 March 2013).



degrading treatment). According to the court, “the practices at issue (...) together with the manner in which the criminal-law mechanisms were implemented, did not provide adequate protection to the applicant against acts of [domestic] violence”.<sup>1037</sup> The ECtHR has also found violations of the ECHR with regard to domestic violence in the cases of *E.S. and Others v Slovakia*,<sup>1038</sup> *Hajduová v Slovakia*,<sup>1039</sup> *Kalucza v Hungary*<sup>1040</sup> and *Eremia and Others v the Republic of Moldova*.<sup>1041</sup>

The Inter-American Court of Human Rights (IACtHR) dealt with similar issues in the landmark case of *Campo Algodonero*.<sup>1042</sup> A 2003 report by the Inter-American Commission of Human Rights (IACHR) named the killing of over 200 women since 1993 in *Campo Algodonero* as one of its key concerns.<sup>1043</sup> Despite the establishment of a Special Prosecutor’s Office in 1998 to investigate gender-based violence in the area, “the climate of violence and intimidation of women continued”.<sup>1044</sup> The 2003 IACHR report further testified to the “the negligence of the authorities responsible for investigating and prosecuting [the] crimes, and the overall inefficacy of the administration of justice and lack of political will at all levels to confront the problem”.<sup>1045</sup>

In its judgment, the IACtHR found that Mexico had violated the American Convention on Human Rights. It expressly recognised, for first time, the “States’ affirmative obligations to respond to violence against women by private actors”.<sup>1046</sup> Furthermore, it was also the first time that the IACtHR examined “cases at issue in the context of mass violence against women and

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<sup>1037</sup> para. 86.

<sup>1038</sup> *E.S. and Others v Slovakia*, App No 8227/04 (ECtHR 15 September 2009).

<sup>1039</sup> *Hajduová v Slovakia*, App No 2660/03 (ECtHR 13 November 2010).

<sup>1040</sup> *Kalucza v Hungary*, App No 57693/10 (ECtHR 24 April 2012).

<sup>1041</sup> *Eremia and Others v the Republic of Moldova*, App No 3564/11 (ECtHR 28 May 2013).

<sup>1042</sup> See previous discussion in chapter 3 4 3. Inter-American Court of Human Rights, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs) (*Comisión Nacional de los Derechos Humanos de México*, November 2009) <<http://www.cndh.org.mx/sites/all/fuentes/documentos/internacional/casos/4.pdf>> accessed 13 May 2013.

<sup>1043</sup> IACHR, ‘The situation of the rights of women in Ciudad Juárez, Mexico: the right to be free from violence and discrimination’ OEA/Ser.L/V/II.117, Doc. 44 (2003) para. 33.

<sup>1044</sup> Para 33.

<sup>1045</sup> para. 34.

<sup>1046</sup> Bettinger-López, ‘Inter-American Court rules against Mexico on gender violence in Ciudad Juárez’ *IntLawGrrls*.

structural discrimination” and “found that gender-based violence can constitute gender discrimination”.<sup>1047</sup>

In 2011, IACtHR reiterated this position in *Jessica Lenahan (Gonzales) v United States*.<sup>1048</sup> In its judgment, the IACtHR found that “[t]he systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence, constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Article II of the American Declaration [on the Rights and Duties of Man]”.<sup>1049</sup> Furthermore, the IACtHR went on to recognise that State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence “since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts”.<sup>1050</sup> The court’s decision was significant, as it was the first time the United States had been held accountable under international law for violating the human rights of a victim of domestic violence.

With regard to international refugee law, the question of state responsibility in cases of persecution committed by non-state actors has particular importance for gender-related persecution claims, as “women often have a less direct relationship with the State or because the access to protection is gendered”.<sup>1051</sup> Furthermore, there is evidence that “women are more likely than their male counterparts to experience or fear persecution by [non-state actors] and (...) that they may be less able to obtain the protection of the State against such harm”.<sup>1052</sup> According to Crawley “[w]hilst there is no shortage of episodes where women are directly victimised by State or by agents of the State, much of the violence committed against women is (...)

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<sup>1047</sup> Bettinger-López, ‘Inter-American Court rules against Mexico on gender violence in Ciudad Juárez’ *IntLawGrrls*.

<sup>1048</sup> *Jessica Lenahan (Gonzales) v United States*, Case No. 12.626, Report No. 80/11 (IACtHR, 2011).

<sup>1049</sup> para. 170.

<sup>1050</sup> para. 168.

<sup>1051</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit* para. 55.

<sup>1052</sup> Para 55.

perpetrated by husbands, fathers, boyfriends, in-laws and, in the case of female genital mutilation, women in the local community”.<sup>1053</sup>

### 5.3.1 Emerging state responsibility

There has, however, been a move towards under international refugee law of attributing the responsibility for persecution committed by a non-state actor to the state. According to paragraph 51 of the UNHCR Handbook on Procedures, even though persecution usually relates to officials’ actions, it “may also emanate from sections of the population that do not respect standards established by the laws of the country concerned”.<sup>1054</sup> The 2002 UNHCR Guidelines confirm this view in paragraph 19, which states that “there is scope within the refugee definition to recognise both State and non-State actors of persecution”.<sup>1055</sup> Consequently, “serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection”.<sup>1056</sup>

The acknowledgement that violence committed by non-state actors can amount to persecution has also found support in various different jurisdictions, especially in common law jurisdictions, which have generally accepted that persecution committed by non-state actor takes place because the state is “unable or unwilling to offer effective protection against such harm”.<sup>1057</sup> The possibility of non-state persecution has been accepted in Australia, among others, in the case of *Minister for Immigration and Multicultural Affairs v Ibrahim*,<sup>1058</sup> as well as in Canada in the case of *Zalzali v Canada*,<sup>1059</sup> and in the UK by the House of Lords in *Adan v Secretary of State for the Home Department*<sup>1060</sup> and *Horvath v Secretary of State for the Home Department*.<sup>1061</sup>

<sup>1053</sup> Crawley *Refugees and Gender: Law and Process* 52.

<sup>1054</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1992), U.N. Doc. HCR/IP/4/Eng/REV.1, para. 51.

<sup>1055</sup> UNHCR, ‘Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 19.

<sup>1056</sup> Para. 19.

<sup>1057</sup> Edwards, “Age and gender dimensions in international refugee law” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 59.

<sup>1058</sup> High Court of Australia, [2000] HCA 55 (26 October 2000).

<sup>1059</sup> Canadian Federal Court of Appeal, [1991] 3 FC 605.

<sup>1060</sup> [1999] 1 AC 293.

Overall, as Crawley and Lester observe, “[s]tate practice in much of the world (...) is overwhelmingly supportive of the position adopted by UNHCR, that persecution by non-State agents falls within the scope of 1951 Convention refugee definition”.<sup>1062</sup>

### 5.3.2 The ‘bifurcated approach’

The 1993 Canadian Guidelines defines the persecution that women fear as “acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons”.<sup>1063</sup> This has been termed a ‘bifurcated approach’ and has been described as a legal theory that acknowledges that “an applicant’s persecutor is an individual not abusing her based on [a Convention ground], but rather that the government fails to protect her based on a gender-defined social group”.<sup>1064</sup> This approach is a significant development, as “for most women, indirect subjection to the State will almost always be mediated through direct subjection to individual men or groups of men”.<sup>1065</sup>

The ‘bifurcated approach’ was first formulated and applied by the Supreme Court of Canada in 1993 in *Ward v Canada (Ward)*, with Judge La Forest concluding that “state complicity in persecution is a not a pre-requisite to a valid refugee claim”.<sup>1066</sup> Ultimately, the Supreme Court’s judgment in *Ward* indicates that even in cases where a non-state actor commits the persecution, “asylum standards can still be met if authorities permitted the persecution or if the authorities are “unable to offer effective protection”.<sup>1067</sup> As Gomez argues, the Canadian Supreme Court accepted, in the judgment, that requiring an asylum-seeking woman “to put her life at risk in order to

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<sup>1061</sup> [2000] 3 All ER 577.

<sup>1062</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit* para. 56.

<sup>1063</sup> Immigration and Refugee Board of Canada “Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution” *IRB*.

<sup>1064</sup> Bullard (2011) 95 *Minnesota Law Review* 1879.

<sup>1065</sup> Wright (1993) *Studies in Transnational Legal Policy* 249.

<sup>1066</sup> *Ward v Canada* [1993] 2 SCR 689, 713.

<sup>1067</sup> D. Gomez ‘Last in line – The United States trails behind in recognizing gender-based asylum claims’ (2003) 25 *Whittier Law Review* 959, 980.

prove that she sought the protection of the state” would defeat the whole purpose of refugee protection.<sup>1068</sup>

With regard to defining the state’s inability to protect its citizens, the judgment in *Ward* defined two possible situations. In the apparent situation of a state’s inability to protect, the claimant would have been expressly denied protection by the state.<sup>1069</sup> However, in cases where “the state has not actually been approached by the claimant for protection, the state should be presumed capable of protecting its nationals”.<sup>1070</sup> Yet, despite this presumption, the claimant is “still allowed to present a rebuttal by demonstrating evidence that amounted to a lack of protection by the state”.<sup>1071</sup>

In the UK, the bifurcated approach was applied as early as 1998, with the publication of Gender Guidelines for the Determination of Asylum Claims in the UK.<sup>1072</sup> In Section 1(17), the Guidelines defined the bifurcated approach in the form of an equation: Persecution = Serious Harm + Failure of State Protection.<sup>1073</sup>

In 1999, the House of Lords formally accepted the bifurcated approach in *Islam and Shah*.<sup>1074</sup> In this case, the House of Lords paid particular attention to the manner in which women were viewed and treated in their country of origin.<sup>1075</sup> Lord Steyn came to the conclusion that “[n]otwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman’s place in society in Pakistan is low”<sup>1076</sup> and that “in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state”.<sup>1077</sup> Having set the framework for the case, the House of Lords accepted the test of Persecution = Serious Harm + Failure of State Protection. As Musalo argues,

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<sup>1068</sup> 980.

<sup>1069</sup> *Ward v Canada*, [1993] 2 SCR 689.

<sup>1070</sup> 689.

<sup>1071</sup> Gomez (2003) *Whittier Law Review* 981.

<sup>1072</sup> Refugee Women’s Legal Group, ‘Gender Guidelines for the Determination of Asylum Claims in the UK’ (RWLG, July 1998)

<[www.ilpa.org.uk/data/resources/4112/genderguidelines.pdf](http://www.ilpa.org.uk/data/resources/4112/genderguidelines.pdf)> accessed 4 February 2014.

<sup>1073</sup> Refugee Women’s Legal Group, ‘Gender Guidelines for the Determination of Asylum Claims in the UK’ RWLG.

<sup>1074</sup> *Ex parte Shah* [1999] 2 AC 269.

<sup>1075</sup> Gomez (2003) *Whittier Law Review* 983.

<sup>1076</sup> *Ex parte Shah* [1999] 2 AC 269

<sup>1077</sup> 269.

this is significant, because by “determining nexus in reference to the individual persecutor as well as the State, [the House of Lords] found an analytical path around the barrier created by the characterization of family violence as ‘personal’ rather than as a Convention Reason”.<sup>1078</sup> Ultimately, under the test established by the House of Lords, a state’s failure to protect the victim of persecution can “serve as the nexus to [a Convention ground] rather than the individual abuser”.<sup>1079</sup>

The acceptance of the bifurcated approach in the UK was confirmed again in 2000, when the Immigration Appellate Authority published its Asylum Gender Guidelines (IAA Guidelines)<sup>1080</sup> which acknowledges the pervasiveness and the gender-specific form of “physical and mental violence and ill-treatment within the family”.<sup>1081</sup> The IAA Guidelines go farther and accept that serious harm committed by a non-state actor may amount to persecution, as it states that “treatment which would constitute ‘serious harm’ if it occurred outside the family will also constitute ‘serious harm’ if it occurs within a family context”.<sup>1082</sup> However, in order for the serious harm inflicted by a non-state actor to amount to persecution, the IAA Guidelines require that the victim demonstrate that “the state has failed or would fail to protect her”.<sup>1083</sup> State failure is described as the authorities being either “unwilling [or] unable to give effective protection”.<sup>1084</sup>

Moreover, the Australian Government accepted the bifurcated approach in its 1996 Guidelines on Gender Issue for Decision Makers.<sup>1085</sup> Under Article 4(11), agents of persecution include “a non-state actor from whom the state has been unwilling or unable to protect the victim”.<sup>1086</sup> Furthermore, under articles 4(12) and 4(13) a state’s failure to protect its

<sup>1078</sup> K. Musalo, ‘Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence’ (2003) 52 De Paul Law Review 777, 790.

<sup>1079</sup> Bullard (2011) *Minnesota Law Review* 1879.

<sup>1080</sup> United Kingdom Immigration Appellate Authority (IAA), ‘Asylum Gender Guidelines’ (IAA, 1 November 2000) <<http://www.refworld.org/docid/3ae6b3414.html>> accessed 3 February 2014.

<sup>1081</sup> Art 2(A)(23).

<sup>1082</sup> Art 2(A)(23).

<sup>1083</sup> Art 2(B)(1)

<sup>1084</sup> Art. 2(B)(1)

<sup>1085</sup> Australian Government, Department of Immigration and Multicultural Affairs, ‘Guidelines on Gender Issue for Decision Makers’ (Australia, July 1996), as quoted by Gomez (2003) *Whittier Law Review* 984.

<sup>1086</sup> Gomez (2003) *Whittier Law Review* 984.

citizens include an “ineffective and inaccessible system for dealing with complaints or the state’s practice of ‘turn[ing] a blind eye’”..<sup>1087</sup>

In 2002, the High Court of Australia applied the bifurcated approach in *Khawar*.<sup>1088</sup> In *Khawar*, the applicant’s asylum claim had originally been denied, with the Refugee Review Tribunal (RRT) stating that those harming [the applicant] were not motivated by her membership of any particular social group, but by purely personal considerations related to the circumstances of her marriage, the fact that she brought no dowry to the family and their dislike of her as an individual”.<sup>1089</sup> On appeal, Judge Branson of the Australian Federal Court overruled the RRT’s decisions by stating that due to the “central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution, not because of their membership of a social group, but because of the hostility of their husbands, is unrealistic”.<sup>1090</sup> This decision was upheld by the High Court of Australia, which applied the same Persecution = Serious Harm + Failure of State Protection formula, that the House of Lords had applied in *Ex Parte Shah*. According to the High Court, the nexus requirement could consequently be met when either the serious harm or failure of State protection is for reasons of a Convention ground.<sup>1091</sup> Ultimately, the High Court’s judgment in *Khawar* reconfirmed the approach taken by Lord Hope of Craighead in an earlier House of Lords case, *Horvath v Secretary of State for the Home Department*,<sup>1092</sup> according to which “in the case of an allegation of persecution by non-state agents, the failure of the state to provide the protection is (...) an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme”.<sup>1093</sup>

Similarly, in 1999 the New Zealand Refugee Status Appeals Authority accepted the bifurcated approach in Refugee Appeal No 71427/99,<sup>1094</sup> in

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<sup>1087</sup> 984.

<sup>1088</sup> *Immigration and Multicultural Affairs v Khawar* (2002) HCA 14.

<sup>1089</sup> para. 13.

<sup>1090</sup> para. 55.

<sup>1091</sup> Musalo (2003) *De Paul Law Review* 796.

<sup>1092</sup> *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489.

<sup>1093</sup> 497–8, restated by Gleeson CJ in *Khawar*, para. 19.

<sup>1094</sup> 2000 NZAR 545.

which the applicant, an Iranian woman, applied for asylum after having been subjected to brutal domestic violence by her husband on a regular basis. In a judgment delivered by Chairperson Haines QC, despite the applicant's husband's behaviour not satisfying the nexus requirement, the applicant was granted asylum, because "Iran condones, if not actively encourages, non-state actors such as husbands or former husbands to cause serious harm to women".<sup>1095</sup> According to Chairperson Haines QC, "in relation to this risk of non-state harm there will be an undoubted failure of state protection".<sup>1096</sup> With regard to the nexus required, according to Chairperson Haines QC:

"[T]he reason why the appellant is exposed to serious state harm and to a lack of state protection both from the husband and from the state itself is because she is a woman. The cloak under which this persecution will ostensibly take place will be religion. (...) But as we have stated before, the overarching reason why the appellant is at risk of persecution is because she is a woman".<sup>1097</sup>

Ultimately Chairperson Haines QC concluded that "while the serious harm faced by the appellant at the hands of her first husband is not for a Convention reason, the failure by the state to protect her from that harm is for the Convention reasons of membership of a particular social group, religion and political opinion".<sup>1098</sup>

The UNHCR already accepted the bifurcated approach in 1992 in the UNHCR Handbook on Procedures.<sup>1099</sup> According to paragraph 65 of the handbook, despite persecution being "normally related to action by the authorities of a country", it can also take place when "serious discriminatory or other offensive acts are committed by the local populace (...) if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection".<sup>1100</sup>

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<sup>1095</sup> para. 118.

<sup>1096</sup> para. 118.

<sup>1097</sup> para. 119.

<sup>1098</sup> para. 120.

<sup>1099</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status' (Geneva, January 1992) UN Doc HCR/IP/4/Eng/REV.1

<sup>1100</sup> para. 65.



This position was reiterated again in 1997, specifically with regard to domestic violence and FGM. According to the UNHCR, “domestic violence becomes an asylum issue (...) in situations where the abuse attains a certain level of severity, and where the authorities are unable or unwilling to provide any protection to the person or people concerned”.<sup>1101</sup> Furthermore, with regard to FGM, the UNHCR stated that “in situations where [FGM] is imposed on a woman against her will and where the authorities are unable or unwilling to provide that person with protection, then female genital mutilation could provide the basis for a claim to refugee status”.<sup>1102</sup>

The acceptance of the bifurcated approach was further confirmed in the 2002 UNHCR Guidelines, according to which gender-related violence can amount to persecution whether perpetrated by State or private actors.<sup>1103</sup> In paragraph 11, the 2002 Guidelines confirm the attributability of responsibility to the State in cases where, despite having prohibited the persecutory practice, “the State (...) nevertheless continue[s] to condone or tolerate the practice, or [is not] able to stop the practice effectively”.<sup>1104</sup>

Consequently, according to the 2002 Guidelines, a mere enactment of a law prohibiting or denouncing persecutory practices “will (...) not in itself be sufficient to determine that the individual’s claim to refugee status is not valid”.<sup>1105</sup> Furthermore, the 2002 Guidelines specifically address cases where states do not accord protection from ‘serious abuse’ as a matter of policy and name domestic violence as an example of this type of abuse.<sup>1106</sup> According to paragraph 15, “if the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution”.<sup>1107</sup>

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<sup>1101</sup> UNHCR, *The State of the World’s Refugees: A Humanitarian Agenda*, (New York: Oxford University Press, 1997) 197.

<sup>1102</sup> 197.

<sup>1103</sup> UNHCR, Guidelines on International Protection No. 1: 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), UN Doc. HCR/GIP/02/01, para. 9.

<sup>1104</sup> para. 11.

<sup>1105</sup> para. 11.

<sup>1106</sup> para. 15.

<sup>1107</sup> para. 15.

Overall, the emerging adoption of the bifurcated approach has been significant with regard to gender-related persecution asylum claims. As Edwards argues, the bifurcated approach “ensure[s] the equitable treatment of men and women before the law”.<sup>1108</sup> Ultimately, accepting only the traditional, direct link between persecution committed by the state and the claimant would “discriminate against women who are more likely to be subjected to indirect links between the persecution and the actions of the State, through an inability or an unwillingness of the State to protect them”.<sup>1109</sup>

However, the bifurcated approach has not found universal acceptance. Jurisdictions relying on the ‘accountability approach’ stress that the responsibility of the State of origin for the acts inflicted upon the victim is a constitutive element of persecution in the sense of Article 1A(2) of the 1951 Convention.<sup>1110</sup> For example, in a 1995 decision, the Federal Administrative Court of Germany held that “States are the holders of the monopoly of power”.<sup>1111</sup> According to the court, persecution is therefore “the abuse of such jurisdictional power of the State”, and consequently “only agents of the State or groups that have replaced the State as holder of that power and have become a de facto government can persecute”.<sup>1112</sup>

Similarly in the United States, despite having accepted the bifurcated approach in 1996 in the landmark case of *Kasinga*<sup>1113</sup>, as discussed in sub-chapter 3 4 1, which involved a Togolese woman seeking asylum out of fear of being forced to undergo FGM, the BIA rejected the theory in 2001 in the case of *In re R-A*<sup>1114</sup> and stressed the need of nexus between the actual persecutor and a convention ground.<sup>1115</sup> In rejecting the bifurcated approach, the BIA stated that “[it] understand[s] the ‘on account of’ test to direct an inquiry into the motives of the entity actually inflicting the harm”.<sup>1116</sup> Although

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<sup>1108</sup> Edwards *Violence against Women under International Human Rights Law* 63.

<sup>1109</sup> 63.

<sup>1110</sup> W. Kälin ‘Non-state agents of persecution and the inability of the state to protect’ (2000) 15 *Georgetown Immigration Law Journal* 415, 417.

<sup>1111</sup> Bundesverwaltungsgericht, (1996) 32 E.Z.A.R. 200 as quoted by Kälin (2000) *Georgetown Immigration Law Journal* 417.

<sup>1112</sup> 417.

<sup>1113</sup> *In re Fauziya Kasinga*, US Board of Immigration Appeals, File No. A73 476 695, 13 June 1996.

<sup>1114</sup> *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999).

<sup>1115</sup> Bullard (2011) *Minnesota Law Review* 1879.

<sup>1116</sup> *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999) 42.

the attorney general later vacated the case, no US court has since explicitly adopted the bifurcated approach.<sup>1117</sup>

The 'accountability approach' has furthermore been widely criticised especially from the perspectives of state sovereignty and the process of concluding treaties. As Türk argues, to include state accountability as a requirement in the refugee definition "would in essence formulate an additional requirement, which was not foreseen originally and cannot be justified with reference to the actual wording of the refugee definition".<sup>1118</sup> Nevertheless, the civil law jurisdictions of Germany, Switzerland, France and Italy continue to be divided on the issue and are inclined to require some level of accountability of the State.<sup>1119</sup> Overall, discrepancies continue to remain between the case law in different jurisdictions.<sup>1120</sup>

#### **5 4 Emphasis on 'utility' in the refugee status assessment process**

In addition to the inherent gender-bias of the current refugee law regime as described in chapters 1 and 2, the results of the private/public divide as analysed under 5 2 and the persecution of non-state actors as demonstrated under 5 3, it has been argued that the androcentric application of the current refugee definitions also supports the disproportionate numbers of male refugees in developed countries.<sup>1121</sup> The androcentric refugee framework has also produced seemingly gender-neutral state practice and national policies that have further limited the chances for women to obtain asylum.<sup>1122</sup> As Ganguly-Scrase argues, women refugees are rendered invisible in many national policies, which focus on asylum-seekers as male.<sup>1123</sup> The androcentric policies combined with gender-biased international refugee law have brought about a situation where the majority of the world's forcibly

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<sup>1117</sup> 42.

<sup>1118</sup> V. Türk, 'Non-State Agents of Persecution' (unpublished manuscript) as quoted by Kälin (2000) *Georgetown Immigration Law Journal* 418.

<sup>1119</sup> Edwards *Violence against Women under International Human Rights Law* 60.

<sup>1120</sup> 60.

<sup>1121</sup> Macklin (1995) *Human Rights Quarterly* 219.

<sup>1122</sup> Valji (2001) *Refuge* 28.

<sup>1123</sup> Ganguly-Scrase, 'Infiltrators, illegals and undesirables: gender and forced migration in South Asia' in *Community, Place, Change: TASA 2005 Conference Proceedings Australia: The Sociological Association of Australia* 1.

displaced are women, and yet, the greater part of asylum-seekers are men.<sup>1124</sup>

The propensity of states to stress the ‘utility’ of the asylum-seekers for the country and to select asylum-seekers whom the state views as ‘easily assimilatable’ has strongly contributed to the overwhelming proportion of asylum-seekers in the Western states being male.<sup>1125</sup> As Valji explains, because of the limited opportunities for women to attend school to receive education or to find work due to social and economic factors in most parts of the world, the “side-lining of humanitarian principles to fulfil labour demands subverts the intentions of providing protection, and places women at an unfair advantage”.<sup>1126</sup>

Canada, for example, has added a ‘personal suitability’ or ‘admissibility’ component above and beyond the refugee selection criteria.<sup>1127</sup> Owing to these additional components, in addition to meeting the 1951 Refugee Convention’s definition of a refugee, the asylum-seeker must also “meet the criteria of admissibility, which generally means that the person should exhibit the potential for eventual successful settlement in Canada”.<sup>1128</sup> The criteria used for the evaluation of ‘personal suitability’ are largely of a socio-economic nature, such as exposure to Western lifestyles, education, job skills, and knowledge of English or French.<sup>1129</sup> Gender, by contrast, is not considered as part of the evaluation.

This gender-free evaluation is, however, not gender neutral in its consequences.<sup>1130</sup> According to Boyd:

“Gender stratification in many countries means that women receive fewer educational opportunities than men, are less likely to acquire English or French language skills as part of schooling, and may have

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<sup>1124</sup> C. Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths, 2004) 163.

<sup>1125</sup> Valji (2001) *Refugee* 28.

<sup>1126</sup> 28.

<sup>1127</sup> Macklin (1995) *Human Rights Quarterly* 219.

<sup>1128</sup> M. Boyd, ‘Gender Concealed, Gender Revealed: The Demography of Canada’s Refugee Flows’ in *Gender Issues and Refugees: Development Implications*, Conference Proceeding 137 (York University, 9-11 May 1993) 12-13 as quoted in Macklin (1995) *Human Rights Quarterly* 219.

<sup>1129</sup> 219.

<sup>1130</sup> 219.

less exposure to urban or industrial jobs. Furthermore, given the gender gap in Canadian wages, women may be considered less economically self-sufficient than men if they have many dependents. Finally, gender stratification in refugee camps also can result in male refugees occupying important mediating positions that increase the chances of selection for resettlement”.<sup>1131</sup>

Closely tied to the hurdle of ‘utility’ or ‘admissibility’ are the socio-economic obstacles faced by many of the women fleeing persecution from developing countries. Despite the 1951 UN and the 1969 OAU refugee conventions not containing any distinction “between the protection obligations owed to men and women defined as refugees (...) In practice however, women refugee claimants can face numerous difficulties in gaining access to international [refugee] protection”.<sup>1132</sup> By using Canada as an example, Mackling demonstrates the difficulties that women refugees face and argues that it is “a variety of psychological, cultural, and financial impediments [that] render women less able than men to undertake the hazardous, uncertain and expensive journey to Canada”.<sup>1133</sup>

Similarly, Bhabha observes that one manifestation of refugee women’s disadvantage in the refugee determination process is their limited access to asylum adjudication fora in the first place. As Bhabha argues “[i]f, given similar risks of persecution, a smaller percentage of women (...) than of similarly placed men make asylum applications, this is a prima facie indication of disadvantage and it is consistent with the claim that women (...) have a harder time getting asylum”.<sup>1134</sup> The disadvantaged position of refugee women is indeed demonstrated by the statistical evidence on the demographic characteristics of refugees, which indicates two findings: “First, in every single developing country of asylum neighbouring the refugees’ country of origin, women (...) refugees substantially outnumber adult males.

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<sup>1131</sup> 219.

<sup>1132</sup> Bacon and Booth (2000) *UNSW Law Journal* 136.

<sup>1133</sup> Macklin (1995) *Human Rights Quarterly* 220.

<sup>1134</sup> J. Bhabha ‘Demography and Rights: Women, Children and Access to Asylum’ (2004) 16(2) *International Journal of Refugee Law* 2004 227, 232.

Second, in every developed state, male asylum seekers far outnumber females”.<sup>1135</sup>

Similarly, Bacon and Booth observe that “at the most basic level, women claimants often lack access to economic and social resources which would enable them to flee persecution in their country of origin”.<sup>1136</sup> This observation was also pointed out in the 2006 United Nations Population Fund Report on the State of the World Population, which stated that women refugees “often bear a disproportionate share of responsibilities and burdens” when it comes to caring for children, the sick and the elderly.<sup>1137</sup> Furthermore, as Kneebone argues, the notable absence of women asylum-seekers from Western countries is partly caused by “women tend[ing] to be left behind in refugee camps (...) whilst the men are either fighting or fleeing or have been killed”.<sup>1138</sup>

On the whole, despite women and children making up a large majority of the world’s refugee population, a disproportionately small number are likely to reach safe countries because of poverty and a lack of mobility.<sup>1139</sup> Furthermore, the injustice that women face under the current refugee law framework is degenerated by the fact that men as a group are more economically and politically empowered.<sup>1140</sup>

Pittaway and Bartolomei have further argued that resettlement policies “actively discriminate against women on grounds of both race and gender”.<sup>1141</sup> Likewise, Oloka-Onyango states that the “racist considerations (...) in operation in the evolution of the new immigration practices and (...) the restrictive application of refugee law (...) obviously has significant implications for the status of women”.<sup>1142</sup>

However, despite the evident discrimination, hardly any international or domestic legal instruments or policies have acknowledged the way in which

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<sup>1135</sup> 232.

<sup>1136</sup> Bacon and Booth (2000) *UNSW Law Journal* 136.

<sup>1137</sup> United Nations Population Fund, ‘State of world population 2006 - A Passage to Hope: Women and International Migration’ 58 (UNFPA, 2006)

<[http://www.unfpa.org/swp/2006/pdf/en\\_sowp06.pdf](http://www.unfpa.org/swp/2006/pdf/en_sowp06.pdf)> accessed 5 June 2013.

<sup>1138</sup> Kneebone (2005) *International Journal of Refugee Law* 10.

<sup>1139</sup> Bacon and Booth (2000) *UNSW Law Journal* 136.

<sup>1140</sup> Kim (1994) *Journal of Gender and the Law* 112.

<sup>1141</sup> Pittaway and Bartolomei (2000) *Refugee* 21.

<sup>1142</sup> Oloka-Onyango (1995-1996) *Denver Journal of International Law and Policy* 367.

racism and sexism intersect to doubly discriminate against refugee women.<sup>1143</sup> Overall, the discrimination against refugee women persists in numerous forms and in various situations. As Pittaway and Bartolomei state, refugee women remain discriminated against in situations of “armed conflict, in refugee determinations, and in resettlement because of their gender”.<sup>1144</sup>

## 5 5 Xenophobia

Similarly to the other hurdles faced by women asylum-seekers, the xenophobic undercurrent in the domestic asylum processes has a uniquely, detrimental impact on the asylum claims of women. With regard to racism and xenophobia in the refugee determination process, the practice of ‘othering’ often takes place. The practice of ‘othering’ of refugees, or “regarding one or several sections of the community as [having] intrinsically lesser value than the dominant culture or power holders”, has increased both in developed countries and in Africa,<sup>1145</sup> where there has been an escalation in the climate of xenophobia and racism.<sup>1146</sup> Van Boven has described the xenophobic phenomena of ‘othering’ as “a climate and a perception that a priori regards a foreigner as an adversary, a rival, a competitor, or an adventurer who is a threat to prosperity, culture and identity”.<sup>1147</sup> ‘Othering’ has been especially harmful to refugee women, as Pittaway and Bartolomei explain:

“Racism directed at refugee populations in resettlement countries often causes refugee women to remain silent about their experiences of gender discrimination and violence within their own communities. Often racism within the broader community exacerbates the pressure on refugee women to maintain their traditional roles in order to keep their communities intact. The problems of many refugee women remain hidden in countries of resettlement. (...) Refugees [furthermore] face

<sup>1143</sup> Pittaway and Bartolomei (2000) *Refugee* 23.

<sup>1144</sup> 22.

<sup>1145</sup> B. Rutinwa, ‘The end of asylum? The changing nature of refugee policies’ (2002) 21(1) *Africa Refugee Survey Quarterly* 12, 18.

<sup>1146</sup> Pittaway and Bartolomei (2000) *Refugee* 24.

<sup>1147</sup> T. van Boven, ‘United Nations Strategies to Combat Racism and Racial Discrimination: Past Experiences and Present Perspectives’ Doc. E/CN.4/1999/WG.1BP.7, para. 5(b) (1999) as cited by Pittaway and Bartolomei (2000) *Refugee* 24.

systematic discrimination on the base of race, ethnicity, and gender in the process of selection for resettlement in third countries—most often developed countries with predominantly white populations. Refugees are selected for resettlement from situations of refuge in first countries of asylum. There is a marked trend for resettlement countries to give first preference to refugees most likely to ‘blend’ into the host country”.<sup>1148</sup>

The requirement of being able to ‘blend’ into the host population demonstrates the inherently racist nature of the resettlement process, which ultimately results in favouritism towards refugees from the North. Generally, refugees from the South are usually assisted with basic food and medical supplies, while refugees from the North are frequently offered resettlement in the North, and/or substantial assistance in the rebuilding of infrastructure.<sup>1149</sup>

As Pittaway and Bartolomei observe, this imbalanced and racist approach is often justified on the grounds of ‘cultural compatibility’.<sup>1150</sup> According to a UNHCR report, especially single mothers from the South are “often denied access to resettlement services on the grounds that they will be a drain on the host economy”.<sup>1151</sup> Overall, owing to the double hurdle of gender and race, women’s migration from Third World countries to Europe has virtually ceased.<sup>1152</sup> As Hathaway poignantly states, “[w]e’re not going to see a flood of female claimants. Most women can’t get out of their countries, and when they can, they are lucky to make it to the next country”.<sup>1153</sup>

The phenomenon of increasing xenophobic sentiment is not limited to developed countries but has also been on the rise in Africa in the past decades. The sympathetic approach of the local populations towards refugees

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<sup>1148</sup> Pittaway and Bartolomei (2000) *Refuge* 27.

<sup>1149</sup> 28.

<sup>1150</sup> 28.

<sup>1151</sup> UNHCR, ‘Meeting New Challenges: Evolving Approaches to the Protection of Women-at-Risk’ (Resettlement Section, draft in progress, April 1998) as cited Pittaway and Bartolomei (2000) *Refuge* 28.

<sup>1152</sup> Giles ‘Aid Recipients or Citizens?’ in *Development and Diaspora: Gender and Refugee Experience* 49.

<sup>1153</sup> Globe and Mail, ‘Domestic Abuse Accepted for Refugee Status’ (10 February 1993) A1, A2 in Macklin (1995) *Human Rights Quarterly* 221.



that was dominant in the 1960s has been disappearing with a new negative and restrictive approach gaining ground.<sup>1154</sup>

The factors behind the change in attitude are multifaceted. In 1960s, a majority of the refugee flow originated from Southern Africa, from where asylum-seekers were fleeing from racist, colonial and apartheid regimes.<sup>1155</sup> As Rutinwa observes, these asylum-seekers were willingly accepted by the host populations who were “in total solidarity with their governments in standing up against colonial and racial domination in Africa”.<sup>1156</sup> Overall, the asylum-seekers were seen as freedom fighters who were “retreating to mobilize themselves in order to fight for their right to self-determination and the worth and dignity of the African race”, and they were consequently perceived in political rather than humanitarian terms.<sup>1157</sup>

Towards the end of the 1960s and during the 1970s, the growing economies of many African countries enabled the hosting of refugees without it impacting the government-funded welfare programmes for local populations.<sup>1158</sup> However, the economic decline, which has since taken place on the African continent, combined with the austerity measures imposed by the IMF and the World Bank as a condition for economic aid, has forced many African governments to abort the welfare programmes.<sup>1159</sup> Consequently, with increasing competition for resources, the approach of the host populations towards asylum-seekers has rapidly deteriorated.<sup>1160</sup>

The rapid negative change in the approach towards refugees could already be detected in South Africa in the 1990s. In 1998, South Africa’s then Deputy Minister of Home Affairs, Lindiwe Sisulu, described the deteriorating attitude of the local population towards refugees. According to Sisulu:

“[t]he social and economic mobility of large numbers of foreign nationals when many citizens remain impoverished, criminal activity on the part of some, and the presence of refugees has resulted in little

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<sup>1154</sup> Rutinwa (2002) *Africa Refugee Survey Quarterly* 18.

<sup>1155</sup> 18.

<sup>1156</sup> 18.

<sup>1157</sup> 18.

<sup>1158</sup> 18.

<sup>1159</sup> 19.

<sup>1160</sup> 19.

differentiation between immigrants, economic migrants and refugees, by our citizens (...) prejudice and intolerance towards foreign nationals are rampant, with refugees being the most vulnerable. Foreign nationals are perceived as a 'problem' that must be 'dealt with'".<sup>1161</sup>

## 5.6 Culturalist approach

It is important to recognise the reverse side of the 'othering' that is taking place in Western refugee settlement processes. Under the current refugee settlement system, there is a continuing neo-colonial portrayal of third-world women as 'cultural others' who have to be saved from their 'uncivilised cultures'.<sup>1162</sup> According to Razack, one of the only ways for a refugee woman to stand any chance of securing gender-based asylum, she must cast herself as a cultural other fleeing from a more 'primitive culture'.<sup>1163</sup> Similarly, Sinha has highlighted the tendency of some asylum adjudicators in the US to grant gender-based asylum only in cases where a strong 'cultural hook'<sup>1164</sup> exists.<sup>1165</sup>

This neo-colonial approach dominates the current international refugee paradigm, and as a result, woman refugees have better chances of having their asylum claims accepted only if they present themselves as victims of "dysfunctional, exceptionally patriarchal cultures and states".<sup>1166</sup> According to Razack, this approach is based on the dubious construct of the "benevolent generous First World once again extending a helping hand to a hopelessly backward Third World in refugee course".<sup>1167</sup> This view is further echoed by Spijkerboer and Macklin, who have suggested that the 'neo-colonial' approach

<sup>1161</sup> L. Sisulu 'Key Note Address', International Conference on Refugees in the New South Africa (Pretoria, 27-29 March 1998) 2-3 as quoted by Rutinwa (2002) *Africa Refugee Survey Quarterly* 19.

<sup>1162</sup> Middleton "Barriers to protection: gender-related persecution and asylum in South Africa" in *Gender and Migration: Feminist Interventions* 82.

<sup>1163</sup> S. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (University of Toronto Press, 1998) 92.

<sup>1164</sup> Explained as 'persecutory practices seen to be cultural in nature' by Visweswaran in K. Visweswaran 'Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work' (2004) 26 *Human Rights Quarterly* 483, 498.

<sup>1165</sup> Sinha (2001) *New York University Law Review* 1562.

<sup>1166</sup> G. Spivak, 'Can the Subaltern Speak?' in Williams P and Chrisman L (eds) *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Columbia University Press, 1994) 50.

<sup>1167</sup> 60.

“feeds into a protection discourse (...) highly imbued with notions of political, economic, social and cultural superiority”.<sup>1168</sup>

The neo-colonial approach is detrimental to women refugees, as it fails to focus on the actual crime of gender-related persecution itself but rather centres on the ‘moral superiority’ of the First World. Additionally, this construct has inbuilt limitations as it will “only work when the [women] victims can access readily understood racial tropes”.<sup>1169</sup> According to Kneebone, the current refugee paradigm “constructs women culturally or socially (...) and diminishes their experiences as woman refugees”.<sup>1170</sup> This reliance on culture has serious consequences for those women whose claims involve persecution that cannot be linked to culture or a cultural practice.<sup>1171</sup> This is also pointed out by Crawley, who argues that the “associations of ‘third world women’ with ‘culture’ and ‘tradition’ have implications for both asylum seeking women and the discourse of protection more generally”.<sup>1172</sup> Furthermore, the stance of attributing persecution faced by women refugees to culture alone does not recognise that violence against women is a global phenomenon and the most pervasive abuse of human rights.<sup>1173</sup> The culturalist argument, therefore, further promotes the narrow concept of human rights that excludes the violence faced by women and “highlights the political nature of the abuse of women”.<sup>1174</sup>

Gender-related persecution, which is often based on various instances of private behaviour<sup>1175</sup>, has traditionally been “disregarded as relatively trivial and frivolous, in contrast with the classic grounds of persecution”.<sup>1176</sup> Additionally, with the currently dominant restrictionist immigration policies, the adjudicators often encounter a “high-stakes comparison and ‘objective’ evaluation of opposing normative and ethical systems, where a sovereign

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<sup>1168</sup> Crawley *Refugees and Gender: Law and Process* 10.

<sup>1169</sup> S. Razack, ‘Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender’ (1995) 8 *Canadian Journal of Women and the Law* 45, 72.

<sup>1170</sup> Kneebone (2005) *International Journal of Refugee Law* 7.

<sup>1171</sup> Middleton “Barriers to protection: gender-related persecution and asylum in South Africa” in *Gender and Migration: Feminist Interventions* 83.

<sup>1172</sup> Crawley *Refugees and Gender: Law and Process* 10.

<sup>1173</sup> Kerr ‘Introduction’ in *Ours by Right: Women’s Rights as Human Rights* 4.

<sup>1174</sup> K. Mathur, *Countering Gender Violence: Initiatives Towards Collective Action in Rajasthan* (New Delhi: Sage Publications, 2004) 37.

<sup>1175</sup> Bhabha (1996) *Public Culture* 4.

<sup>1176</sup> 4

state's internal cultural norms and policies"<sup>1177</sup> are being assessed. Very often the outcome, especially in gender-related persecution cases, is the "invocation of state sovereignty to define ethical and ideological boundaries for international protection".<sup>1178</sup>

As a consequence of the receiving states' restrictionist approach to refugees, there has been a considerable increase in the use of culturalist arguments by the adjudicators. These culturalist arguments have had a detrimental impact on women refugees, because the former often ignore violence against women as a global phenomenon and promote the narrow concept of human rights, which excludes the violence that women face. By linking human rights violations against women with a 'cultural practice' rather than recognising them as a form of persecution, the culturalist approach leaves women vulnerable and without any protection, while it condones the brutal crimes against women that continue to take place on a global scale.

For instance, in the *Gilani* case<sup>1179</sup>, as discussed in sub-chapter 4 3, which involved a claim of gender-related persecution, state sovereignty and culturalist arguments were used to deny asylum. The application in *Gilani* was based on the applicant's fear of persecution due to her membership in a particular social group consisting of "women or Westernized middle-class Islamic women" or alternatively due to her political opinion or religion,<sup>1180</sup> with the applicant's fear of persecution arising out of "her fundamental opposition" to policies concerning women in Iran after the Islamic Revolution.<sup>1181</sup>

The immigration adjudicator in *Gilani* denied the application despite acknowledging that in Iran "women in general are seriously under privileged and very much regarded as second class citizens under the domination of the male".<sup>1182</sup> However, according to the adjudicator, "this is something that

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<sup>1177</sup> 10.

<sup>1178</sup> 12.

<sup>1179</sup> *Mahshid Mahmoudi Gilani v The Secretary of State for the Home Department*, TH/9515/85/(5216) Asylum and Immigration Tribunal (Immigration Appellate Authority), 3 June 1987 (UNHCR Refworld, 3 June 1987) <[http://www.unhcr.org/refworld/country,,GBR\\_AIT,,IRN,,3ae6b710c,0.html](http://www.unhcr.org/refworld/country,,GBR_AIT,,IRN,,3ae6b710c,0.html)> accessed 13 July 2012.

<sup>1180</sup> *Mahshid Mahmoudi Gilani v The Secretary of State for the Home Department*, UNHCR.

<sup>1181</sup> Bhabha (1996) *Public Culture* 12.

<sup>1182</sup> *Mahshid Mahmoudi Gilani v The Secretary of State for the Home*, UNHCR.

applies to all women in Iran”.<sup>1183</sup> With this statement, the adjudicator depoliticized majoritarian dominance<sup>1184</sup> by making the prevalence of the persecution a qualifying factor in access to rights<sup>1185</sup> and consequently negated the right to protection from gender-related persecution for every Iranian woman.

Finally, the adjudicator used the combination of state sovereignty and a culturalist stance to deny the application by stating that “one is on dangerous ground if you attempt to interfere with a person’s customs or religious beliefs and on even more dangerous ground if you do so on a national or worldwide scale”.<sup>1186</sup> As Bhabha observes:

“By conflating the applicant’s customs and beliefs with those of the Iranian government, establishing binary opposition between Westernized and Iranian worlds, and using a personalized appeal to national sovereignty as a trump, this case maps the Iranian state directly onto the woman’s body, and eliminates precisely that space for the articulation of difference within the category of woman, and of individual autonomy that the refugee regime was designed to protect”.<sup>1187</sup>

A similar approach was taken by the BIA in *Fatin v Immigration and Naturalization Service (Fatin)*.<sup>1188</sup> In *Fatin*, the applicant’s fear of persecution arose out of her refusal to wear a veil in post-Islamic Revolution Iran. According to the applicant, this refusal would lead to her “be[ing] punished in public or be[ing] jailed”,<sup>1189</sup> with the punishment taking the form of being “whipped or thrown stones at”.<sup>1190</sup> The asylum application was specifically based on the applicant’s fear of persecution resulting from her membership in

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<sup>1183</sup> *Mahshid Mahmoudi Gilani v The Secretary of State for the Home, UNHCR*.

<sup>1184</sup> Bhabha (1996) *Public Culture* 14.

<sup>1185</sup> 14.

<sup>1186</sup> *Mahshid Mahmoudi Gilani v The Secretary of State for the Home, UNHCR*.

<sup>1187</sup> Bhabha (1996) *Public Culture* 14.

<sup>1188</sup> *Fatin v Immigration and Naturalization Service*, 12 F.3d 1233, United States Court of Appeals for the Third Circuit, 20 December 1993, (UNHCR Refworld, 20 December 1993) <<http://www.unhcr.org/refworld/docid/3ae6b6d60.html>> accessed 15 July 2012.

<sup>1189</sup> *Fatin v Immigration and Naturalization Service, UNHCR Refworld*.

<sup>1190</sup> *Fatin v Immigration and Naturalization Service, UNHCR Refworld*.

the particular social group of “upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals”.<sup>1191</sup> The BIA, however, denied the asylum application by stating that the applicant would simply be “subject to the same discriminatory treatment as all other women in Iran”.<sup>1192</sup>

As Bhabha observes, in *Fatin* state sovereignty argument was utilised to reject an asylum application based on gender-related persecution. Despite the state-imposed practices going against the applicant’s “fundamental beliefs” and “resulting in a fear of persecution”, according to the adjudicators “it is up to the individual member of the society to confirm because of her nationality”.<sup>1193</sup> Overall, gender-related persecution cases “reveal the unresolved tension between individual and state interest in the control of sexuality, and thus provide a fertile arena for investigation arguments qualifying the scope of universal human rights intervention and denying refugee protection”.<sup>1194</sup>

Globalisation has worsened the position of asylum-seeking women, who historically have been disadvantaged by the Refugee Convention and underrepresented for many years among refugees in Western countries while awaiting asylum.<sup>1195</sup> As Nilsson argues, globalisation has had an effect on the ‘feminisation of immigration’, which has led to increasing numbers of women seeking asylum alone, without their male relatives.<sup>1196</sup> Studies have revealed, however, that women’s applications are more successful if they seek asylum on the basis of their relationship with their families than if they apply based only on their own experiences. As Nilson observes, “derivative persecution of female asylum seekers is more readily accepted by decision makers than direct persecution, where the claimant has to establish that she has suffered or fears persecution on a particular Convention ground”.<sup>1197</sup>

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<sup>1191</sup> *Fatin v Immigration and Naturalization Service, UNHCR Refworld.*

<sup>1192</sup> *Fatin v Immigration and Naturalization Service, UNHCR Refworld.*

<sup>1193</sup> Bhabha (1996) *Public Culture* 15.

<sup>1194</sup> 5.

<sup>1195</sup> E. Nilsson, ‘Persecution on Account of One’s Gender: Refugee Status or Status Quo?’

(2012) 2(1) *feminists@law* 1 (University of Kent, *feminists@law*, 2012)

<<http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/56>> accessed 3 June 2013.

<sup>1196</sup> 1.

<sup>1197</sup> 1.

## 5 7 Conclusion

As I have demonstrated in this chapter the deeply entrenched dichotomy between public and private spheres, which can be found in both domestic and international law, including international refugee law, has severely hindered women seeking asylum. The gender-related persecution that women face is often deemed to take place in the 'private' sphere and consequently is considered to fall outside the protection of international refugee law. However, courts very often misconstrue the nature of gender-related persecution and deem sexual violence by military officials, for example, to be a 'private' act. The stereotypical construction of refugee women as 'vulnerable' and apolitical has also had a negative impact on the success of women asylum-seekers' claims.

Especially with regard to asylum applications based on domestic violence, the most prominent feature in the current asylum jurisdiction in Western states is "the limited reference to recent developments in international human rights standards on domestic violence".<sup>1198</sup> As Mullally argues, with regard to gender-related persecution in general and domestic violence in particular, "the worlds of refugee and human rights law continue to remain apart".<sup>1199</sup> This point, manifested in the political nature of both, domestic violence and the resistance to it, continues to be challenged by the Western states under asylum jurisdiction.<sup>1200</sup> Ultimately, asylum adjudicators continue to view the political nature of resistance to domestic violence as a 'personal matter', and consequently "the 'political opinion' ground of refugee law frequently remains beyond the reach of refugee women" as further discussed under sub-chapter 4 3.<sup>1201</sup>

Courts have traditionally been reluctant to recognise that persecution committed by non-state actors falls under the purview of international refugee law. However, with the emergence of the concept of indirect state responsibility and the so-called 'bifurcated approach', as I demonstrate under

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<sup>1198</sup> Mullally (2011) *International and Comparative Law Quarterly* 482-3.

<sup>1199</sup> 482.

<sup>1200</sup> 483.

<sup>1201</sup> 483.

sub-chapter 5 3 2, there seems to be a slow change towards a more gender-inclusive interpretation of actors capable of committing persecution.

In addition to the discriminatory legal framework, refugee women are also facing further discrimination due to their lower socio-economic status and their race. Owing to increased xenophobia and protectionism in the receiving states, the refugee policies often tend to stress refugees' 'utility' and ability to 'blend' into the main population. This has caused serious obstacles to refugee women, as their limited access to education or work experience again places them at an unfair advantage.

A further factor making the asylum applications of women fleeing domestic violence more difficult is that the applicants often find themselves in a 'double bind'.<sup>1202</sup> According to Mullally, the racial 'othering' and the gendered stereotypes of 'Third World women' that are typical in Western asylum jurisdictions, combined with the Western states' eagerness to protect their sovereignty, pose further obstacles to domestic violence asylum claims.<sup>1203</sup> This is manifested in the common presumptions regarding the extent of domestic violence in a particular society, which strengthens the view that to recognise a domestic violence claim for asylum would open floodgates.<sup>1204</sup>

Ultimately, instead of constructing gender-related persecution in the adverse and narrow way in which the courts I discussed above under 3 4 are proceeding, it should be understood as 'resulting from the intersection of individual or state persecution and structural injustice', as Parekh and Walker argue.<sup>1205</sup> The normalising effect of the combination of these two factors ultimately results in the invisibility and minimisation of gender-related persecution.

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<sup>1202</sup> 479.

<sup>1203</sup> 479.

<sup>1204</sup> 479.

<sup>1205</sup> Parekh (2012) *Journal of Global Ethics* 269.



## Chapter 6

### Acknowledging gender-related persecution

#### 6 1 Introduction

As is evident from the discussion in the previous chapters international refugee law is inadequate in offering protection to women subjected to gender-related persecution. The analysis in the preceding chapters clearly demonstrated how law makers, adjudicators and policy makers alike have tried to stretch and bend the definition and nexus requirement as set out under Article 1 A 2 of the 1951 Convention; with little success.

This final substantial chapter focuses on three different domestic approaches to gender-related persecution that have been put in place to supplement the weak protection that the international legislative framework offers. I undertook this analysis to explore the methods that states have adopted to fill the protection gap to be able to safeguard victims of gender-related persecution. The states' adoption of alternate approaches demonstrates the increasing global recognition of the shortcomings of the international refugee law framework regarding the provision of adequate protection to victims of gender-related persecution. This recognition has forced states to find different ways to address the protection gap. However, while the adoption of alternative measures illustrates an emerging willingness of states to accept gender-related persecution as a legitimate ground of persecution, it remains questionable how effective these approaches will be without the re-conceptualisation of the underlying theory of international refugee law, specifically with regard to the refugee definition.

In sub-chapter 6 1 I discuss the gender guidelines that have been created to assist domestic adjudicators when deciding about cases that involve gender-related persecution. Although the creation of gender guidelines is a step in the right direction, it is uncertain whether they will be sufficient, because of their non-binding nature, and ultimately the discretion is still vested in the hands of the adjudicator.

In sub-chapter 6 2 I focus on the emerging concept of complementary protection and its applicability to gender-related asylum claims. While the

possibility of finding alternative forms of protection for victims of gender-related persecution is worth exploring, it seems because of the lack of universal understanding and a legislative framework that complementary protection is an inadequate solution to the protection gap faced by victims of gender-related persecution. Even in certain regions such as within the European Union, where there is a multilateral legislative framework for complementary protection, implementation has been inconsistent.

In the final sub-chapter I return to one of the issues that provoked my research into gender based persecution namely the alternative solution of adding gender as an independent, legally binding category to the refugee definition under domestic law. This approach has been tried in a limited number of states, including South Africa (as indicated in the introduction), Spain, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela. Sub-section 6.3 examines the hypothesis that the embedding of gender as an independent category in the legal framework would secure adequate protection to those fleeing gender-related persecution. By granting gender the status of an independent category under the refugee definition, the root cause of persecution faced by women worldwide would be recognised, and its seriousness acknowledged.

## **6.2 Gender guidelines**

### *6.2.1 UNHCR Gender Guidelines*

As a point of departure in 1993, the UNHCR Executive Committee (ExCom) presented Conclusion No 73 on Refugee Protection and Sexual Violence,<sup>1206</sup> in which it recommended that states develop “appropriate guidelines on women asylum-seekers in recognition of the fact that women refugees often experience persecution differently from refugee men”.<sup>1207</sup> More comprehensive gender guidelines were issued in 2002, when the UNHCR published its Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or

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<sup>1206</sup> UNHCR Executive Committee, ‘Conclusion No 73 on Refugee Protection and Sexual Violence’, 44th session (8 October 1993), UN Doc. 12A (A/48/12/Add.1).

<sup>1207</sup> para. 21(e).

1967 Protocol relating to the Status of Refugees.<sup>1208</sup> The aim of these guidelines was to provide guidance to the domestic courts for a more gender-sensitive interpretation of the international refugee law and consequently a more inclusive framework for gender-related persecution cases.

However, while examining the impact of the 2002 UNHCR Gender Guidelines, the 2012 European Parliament Report came to the conclusion that the influence of the UNHCR Gender Guidelines in practice has been very limited due to their non-binding character.<sup>1209</sup> This had already been demonstrated in a 2004 UNHCR comparative analysis, which concluded that the UNHCR Gender Guidelines had not been officially adopted into domestic legislation or policies in any of the 42 European countries surveyed.<sup>1210</sup> This finding was echoed by the 2012 Secretariat of the European Parliament study, according to which the implementation of the UNHCR Gender Guidelines “remains either inadequate or non-existent in most of the European countries”.<sup>1211</sup>

Michels similarly argues that due to their informing (rather than obligatory) character, the UNHCR Gender Guidelines have not made any ground-breaking difference to the way in which gender-related asylum cases are adjudicated.<sup>1212</sup> Furthermore, the impact of the UNHCR Gender Guidelines on gender-related asylum claims is weakened by not being clear on “whether, when or how gender-related claims entitle female asylum seekers a refugee status”.<sup>1213</sup>

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<sup>1208</sup> UNHCR, Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’ (7 May 2002) UN Doc. HCR/GIP/02/01

<sup>1209</sup> Cheikh Ali, Querton and Soulard, “Gender related asylum claims in Europe” *European Parliament* 31.

<sup>1210</sup> Crawley and Lester “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe” *UNHCR Evaluation and Policy Analysis Unit* 22.

<sup>1211</sup> Cheikh Ali, Querton and Soulard, “Gender related asylum claims in Europe” *European Parliament* 27.

<sup>1212</sup> M. Michels, ‘To what extent does the European recast Qualification Directive protect refugee women seeking asylum on the basis of gender-related claims?’ (M.Phil. thesis, University of Cape Town, 2014) 25.

<sup>1213</sup> 25.

### 6 2 2 Domestic gender guidelines

Following UNHCR ExCom's Conclusion No 73, Canada was the first country to adopt gender-sensitive guidelines in March 1993. Since its publication, the Canadian Immigration and Refugee Board has updated the guidelines twice: first in November 1996, with the publication of Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution,<sup>1214</sup> and for the second time in February 2003, with the publication of Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution.<sup>1215</sup> The Canadian Guidelines recognise that women can belong to a 'gender-defined social group'<sup>1216</sup>, as discussed in sub-chapter 4 2, on account of which they can "fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin".<sup>1217</sup> Similarly, the guidelines recognise that women can face "persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons".<sup>1218</sup>

Following the lead of Canada, the US was the second country to adopt gender-sensitive guidelines. In May 1995, the United States Department of Justice published the Considerations for Asylum Officers Adjudicating Asylum Claims from Women memorandum<sup>1219</sup> (US Guidelines). It serves as guidance for a gender-sensitive interpretation of gender-related claims.<sup>1220</sup>

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<sup>1214</sup> Immigration and Refugee Board of Canada (IRB) 'Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution' (IRB, 13 November 1993) <<http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx>> accessed 15 May 2012.

<sup>1215</sup> Immigration and Refugee Board of Canada (IRB) 'Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)' (IRB, February 2003) <<http://www.unhcr.org/refworld/country,,,LEGALPOLICY,CAN,,4713831e2,0.html>> accessed 15 May 2012.

<sup>1216</sup> Section A(I)(4).

<sup>1217</sup> Section A(I)(4).

<sup>1218</sup> Section A(I)(3).

<sup>1219</sup> P. Coven, 'Considerations for Asylum Officers Adjudicating Asylum Claims From Women' (U.S. Department of Justice, 26 May 1995) <[http://cgrs.uchastings.edu/documents/legal/guidelines\\_us.pdf](http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf)> accessed 15 May 2015.

<sup>1220</sup> Center for Refugee and Gender Studies (University of California) 'Gender Guidelines' (May 2012) <[http://cgrs.uchastings.edu/law/gender\\_guidelines.php#\\_ednref7](http://cgrs.uchastings.edu/law/gender_guidelines.php#_ednref7)> accessed 15 May 2015.

The US Guidelines, however, only have persuasive authority and can arguably be ignored by immigration judges.<sup>1221</sup>

Similar developments have taken place in various other countries, including the Netherlands,<sup>1222</sup> Australia,<sup>1223</sup> Sweden<sup>1224</sup> and the United Kingdom.<sup>1225</sup> As a consequence of the development of gender guidelines, Sengupta argues that there is an emerging customary international law of gender-based persecution as a ground for granting refugee status.<sup>1226</sup> In addition to the creation of gender guidelines, some states have included gender as an independent ground of persecution to their domestic jurisdictions, which supports the idea of an emerging customary law. I further explore this idea below in sub-chapter 6 4.

Yet, regardless of the introduction of gender guidelines, national jurisprudence remains restrictive to gender-related asylum claims. For example, the Dutch Guidelines reject gender as an exclusive ground of PSG and require additional grounds of persecution. According to Article C.2.11:

“[s]ex cannot be the sole ground to determine membership of a ‘particular social group’. Women in general are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually”.<sup>1227</sup>

Despite the gender guidelines on international protection standards having been around for more than two decades, the domestic refugee law practice has been slow to change. The gender guidelines have been criticised

<sup>1221</sup> Center for Refugee and Gender Studies “Gender Guidelines” *University of California*.

<sup>1222</sup> The gender-sensitive ‘Vreemdelingen-circulaire’ were adopted in 1994.

<sup>1223</sup> The ‘Guidelines on Gender Issues for Decision Makers’ were adopted in 1996.

<sup>1224</sup> ‘Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection’ were published in March 2001.

<sup>1225</sup> ‘Gender Issues in the Asylum Claim’ guidelines were adopted in March 2004 and were revised in September 2010.

<sup>1226</sup> Sengupta, ‘Becoming a Refugee Woman: Gender-based persecution and Women Asylum Seekers under International Refugee Law’ *SSRN* 4.

<sup>1227</sup> The Netherlands Ministry of Justice, ‘Vreemdelingen-circulaire 2000’ Article C.2.11.

(Government of Netherlands, October 2014)

<[http://wetten.overheid.nl/BWBR0012288/2/2/211/Tekst/geldigheidsdatum\\_29-10-2010](http://wetten.overheid.nl/BWBR0012288/2/2/211/Tekst/geldigheidsdatum_29-10-2010)> accessed 19 October 2014.

for their continued inadequacy in providing true protection for victims of gender-related persecution. Gibney, for example, has described the current response from Western states as “organised hypocrisy”.<sup>1228</sup> With regard to both UNHCR and domestic gender guidelines, one of the main criticisms towards their efficacy in providing protection to victims of gender-related persecution is that they lack teeth.<sup>1229</sup> Because neither international nor domestic gender guidelines are legally binding, but merely directional, they ultimately leave the decision to the adjudicating immigration judge.

This was demonstrated in the 2012 European Parliament Report on the effect of gender guidelines in nine EU member states. The study exposed the mixed experiences of gender guidelines in asylum adjudication as well as ad hoc approaches to implementation.<sup>1230</sup> Similarly, Mullally argues that in the jurisdictions where gender guidelines do exist, their “impact on adjudication appears limited”.<sup>1231</sup> Additionally, the substance of the various gender guidelines is not uniform, and the extent to which the existing domestic gender guidelines comply with UNHCR guidance notes and guidelines varies significantly.<sup>1232</sup>

Similar observations were made the 2012 European Parliament Report on the national non-binding gender guidelines adopted in Romania, Sweden and the UK and the alternative gender-sensitive guidance documents adopted in Belgium and Italy.<sup>1233</sup> The study concluded that even though “gender guidelines or instructions may enhance gender awareness among national stakeholders, their implementation in practice is often lacking”.<sup>1234</sup>

An additional concern caused by the non-binding nature of the domestic guidelines is their vulnerability to being repealed.<sup>1235</sup> Owing to their non-binding legal status, none of the existing domestic gender guidelines

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<sup>1228</sup> M.J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) 229.

<sup>1229</sup> Kandt (1995) *Georgetown Immigration Law Journal* 169.

<sup>1230</sup> S. Mullally ‘Gender asylum law: providing transformative remedies?’ in S. Singh Juss and C. Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, 2013) 200.

<sup>1231</sup> 201.

<sup>1232</sup> 201.

<sup>1233</sup> Cheikh Ali, Querton and Soulard, “Gender related asylum claims in Europe” *European Parliament* 31.

<sup>1234</sup> 31.

<sup>1235</sup> V. Oosterveld, ‘The Canadian Guidelines on Gender-Related Persecution: An Evaluation’ (1996) 8 *International Journal of Refugee Law* 569, 583.

guarantees the victims of gender-related persecution any legal certainty or continuous protection. As Kandt observes with regard to Canadian gender guidelines:

“[S]ince the Canadian Guidelines are only persuasive, not binding, it is possible that should a government that is less sympathetic on these issues come to power in the future, these guidelines could easily be scrapped without having to go through any formal legislative process. This is a significant danger (...). Such a threat would not be posed towards the five categories that have been adopted under the UN Convention by its signatory countries”.<sup>1236</sup>

### **6 3 Complementary protection and its applicability to gender-related persecution cases**

Another alternative solution to mitigate the protection gap under the current refugee law framework is to afford victims of gender-related persecution ‘complementary protection’. As discussed in chapter 2, along with the development of the human rights instruments, the human rights-based complementary protection framework began to attract attention on the international plane in the late 1980s.<sup>1237</sup> The complementary protection framework is rooted in obligations arising out of general humanitarian principles and international human rights instruments.<sup>1238</sup> According to McAdam, the main function of complementary protection is to “provide an alternative basis for eligibility for protection”.<sup>1239</sup> Similarly, Goodwin-Gill and McAdam argue that complementary protection is a “shorthand term for widened scope of non-refoulement under international law”.<sup>1240</sup> Despite the term ‘complementary protection’ having emerged only in the 1990s, the origins of the framework are rooted, as alluded to above, in earlier

<sup>1236</sup> Kandt (1995) *Georgetown Immigration Law Journal* 169.

<sup>1237</sup> G. S. Goodwin-Gill and J. McAdam ‘Protection under Human Rights and General International Law’ in G. S. Goodwin-Gill and J. McAdam *The Refugee in International Law* (3<sup>rd</sup> ed) (Oxford: Oxford University Press, 2007) 291.

<sup>1238</sup> J. McAdam, ‘Complementary Protection’, UNHCR Discussion Paper No 2, 2005 (UNHCR, 2005) < <http://www.unhcr.org.au/pdfs/Discussion22005.pdf> > accessed 15 October 2014.

<sup>1239</sup> 5.

<sup>1240</sup> Goodwin-Gill and McAdam, ‘Protection under Human Rights and General International Law’ in *The Refugee in International Law* (3<sup>rd</sup> ed) 285.

international and regional human rights instruments and state practice. The specific instruments encompassing complementary protection and the prohibition of refoulement include Article 3(1) of the Convention against Torture (CAT),<sup>1241</sup> Article 7 of the International Convention on Civil and Political Rights (ICCPR),<sup>1242</sup> Article 3 of the European Convention on Human Rights (ECHR)<sup>1243</sup> and Article 12(3) of the African Charter on Human and Peoples' Rights as highlighted under sub-chapter 2 3 above.<sup>1244</sup>

As discussed in chapter 2, despite Western states having traditionally resisted the expansion of the international refugee law framework to include further grounds for persecution, there has been a recognition by the states that some people who fall outside the international refugee definition merit protection and should not be returned to serious forms of harm.<sup>1245</sup> However, as Goodwin-Gill and McAdam observe, state practice has been “characterised by highly varied, ad hoc responses at the national level” that have been made almost exclusively at the discretion of the executive.<sup>1246</sup> Overall, the usage of complementary protection was for a long time confined to situations of mass influx,<sup>1247</sup> and its origins are interlinked with the development of ‘temporary protection’, which prohibits the states from returning persons fleeing from generalised violence and internal armed conflict within their state of origin.<sup>1248</sup> Consequently, Goodwin-Gill and McAdam argue that complementary protection is the individual counterpart of temporary protection, which extends protection to “single or small group arrivals on the same humanitarian basis”.<sup>1249</sup>

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<sup>1241</sup> Art 3(1) CAT: ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.

<sup>1242</sup> Art 7 ICCPR: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’.

<sup>1243</sup> Art 3 ECHR: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

<sup>1244</sup> Art 12(3) ACHPR: ‘Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions’.

<sup>1245</sup> Goodwin-Gill and McAdam, ‘Protection under Human Rights and General International Law’ in *The Refugee in International Law* (3<sup>rd</sup> ed) 289.

<sup>1246</sup> 289.

<sup>1247</sup> 291.

<sup>1248</sup> 289.

<sup>1249</sup> 290.



Nonetheless, as of yet, neither an international treaty on complimentary protection nor any other agreement on what complementary protection should encompass exists. While the UNHCR considered the possibility of drafting an Optional Protocol to the 1951 Refugee Convention with regard to complementary protection as early as 1992, it concluded that such a possibility would be disregarded for fear of “reopening fundamental principles and precepts in the Convention itself for further consideration”.<sup>1250</sup> Similarly, in 1994, the UNHCR ExCom concluded that despite a new international treaty on the issue being “desirable”, there seemed to be “little inclination on the part of States (...) to incur further legal obligations in this domain”.<sup>1251</sup>

In 2004, however, the EU member states adopted the first binding multilateral legal instrument<sup>1252</sup> on complementary protection in the form of the Qualification Directive.<sup>1253</sup> According to Article 15 of the Qualification Directive, a person will qualify for subsidiary protection if exposed to serious harm consisting of :

“[D]eath penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.<sup>1254</sup>

A year later, in 2005, the UNHCR ExCom published a non-binding Conclusion on the Provision on International Protection Including through Complementary Forms of Protection.<sup>1255</sup> Some academics have argued that there is no need to expand the current international refugee law framework to

<sup>1250</sup> UNHCR, ‘Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion note’ UN Doc EC/1992/SCP/CRP.5 (2 April 1992), para. 7

<sup>1251</sup> UNHCR Executive Committee, ‘Note on International Protection’ UN Doc. A/AC.96/830 (7 September 1994), para. 53.

<sup>1252</sup> European Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive).

<sup>1253</sup> Complementary Protection is included in Articles 15-17 of the Qualification Directive.

<sup>1254</sup> Art 15 of the Qualification Directive.

<sup>1255</sup> UNHCR Executive Committee, Conclusion No 103 on the ‘Provision on International Protection Including through Complementary Forms of Protection’ (7 October 2005).

include gender as a category of persecution, because of these developments in the field of complementary protection. This argument, however, disregards various problems with complementary protection as a solution to the lack of protection against gender-related persecution. Firstly, with respect to the EU, the only region with a binding multilateral legal instrument, only five member states have granted complementary protection in a total of seven cases involving gender-related violence since the passage of the 2005 Qualification Directive.<sup>1256</sup> At the same time, there has been almost the same number of rejections.<sup>1257</sup> Similarly to the analysis in sub-chapter 5 2 of the different gender guidelines, this demonstrates the continuing ad hoc nature of the responses of the member state jurisdictions as well as the discrepancy in the outcomes, despite the supposedly unifying Qualification Directive. This point has also been observed by Petitpas and Nelles, according to whom “the extent to which European states currently recognise refugee status for women and girls at risk of gender-based persecution varies significantly”.<sup>1258</sup>

As mentioned above, there have only been seven cases involving gender-related persecution in which complementary protection has been granted since the passage of the Qualification Directive in 2005.<sup>1259</sup> In Finland, complementary protection has been granted in two cases. The first case involved a female minor from Somalia who belonged to a minority clan and was at risk of forced marriage in her country of origin.<sup>1260</sup> While the Helsinki Administrative Court granted the applicant complementary protection, it did so on the basis of the precarious general security and humanitarian situation rather than on the basis of the risk of forced marriage.<sup>1261</sup> The second case involved a pregnant Ethiopian woman who had been denied refugee status despite having been subjected to assault and rape carried out

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<sup>1256</sup> This information was found on the European Database of Asylum Law, (*European Database of Asylum Law*, 28 September 2015) <[www.asylumlawdatabase.eu](http://www.asylumlawdatabase.eu)> accessed 28 September 2015.

<sup>1257</sup> *European Database of Asylum Law*.

<sup>1258</sup> E. Petitpas and J. Nelles, ‘The Istanbul Convention: new treaty, new tool’ (2015) 49 *Forced Migration Review* 83, 84.

<sup>1259</sup> *European Database of Asylum Law*, (*European Database of Asylum Law*, 28 September 2015) <[www.asylumlawdatabase.eu](http://www.asylumlawdatabase.eu)> accessed 28 September 2015.

<sup>1260</sup> Helsinki Administrative Court, Case number 10/0642/1 (28 May 2010), (EDAL, 28 May 2010) <<http://www.asylumlawdatabase.eu/en/case-law/finland-helsinki-administrative-court-28-may-2010-1006421>> 15 October 2014.

<sup>1261</sup> Case number 10/0642/1 *EDAL*.

by the police in Ethiopia.<sup>1262</sup> The Helsinki Administrative Court, however, granted the applicant complementary protection because she would be “at risk of suffering a real threat of serious harm or inhuman or degrading treatment on the basis that she had experienced serious human rights violations in the past, she [was] in the final stages of pregnancy or would be returned with a new-born child and that she would not have any social networks to fall back on”.<sup>1263</sup>

In Germany, only one case of complementary protection linked to gender-related persecution has been granted. In 2010, the Administrative Court in Münster granted protection from deportation to a Nigerian woman due to the threat of FGM and forced marriage if she was returned to her country of origin.<sup>1264</sup> Importantly, however, the applicant’s refugee claim was originally rejected because the court found that FGM did not constitute persecution.<sup>1265</sup>

In 2010, the Spanish Supreme Court granted complementary protection to a Columbian woman who had applied for refugee status after having been subjected to rape and physical mistreatment by a non-identified group that subsequently threatened her and her partner.<sup>1266</sup> The applicant’s refugee claim was refused on the basis that the applicant had failed to establish a link between the gender-related persecution suffered and her political opinions.<sup>1267</sup> In its judgment, the Spanish Supreme Court reiterated that persecution in accordance with the 1951 Refugee Convention had not been established.<sup>1268</sup> The Supreme Court granted complementary protection on the basis of the applicant having suffered individually as a result of the ongoing situation of indiscriminate violence in Colombia.<sup>1269</sup> Yet again, it is

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<sup>1262</sup> Helsinki Administrative Court, Case number 11/0294/1 (11 March 2011), (EDAL, 11 March 2011) <<http://www.asylumlawdatabase.eu/en/case-law/finland-helsinki-administrative-court-11-march-2011-1102941>> accessed 15 October 2014.

<sup>1263</sup> Case number 11/0294/1 *EDAL*.

<sup>1264</sup> Administrative Court of Münster, Case number 11 K 413/09.A (15 March 2010), (EDAL, 15 March 2010) <<http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnster-11-k-41309a-15-march-2010#content>> accessed 15 October 2014.

<sup>1265</sup> Case number 11 K 413/09.A *EDAL*.

<sup>1266</sup> Supreme Court of Spain, Case number 1519/2010 (30 June 2011), (EDAL, 30 June 2011) <<http://www.asylumlawdatabase.eu/en/case-law/spain-supreme-court-30-june-2011-15192010#content>> accessed 15 October 2014.

<sup>1267</sup> Case number 1519/2010 *EDAL*.

<sup>1268</sup> Case number 1519/2010 *EDAL*.

<sup>1269</sup> Case number 1519/2010 *EDAL*.

important to note that the Supreme Court based its decision to grant complimentary protection on what it described as indiscriminate violence rather than gender-related persecution.

In France, the National Asylum Court (Cour nationale du droit d'asile, CNDA) granted complementary protection in two cases involving gender-related persecution. In 2010, the CNDA granted complementary protection to a Guinean woman who had refused to undergo FGM in her country of origin.<sup>1270</sup> She further claimed that she had been “involved in anti-governmental political activities and that she was subjected to physical abuse for this reason”.<sup>1271</sup> Eventually, her parents sent the applicant to France to be subjected to forced marriage. Once in France, the man she was married to subjected the applicant to violence and confinement. The applicant applied for refugee status based on membership of a particular social group. The application was rejected, as according to CNDA, there was not sufficient evidence to “conclude that the applicant’s anti-governmental political activities, which only started once she was in France and which she manifested during this forced marriage, could amount to such an infringement that she could be seen as a member of a particular social group”.<sup>1272</sup> Despite the gender-related violence the applicant had suffered, the CNDA did not consider her membership of a PSG to be the cause of this violence. Ultimately, the CNDA granted the applicant complementary protection on the basis that she had “deliberately opposed [her parents’] will and that she would face, if returned to her country of origin, acts amounting to inhuman and degrading treatment from her relatives, without being able to request effectively the intervention of the authorities due to the private and domestic nature of the case”.<sup>1273</sup>

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<sup>1270</sup> The French National Asylum Court, *Case of Miss D.*, Case Number 109011388 (23 December 2010) (EDAL, 23 December 2010) < <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-23-december-2010-miss-d-n%C2%B009011388#content> > accessed 15 October 2014.

<sup>1271</sup> *Case of Miss D.*, Case Number 109011388 EDAL.

<sup>1272</sup> *Case of Miss D.*, Case Number 109011388 EDAL.

<sup>1273</sup> *Case of Miss D.*, Case Number 109011388 EDAL.

Similarly, the CNDA granted a Nigerian woman complementary protection in 2011.<sup>1274</sup> The applicant had fled Nigeria to Spain due to threats of being subjected to forced marriage and FGM in her country of origin.<sup>1275</sup> In Spain the applicant was forced to prostitute herself for several months before she fled to France.<sup>1276</sup> The CNDA firstly assessed the applicant's refugee claim, which it refused due to the facts relating to her fear of being subjected to a forced marriage and to FGM "not being established".<sup>1277</sup> Furthermore, with regard to the forced prostitution that the applicant had been subjected to in Spain, the CNDA found that the applicant should not be seen as a "member of a particular social group in Nigeria, which would possess its own identity because it was perceived as different by Nigerian society and, consequently, subjected as such to specific persecution".<sup>1278</sup> Consequently, the CNDA rejected the applicant's refugee claim as based on membership in a PSG comprising victims of trafficking. The CNDA, however, granted the applicant complementary protection, because "given her personal and family situation, the applicant could not avail herself of the effective protection of the authorities of her country of origin".<sup>1279</sup> Ultimately, the CNDA concluded that the applicant faces a serious threat of inhuman or degrading treatment in her country of origin by the members of the network that brought her to Spain and to which she still owed a great deal of money.<sup>1280</sup>

Finally, in 2012, in *J.T.M. v Minister for Justice and Equality*,<sup>1281</sup> the Irish High Court granted complementary protection to a Nigerian woman fleeing serious ill treatment, rape and torture that she had suffered at the hands of her husband, to whom she was forcibly married for 16 years. The claimant's refugee application was refused by the Refugee Appeals Commissioner and later by the Refugee Appeals Tribunal "on the grounds

<sup>1274</sup> The French National Asylum Court, *Case of Miss O.*, Case Number 10020534 (29 July 2011) (EDAL, 29 July 2011) <<http://www.asylumlawdatabase.eu/en/case-law/france-cnda-29-july-2011-miss-o-n%C2%B010020534>> accessed 15 October 2014.

<sup>1275</sup> *Case of Miss O.*, Case Number 10020534 EDAL.

<sup>1276</sup> *Case of Miss O.*, Case Number 10020534 EDAL.

<sup>1277</sup> *Case of Miss O.*, Case Number 10020534 EDAL.

<sup>1278</sup> *Case of Miss O.*, Case Number 10020534 EDAL.

<sup>1279</sup> *Case of Miss O.*, Case Number 10020534 EDAL.

<sup>1280</sup> *Case of Miss O.*, Case Number 10020534 EDAL. 'Mlle O. doit être regardée comme étant exposée, dans son pays d'origine et de la part des membres du réseau qui l'ont conduite en Espagne et auxquels elle doit encore une forte somme d'argent afférente à sa venue en Europe, à l'une des menaces graves mentionnées par les dispositions précitées'.

<sup>1281</sup> [2012] IEHC 99.

that internal relocation was appropriate”.<sup>1282</sup> The applicant consequently applied for complementary protection, which the Ministry for Justice and Equality initially refused because of the finding that the non-state persecutor (the husband) could not be considered an ‘actor of serious harm’, as it had not been demonstrated that the state of origin was unable or unwilling to provide protection against the harm.<sup>1283</sup> Consequently, according to the Ministry, because ‘serious harm’ could only be carried out by ‘actors of serious harm’, it could not be established that the applicant had suffered ‘serious harm’ in her country of origin, despite clear evidence that she had suffered torture.<sup>1284</sup>

Overall, these cases demonstrates that despite all of them arguably including serious gender-related harm, in a vast majority of cases complementary protection was granted because of more general reasons such as “precarious general security and humanitarian situation” or “on-going situation of indiscriminate violence”, rather than on the basis of the threat of serious gender-related harm. By granting complementary protection on more generalised grounds, however, the courts fail to acknowledge the harm suffered by the applicants because of their gender.<sup>1285</sup>

Another cause for concern related to the use of complementary protection in cases involving gender-related persecution is that, whilst there have only been seven gender-related persecution cases in which complementary protection was granted in the states discussed above, there have also been a number of cases in which protection was denied on questionable grounds. In 2008, the Administrative Court in Munich denied both refugee status and complementary protection to an Iraqi woman who had adopted a Western, independent way of life since moving to Germany.<sup>1286</sup> According to the applicant, if she was returned to her country of origin, she would face a serious threat of violence, permanent restrictions on her freedom

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<sup>1282</sup> para. 4.

<sup>1283</sup> para. 8.

<sup>1284</sup> para. 8.

<sup>1285</sup> See Chapter 4 for further discussion on courts failing to acknowledge that victims of gender-related persecution suffer harm because of their gender rather than one of the existing 1951 Convention grounds.

<sup>1286</sup> Administrative Court in Münster, Case number M 8 K 07.51028 (10 December 2008), (EDAL, 10 December 2008) <<http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnchen-10-december-2008-m-8-k-0751028#content>> accessed 15 October 2014.

and risk to her life in the form of an honour killing, because her family members did not accept her Westernised way of life.<sup>1287</sup> In denying refugee status to the applicant, the Administrative Court in Munich stated that the applicant had failed to successfully establish persecution since the threat to her life or freedom was not related to her race, religion, nationality, membership of a particular social group or her political conviction.<sup>1288</sup> Furthermore, with regard to the applicant's attempt to link the threat to her life or freedom to her gender, it held that the "[h]arassment perpetrated by members of her clan [was] (...) obviously not related to her inalienable characteristic as a woman, but to the fact that she [did] not want to behave according to the moral standards of her clan".<sup>1289</sup> According to the Administrative Court in Munich, transgression of *social* and cultural norms regarding *gender* roles and behaviour is not protected under German domestic nor international refugee law.<sup>1290</sup> It also denied complementary protection to the applicant, because the threat of honour killing or other form of serious violence resulting from her transgression of accepted moral conduct was a general, albeit "increased individual risk".<sup>1291</sup> According to the Administrative Court in Munich, the risk faced by the applicant was:

"[N]ot a result of arbitrary violence, but (...) a target-oriented, predictable danger, aimed directly at the applicant, which is an expression of a criminal attitude among some individuals of her culture of origin (...) This risk emerges and prospers in the absence of a functional constitutional order based on peace, providing for corresponding punishment and is, therefore, a typical general risk".<sup>1292</sup>

This decision arguably contradicts the 2005 Qualification Directive, which requires serious threat of "death penalty or execution or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin or serious and individual threat to a civilian's life or person by reason

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<sup>1287</sup> Case number M 8 K 07.51028 EDAL.

<sup>1288</sup> Case number M 8 K 07.51028 EDAL.

<sup>1289</sup> Case number M 8 K 07.51028 EDAL.

<sup>1290</sup> Case number M 8 K 07.51028 EDAL.

<sup>1291</sup> Case number M 8 K 07.51028 EDAL.

<sup>1292</sup> Case number M 8 K 07.51028 EDAL.

of indiscriminate violence in situations of international or internal armed conflict”<sup>1293</sup> in order to grant complementary protection, not the presence of all of them.

In a second German case, the Administrative Court in Aachen denied refugee status and complementary protection to a Nigerian minor who claimed that she would be at serious risk of FGM if she was returned to Nigeria.<sup>1294</sup> In denying the applicant’s claim, the court came to the conclusion that it could “not be established with a reasonable degree of probability that the applicant, in case of return to Nigeria, [was] at risk of political persecution in the form of FGM”.<sup>1295</sup> It came to this conclusion despite acknowledging that “FGM, in all its known forms, is still widespread in Nigeria”.<sup>1296</sup> Furthermore, what makes the court’s decision so questionable is the fact that no general legislation prohibiting FGM in Nigeria exists, and “prosecution is possible only under the general criminal law”.<sup>1297</sup> While some states in Nigeria, such as the applicant’s native state of Edo, have laws prohibiting FGM, no criminal proceedings had taken place at that time.<sup>1298</sup> Ultimately, the Administrative Court in Aachen came to the conclusion that it was not “sufficiently likely that a circumcision would be performed, since a circumcision of a minor girl in principle requires the parents’ consent and in the case [in question] both parents (...) opposed the applicant’s circumcision”.<sup>1299</sup>

Finally, in Sweden, in 2010, the Migration Court of Appeal (*Migrationsöverdomstolen*) denied complementary protection to a woman with three children from Montenegro.<sup>1300</sup> According to the applicant, there was a serious threat to her life and of abuse by her brother-in-law and her father-in-law if she was returned to Montenegro.<sup>1301</sup> The applicant had been subjected

<sup>1293</sup> Article 15 of the Qualification Directive 2005. Emphasis added.

<sup>1294</sup> Administrative Court Aachen, Case number 2 K 562/07.A (10 May 2010) (EDAL, 10 May 2010) <<http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-aachen-10-may-2010-2-k-56207a#content>> accessed 15 October 2014.

<sup>1295</sup> Case number 2 K 562/07.A EDAL.

<sup>1296</sup> Case number 2 K 562/07.A EDAL.

<sup>1297</sup> Case number 2 K 562/07.A EDAL.

<sup>1298</sup> Case number 2 K 562/07.A EDAL.

<sup>1299</sup> Case number 2 K 562/07.A EDAL.

<sup>1300</sup> Migration Court of Appeal (*Migrationsöverdomstolen*), Case number UM 4230-09 (17 March 2010) (EDAL, 17 March 2010) <<http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-17-march-2010-um-4230-09#content>> accessed 15 October 2014.

<sup>1301</sup> Case number UM 4230-09 EDAL.



to rape, violence and forced prostitution by her brother-in-law and had received threats from her father-in-law in her country of origin.<sup>1302</sup> In denying her and her children refugee status through complementary protection, the Migration Court of Appeal stated that the applicant had failed to demonstrate the lack of will or ability of the State of Montenegro to protect her, given that the brother-in-law had been prosecuted and convicted for the assault he had committed against the applicant.<sup>1303</sup> Furthermore, the applicant had received support from a women's shelter in Montenegro and had access to a male and social network leading the Migration Court of Appeal to conclude that the applicant would "not risk social rejection or exclusion upon return".<sup>1304</sup> However, it is questionable whether the Migration Court of Appeal sufficiently considered the general situation with regard to sexual violence in Montenegro. According to the country of origin information, "less than one third of reported cases of sexual violence in Montenegro results in criminal proceedings (...). The Montenegrin society is dominated by patriarchal structures and the said structures have a strong influence on the work of the police in protecting women at risk".<sup>1305</sup>

Furthermore, complementary protection is also used outside Europe, for example in Canada and Australia. The problems that have emerged in the application of complementary protection to cases involving gender-related violence are similar to those emerging in European jurisprudence. For example, like their European counterparts, the Canadian courts have tended to characterise violence against women as 'random violence' or 'general criminal risk'.<sup>1306</sup> In addition to the courts mischaracterising the nature of the violence and persecution faced by women, the belittling of gender violence arguably leads to severe complications in attempts to secure protection for victims of such violence.

Another problem in the Canadian jurisprudence has been the manner in which the Courts have, in my opinion, incorrectly combined the legal tests

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<sup>1302</sup> Case number UM 4230-09 *EDAL*.

<sup>1303</sup> Case number UM 4230-09 *EDAL*.

<sup>1304</sup> Case number UM 4230-09 *EDAL*.

<sup>1305</sup> Case number UM 4230-09 *EDAL*.

<sup>1306</sup> J. Liew, 'Taking it Personally: Delimiting Gender- Based Refugee Claims Using the Complementary Protection Provision in Canada' (2014) 26(2) *Canadian Journal of Women and the Law* 1.

for refugee protection and complementary protection. While section 96<sup>1307</sup> of the Canadian Immigration and Refugee Protection Act of 2002, which governs the granting of refugee status, requires only a 'reasonable chance' of persecution, section 97,<sup>1308</sup> which governs complementary protection, sets a much higher threshold of proving that the threat of persecution is more probable than not.<sup>1309</sup> Moreover, while section 96 requires the persecution feared be based on one of the five enumerated grounds, section 97 limits applicability to serious harm that is "not faced generally". As Liew argues, the consequence of this limitation is that the nature of the harm "must be personal and the degree of the threat must be one that is not experienced generally by everyone in the country of origin".<sup>1310</sup> The outcome of the prohibition of the so-called 'generalised risk' has been that it has "provided justification for the improper delimiting of gender-based claims".<sup>1311</sup> Furthermore, as Liew observes, the prohibition of 'generalised risk' has made the application of complementary protection for persons experiencing group trauma (such as gender-related violence) extremely challenging, "as it prefers individualistic and particularized rather than collective harm and claims framed as 'private' rather than 'public'".<sup>1312</sup>

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<sup>1307</sup> Canadian Immigration and Refugee Protection Act of 2002, section 96:

'A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country'.

<sup>1308</sup> Canadian Immigration and Refugee Protection Act of 2002, section 97:

'(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally: (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection'.

<sup>1309</sup> Liew (2014) *Canadian Journal of Women and the Law* 1.

<sup>1310</sup> 8.

<sup>1311</sup> 8.

<sup>1312</sup> 14.

Overall, the inclusion of complementary protection in the Canadian refugee legislation has had a twofold impact on gender-related persecution cases, which is supported by the case law discussed below. Firstly, the complementary protection provision fails to provide true complementary protection in the case of gender-based claims, as it does not fill protection gaps left open by the refugee definition.<sup>1313</sup> Secondly, the rhetoric that the asylum courts use when they discuss the gender-related persecution cases has been “more detrimental than beneficial towards the project of changing the normative language surrounding violence against women”.<sup>1314</sup>

In *Michel v Canada (Minister of Citizenship and Immigration)*,<sup>1315</sup> the Canadian Refugee Protection Division (RPD) found that the applicant, a Haitian woman who feared rape by members of a gang if she was returned to Haiti, did not fall under the protection of either the refugee or complementary protection frameworks. While reducing the gender-related violence feared by the applicant to general criminal violence, the RPD found that “both women and men in Haiti are vulnerable to being victims of criminal gangs”.<sup>1316</sup> The RPD’s decision was later overturned by the Federal Court, according to which “the Board should have specifically addressed whether there was documentary or other evidence before it as to the generalized persecution of women in Haiti”.<sup>1317</sup> According to the Federal Court, the RPD should have examined whether the applicant would be a member of a PSG and should have separated the analyses of the refugee claim and the complementary protection claim.<sup>1318</sup>

Similarly, the RPD denied refugee and complementary status to another Haitian applicant in an analogous case heard the same year. In *Dezameau v Canada (Minister of Citizenship and Immigration)*,<sup>1319</sup> the applicant feared that if she was returned to Haiti, she and her daughters would be “targets of criminal gangs, kidnappers and potential rapists as a result of the fact that they are women and more particularly those who have

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<sup>1313</sup> 9.

<sup>1314</sup> 9.

<sup>1315</sup> 2010 FC 159.

<sup>1316</sup> para. 22.

<sup>1317</sup> para. 37.

<sup>1318</sup> Liew (2014) *Canadian Journal of Women and the Law* 16.

<sup>1319</sup> 2010 FC 559.

lived outside of the country for a period of time”.<sup>1320</sup> In denying the applicant’s claim, the RPD found that the applicant had never been “a victim of any attack related to her status as a woman”, and consequently, “there was no gender-based claim”.<sup>1321</sup> In assessing the possibility of gender-related persecution taking place in Haiti, the RPD noted that “the Prime Minister of Haiti is a woman”, and “half of Haiti’s population of 8 million are women”.<sup>1322</sup> According to the RPD, the applicant’s fear was “rooted in a general problem of criminality in that country” and the threat of rape was not caused by her gender but rather “faced by all Haitian citizens as a result of the violence in their country”.<sup>1323</sup>

As Liew highlights, it is noteworthy how the RPD in this case used the prohibition of ‘generalised risk’ under complementary protection “to limit the reach of the [refugee protection] in gender-based claims”.<sup>1324</sup> According to the Federal Court reviewing the case, “a gender-related crime cannot be rejected because women face general oppression (...) Where the applicant has not, herself, experienced the type of persecution she fears, the applicant can use evidence of similarly-situated persons to demonstrate the risk and the unwillingness or inability of the state to protect”.<sup>1325</sup>

Overall, there is agreement amongst academics that complementary protection was never intended to fill the protection gaps of the refugee law framework with regard to gender-related persecution.<sup>1326</sup> However, as Liew observes, the operation of complementary protection has gone beyond its original scope in the Canadian context.<sup>1327</sup> Liew further argues that complementary protection considerations, such as the prohibition of the ‘generalised risk’, have annexed analyses concerning refugee status determination and ‘clouded decision-makers’ perspectives as to what are

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<sup>1320</sup> para. 3.

<sup>1321</sup> para. 9

<sup>1322</sup> para. 10

<sup>1323</sup> para. 10

<sup>1324</sup> Liew (2014) *Canadian Journal of Women and the Law* 17.

<sup>1325</sup> *Dezameau v Canada (Minister of Citizenship and Immigration)* [2010] FC 559

para. 26.

<sup>1326</sup> Liew (2014) *Canadian Journal of Women and the Law* 32.

<sup>1327</sup> 32.

proper considerations when determining whether a particular case merits protection, especially in the case of gender-based claims.<sup>1328</sup>

A further issue with complementary protection in general is that, even where protection is granted, there still remains a significant protection gap with regard to the status awarded to the applicant. As McAdam observes, “the quality of domestic status granted to beneficiaries of complementary protection varies considerably”.<sup>1329</sup> Furthermore, persons who have been granted complementary protection are provided with “shorter residence permits, despite the lack of empirical evidence to support [complementary] protection as a temporary status”.<sup>1330</sup> The status that EU member states afford through complementary protection is secondary to that of refugee status.<sup>1331</sup> Under the EU Qualification Directive, refugees are granted three-year renewable permits, while persons falling under complementary protection are given only one-year renewable residence permits.<sup>1332</sup> For example, in the Netherlands, temporary resident permits have been granted to victims of domestic violence on humanitarian grounds.<sup>1333</sup> However, in its Concluding Observations in 2010, the CEDAW Committee expressed concern that, despite the Netherlands affording complementary protection to victims of domestic violence, “domestic violence is still not formally recognized as grounds for asylum”,<sup>1334</sup> which would lead to the granting of a more permanent status.

Overall, while complementary protection can provide temporary protection to some victims of gender-related persecution, it does not provide the necessary protection required by victims of gender-related persecution because of its ad hoc nature. This point is echoed by Hathaway and Foster,

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<sup>1328</sup> 32.

<sup>1329</sup> McAdam “Complementary Protection” *UNHCR* 6.

<sup>1330</sup> 6.

<sup>1331</sup> 6.

<sup>1332</sup> U. Jayasinghe and S. Baglay, ‘Protecting Victims of Human Trafficking Within a ‘Non-Refoulement’ Framework: is Complementary Protection an Effective Alternative in Canada and Australia?’ (2011) 23(3) *International Journal of Refugee Law* 489, 508.

<sup>1333</sup> Center for Gender & Refugee Studies (CGRS), ‘Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdiction: A resource for U.S. Attorneys’ (CGRS, May 2014) <[http://cgrs.uchastings.edu/sites/default/files/Review\\_Foreign\\_Gender\\_Guidelines\\_Caselaw\\_0.pdf](http://cgrs.uchastings.edu/sites/default/files/Review_Foreign_Gender_Guidelines_Caselaw_0.pdf)> accessed 15 October 2014.

<sup>1334</sup> CEDAW Committee, ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women - The Netherlands’, 45<sup>th</sup> Session (February 2010), UN Doc. CEDAW/C/NLD/CO/5, para. 40.

who argue that “where a woman has a well-founded fear of being persecuted for reasons of her gender it is not (...) sufficient to extend protection based on ‘humanitarian reasons’ or subsidiary status. Rather, refugee status ought to be recognized”.<sup>1335</sup>

As shown above, despite the emergence of the concept of complementary protection and the consequential expansion of the limits of the current protection framework, refugee law is not keeping pace with the development of women’s human rights and the accompanying positive obligations of the states.<sup>1336</sup> As Mullally argues, this failure can be attributed to the “continuing constraints of refugee law’s categories, its potential for inclusion and exclusion, and the ever present imperative of migration control which, while not relevant to an assessment of protection needs, nonetheless, frequently constrains the willingness of states to offer protection”.<sup>1337</sup>

#### **6 4 Recognition of ‘gender’ as an independent ground of persecution**

As has been argued in the previous chapters, the current refugee definition under international law is incorrigibly outdated and based on a framework that is more than 60 years old and was designed to respond to the pleas of white, European males in the post–WWII era. As Schenk states, this has been acknowledged not only by various academics who have recognised the “anachronistic texture of the concept of refugee” but also by the UNHCR, which has “urged recognition of the inadequacy” of the current refugee definition under international law to meet the needs of modern society.<sup>1338</sup> Similarly, in 2001, the San Remo Expert Roundtable recognised that, in addition to the failure to acknowledge the political nature of private acts of harm to women, “the main problem facing women asylum-seekers is the failure of decision-makers to incorporate the gender-related claims of women in their interpretation of the existing enumerated grounds”.<sup>1339</sup>

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<sup>1335</sup> J. Hathaway and M. Foster, *The Law of Refugee Status* (2<sup>nd</sup> ed) (Cambridge University Press, 29 August 2014).

<sup>1336</sup> Mullally (2011) *International and Comparative Law Quarterly* 460.

<sup>1337</sup> 460.

<sup>1338</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 338.

<sup>1339</sup> UNHCR, ‘San Remo Expert Roundtable Summary Conclusions – Gender-Related Persecution in Refugee Protection in International Refugee Law’ (UNHCR, 8 September 2001) <<http://www.unhcr.org/419db5b44.pdf>> accessed 4 October 2015.

The inadequate nature of the current refugee law framework with regard to the protection of victims of gender-related persecution can also be detected in states' attempts to widen the reach of the protection through mechanisms such as gender guidelines and complementary protection. However, as have been demonstrated above, these mechanisms fall short of providing legal certainty or continuous protection to victims of gender-related persecution and result in a wide protection gap under the current refugee law framework.

The situation is made worse by states' adoption of increasingly restrictionist refugee policies that appear to have "surpassed both the goal of stopping the violence that forces people to flee and of assisting and protecting those who have managed to escape".<sup>1340</sup> This restrictionist approach has been poignantly demonstrated by the recent responses by some European governments such as with regard to the growing refugee crisis mainly caused by the situation in Syria. Overall, the current refugee law framework "excludes general exploitation or an atmosphere of oppression from the scope of persecution".<sup>1341</sup>

This has had a severe impact on women's asylum applications, as the current refugee definition "disproportionally burdens women, who due to their lower social status are more likely to suffer from general exploitation and denial of many general rights and opportunities afforded to men".<sup>1342</sup> Similarly, the dominant assumption that the application of international law is neutral and universal places women applying for refugee status based on gender-related persecution at a significant disadvantage. As Stevens argues, the lack of recognition that "international legal principles might affect women differently than they affect men" has led to a situation where women's experiences are inclined to be silenced or discounted.<sup>1343</sup> This sentiment is echoed by Dasgupta who argues that "in spite of their universal applicability, principles of

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<sup>1340</sup> B. Frelick 'Refugees: Punishing the Victim' (Christian Science Monitor, 31 December 1992) <<http://www.csmonitor.com/1992/1231/31181.html>> accessed 18 October 2014.

<sup>1341</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 203.

<sup>1342</sup> 203.

<sup>1343</sup> 205.

equality and discrimination (...) have not been realised by the mandates of the Refugee Convention”.<sup>1344</sup>

With regard to gender-related persecution, under the current refugee law system, no cohesive framework exists within which it is possible to evaluate claims.<sup>1345</sup> The outcome of each gender-related persecution claim is almost exclusively at the discretion of the adjudicator, as has been highlighted above.<sup>1346</sup> Ultimately, the decision that the court reaches on the existence of a ‘well-founded fear’, whether the case is based on one of the five enumerated ground or whether complementary protection is granted, is “replete with subjectivity”.<sup>1347</sup> As a consequence, the current refugee law regime has been justly criticised for being characterised by “inconsistencies and jurisprudential gymnastics” with respect to gender-related persecution cases.<sup>1348</sup>

Some of these inconsistencies would arguably be avoided if gender was addressed as an independent ground in the refugee definition. As discussed in the previous chapter, the current categories of refugee definition do not accommodate nor give adequate protection from gender-related persecution. Perhaps even more importantly, the attempts to include gender-related persecution under the existing categories do not adequately address “the core issue of discrimination on grounds of sex as a violation of fundamental rights, or (...) the problems of violence specifically directed against women as women”.<sup>1349</sup> Because of this failure of the international refugee law to recognise the root cause of gender-related persecution, in combination with the difficult fit of gender claims under the existing categories, gender-related claims often do not appear credible to adjudicators, or adjudicators “find insufficient bases to attribute the persecution (...) to any of the other grounds” that are enumerated under international refugee law.<sup>1350</sup>

As Stevens argues, the UNHCR’s passage of non-binding gender guidelines to include women in the PSG category is a recognition that

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<sup>1344</sup> Dasgupta “Can Women Flee? The Curious Case of the Survivors of Domestic Violence” *SSRN* 3.

<sup>1345</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 215.

<sup>1346</sup> Love (1994) *Harvard Women’s Law Journal* 145.

<sup>1347</sup> 145.

<sup>1348</sup> M. Kennady, ‘Gender-related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?’ (1998-2000) *12 Florida Journal of International Law* 317, 340.

<sup>1349</sup> Johnsson (1989) *International Journal of Refugee Law* 221.

<sup>1350</sup> Love (1994) *Harvard Women’s Law Journal* 145.



“gender-specific persecution is an international refugee problem and that interpretations of the current definition have not helped the victims”.<sup>1351</sup> Yet, despite the publication of the UNHCR Gender Guidelines, PSG is not an adequate category to deal with gender-related asylum claims, as it does not recognise the root cause of the persecution. Despite the PSG category potentially producing ‘socially desirable results’ in some gender-related persecution cases, as shown in sub-chapter 4 2, it does not recognise the true importance of the issue on the account of gender.<sup>1352</sup> Overall, inclusion of gender in the PSG category does not provide sufficient protection to women within the “context of society’s recognised, widespread, and institutional persecution of women worldwide”.<sup>1353</sup>

Consequently, I support the argument that the best way to enhance protection from gender-related persecution and to transform the refugee law regime into a more just and equal one is to add gender as an independent, legally binding category of persecution to the refugee definition. Adding gender would recognise the unique problems that women face due to their gender instead of attempting to fit them into pre-existing categories that do not consider women’s needs and often work against them.<sup>1354</sup> Furthermore, independent gender-category would also accord greater attention and respect to the issue of gender-based persecution<sup>1355</sup> by ensuring that the refugee definition “will cover harms specific to women – [such as] female genital mutilation, rape, and gender based discrimination – and will recognize these harms as persecution”.<sup>1356</sup> As Stevens argues, the explicit recognition of gender-based persecution “would ensure that claims to refugee status accurately reflect women’s reality by allowing them to tell their story as opposed to attempting to tailor it to the current categories”.<sup>1357</sup>

However, the proposal to include gender as an independent ground in the refugee definition has received a lot of criticism. According to one such critique, the inclusion of gender would isolate women’s claims into a ‘special’

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<sup>1351</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 217.

<sup>1352</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 339.

<sup>1353</sup> 340.

<sup>1354</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 215.

<sup>1355</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 301.

<sup>1356</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 179.

<sup>1357</sup> 215.

category and create a standard that would treat women and men differently, leading to potential legitimatisation of gender discrimination.<sup>1358</sup> However, as Schenk argues, rather than seeking to protect “women’s rights’ per se, the addition of gender as an independent ground seeks the protection of human rights”.<sup>1359</sup> The addition of gender would, as argued by Bosi, guarantee an “even and consistent application of the law with respect to all types of persecution, including gender persecution”.<sup>1360</sup> Ultimately, as Johnsson states, discrimination and persecution on the ground of gender is no less a violation of fundamental rights than, for example, religious or political persecution.<sup>1361</sup>

The problematic inclusion of gender persecution under the existing international refugee law has sparked an academic debate from which two opposing approaches have emerged. According to the more traditional approach, which aims to maintain the legal status quo, there is no need to modify the current international legislation. This argument is based on the rationale that problems with the inclusion of gender claims under the current framework are not caused by the existing international legislation per se but rather by the social and political context in which the claims of women are adjudicated.<sup>1362</sup> For example, with regard to the problem of ‘privatisation’ of sexual violence by the asylum adjudicators, Crawley argues that the problem is not the existing refugee definition per se, as it does not require adjudicators to view sexual violence as inherently private, but rather the “particular conceptualization of sexual violence that legitimates and normalizes it”.<sup>1363</sup> According to Crawley, it is within this context that “the way in which a non-legal conception of violence is used to distort sexual abuse” has to be addressed.<sup>1364</sup> It is important to note, however, as Inlender points out, that while this argument does address the inclusion of asylum claims based on gender-specific persecution under the existing refugee law framework, it

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<sup>1358</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 339.

<sup>1359</sup> 339.

<sup>1360</sup> Bosi (2004) *New York Law School Law Review* 811.

<sup>1361</sup> Johnsson (1989) *International Journal of Refugee Law* 224.

<sup>1362</sup> H. Crawley, ‘Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy’ in D. Indra (ed) *Engendering Forced Migration: Theory and Practice* (Berghahn Books, 2004) 311.

<sup>1363</sup> 316.

<sup>1364</sup> 316.

overlooks and fails to solve the much more difficult problem of including gender-based persecution claims.<sup>1365</sup> The ‘privatisation’ of gender-related persecution was discussed in detail in sub-chapter 5 2.

According to the proponents of the legislative status quo, rather than improving the current position of women asylum-seekers, adding gender as an independent category might actually make matters worse. For example, according to Binder, while it would be desirable to modernise and develop the refugee definition, such a change is highly unlikely due to political realities and trends in immigration policies.<sup>1366</sup> Consequently, Binder argues for the improvement of the current administrative and judicial practices under the existing international legal framework.<sup>1367</sup> Similarly, Fox argues that the addition of gender as an independent ground for persecution “would unnecessarily delay assistance to women since member-nations will find it necessary to argue and debate a change of that magnitude”.<sup>1368</sup> According to Fox, a better approach would be a human rights–based definition of persecution combined with a recognition of gender under PSG.<sup>1369</sup> On a theoretical level, however, Fox agrees that the addition of gender as an enumerated ground would serve as a legal solution, as it would “ease the fiction of ‘fitting’ a claim within either a religion, political opinion, race, nationality or social group category, where the claimant’s true basis of persecution is due solely to her gender”.<sup>1370</sup> Ankenbrand is cautious about the possible positive effects on women’s asylum claims of the addition of gender as an independent category. According to her, the addition of an independent gender category would bear the risk of “reducing the diverse female experience to a specific category of gender-related persecution which might exclude women even more from the traditional refugee definition and depoliticize women’s lives”.<sup>1371</sup>

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<sup>1365</sup> Inlender, “Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims” in *Migrations and Mobilities: Citizenship, Borders and Gender* 364.

<sup>1366</sup> Binder (2001) *Columbia Journal of Gender and Law* 193.

<sup>1367</sup> 193.

<sup>1368</sup> K. Fox, ‘Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United State’ (1994) 11(1) *Arizona Journal of International and Comparative Law* 117, 131.

<sup>1369</sup> 131.

<sup>1370</sup> 132.

<sup>1371</sup> Ankenbrand (2002) *International Journal of Refugee Law* 55-56.

Overall, the inclusion of gender as an independent ground has received criticism from the proponents of the legislative status quo for ‘essentialising’ women asylum-seekers and their experiences of persecution by constructing “a false sense of cohesiveness, which women as a group do not (...) possess”.<sup>1372</sup> For example, according to Crawley, while there are certain cases where gender alone is the motivation for persecution, “more often the persecution is not applied equally to all women”.<sup>1373</sup> The anti-essentialist critique will be further discussed in sub-chapter 5.7.

The existing categories do not contest the biases against women that are inherent in the asylum application system. As Stevens argues:

“as long as the legal system continues to be ‘objective’ with regard to gender differences, women’s claims will continue to go unrecognized because “[t]he male epistemological stance is objectivity, and sexual objectivity is the ‘primary process of the subjection of women’”.<sup>1374</sup>

The addition of gender as an independent ground for persecution in the refugee definition would acknowledge the true motivation behind gender-related persecution rather than incorporating it into male-dominated categories and would further strengthen the recognition of the universality of violence against women. This point will receive further attention in Chapter 6.

Another point of criticism levelled against gender as an independent ground is the fear that the inclusion of an independent gender category would ‘open the floodgates’ of female refugees and overwhelm the receiving states.<sup>1375</sup> However, the floodgates argument is not a legitimate one with regard to current human rights law and the apparent protection function of international refugee law. As Bosi argues, “it is clearly more crucial to save the life of one human being, of one woman persecuted because of her

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<sup>1372</sup> C. Harvey, ‘Review Essay: Gender, Refugee law and the Politics of Interpretation’ (2000) 12 *International Journal of Refugee Law* 680, 693.

<sup>1373</sup> H. Crawley, ‘Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy’ in D. Indra (ed) *Engendering Forced Migration: Theory and Practice* (Berghahn Books, 2004) 73.

<sup>1374</sup> 73.

<sup>1375</sup> Bosi (2004) *New York Law School Law Review* 812.

gender, than it is to fear that a second [woman] may apply”.<sup>1376</sup> Furthermore, apart from the questionable legitimacy of the argument, it does not have a basis in reality. As Musalo points out by using Canada as an example, the introduction of the Gender Guidelines has not lead to an explosion of claims.<sup>1377</sup> Since 1993, when Canada became the first state to issue gender guidelines, gender claims have “consistently constituted only a miniscule fraction of Canada’s total claims”.<sup>1378</sup> Despite the addition of gender as an independent ground in the Gender Guidelines, victims of gender-related persecution must still fulfil the procedural and substantive requirements, such as a well-founded fear and lack of state protection.

Ultimately, only the addition of gender persecution as an independent category to the legal refugee definition will ensure that women also receive the full benefits of refugee law, in accordance with the principle of non-discrimination.<sup>1379</sup> Furthermore, the inclusion of gender as an independent category would remove any doubts about the applicability of refugee protection to gender-related asylum claims and eliminate the need for complementary protection. As Bosi argues, the addition of gender as a sixth category to current refugee law is “necessary to eliminate the gender bias that exists in asylum law and provide heightened, long-term protection for the human rights of women”.<sup>1380</sup>

As indicated in the introduction, a handful of jurisdictions have undertaken this pioneering expansion of the legal refugee definition in their domestic legislations and in so doing have challenged the international refugee law regime’s failure to protect women. South Africa, as one of the first jurisdictions in the world, included ‘gender’ as an independent category for a well-founded fear of persecution after amending section 3 of the 1998 Refugees Act in the Refugees Amendment Act 33 of 2008. As the chairperson of the Standing Committee for Refugee Affairs of South Africa stated, the rationale behind this amendment was to “take out all the ambiguity, stop all the arguments that might take place in the future because not everyone sees

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<sup>1376</sup> 812.

<sup>1377</sup> K. Musalo, ‘Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?’ (2007) 14 *Virginia Journal of Social Policy and the Law* 119, 133.

<sup>1378</sup> 133.

<sup>1379</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 179.

<sup>1380</sup> Bosi (2004) *New York Law School Law Review* 813.

gender as a particular social group”.<sup>1381</sup> During the public hearings of the 2008 Refugees Amendment Bill, the UNHCR Regional Office “welcome[d] the inclusion of gender related persecution as a ground for recognition as a refugee”.<sup>1382</sup> However, despite already being enacted in 2008, the 2008 Refugees Amendment Act 33 is yet to be put into effect by the Minister of Home Affairs, which means it is premature to draw any conclusions on its possible effects on South African asylum adjudication.

Similarly, following the amendments made in 2009, Spanish refugee legislation<sup>1383</sup> includes gender as an independent sixth ground of persecution. It spells out protection for “foreign women who have fled their countries on account of a well-founded fear of suffering gender-based persecution”. This law was later amended by Article 3 of the Organic Act 12/2009 (Ley Orgánica 12/2009), which broadened the grounds for granting refugee status to include “individuals persecuted on the grounds of gender”.<sup>1384</sup> According to Article 3,<sup>1385</sup> a refugee is “any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinions, membership of a particular social group, gender or sexual orientation, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail herself/himself of the protection of that country”.<sup>1386</sup> The formal recognition of gender as a ground of persecution by Spanish asylum law has been described as representing a significant advance towards

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<sup>1381</sup> Cited in J. Middleton and I. Palmay, ‘Gender Based Persecution in the South African Asylum System’ 2 (Migrant Rights Monitoring Project, February 2008) 2 <[http://www.migration.org.za/sites/default/files/reports/2010/Gender\\_Report\\_2008-FINAL.pdf](http://www.migration.org.za/sites/default/files/reports/2010/Gender_Report_2008-FINAL.pdf)> accessed 16 January 2015

<sup>1382</sup> UNHCR, ‘Submission of the Regional Office of United Nations High Commissioner for Refugees (UNHCR) on the Draft Refugee Amendment Bill 2008’ (Parliamentary Monitoring Group, 26 Mar 2008) < <http://www.pmg.org.za/report/20080326-refugees-amendment-bill-11%E2%80%932008-public-hearings>> accessed 18 July 2012.

<sup>1383</sup> Law 5/1984 Regulating Refugee Status and the Right to Asylum, which was amended in 2009 by the ‘New Amendment to the Organic Law for the Effective Equality of Women and Men’ (Ley Organica 12/2009).

<sup>1384</sup> European Database of Asylum Law ‘EDAL Country overview – Spain’ (EDAL, July 2012) <<http://www.asylumlawdatabase.eu/en/content/edal-country-overview-spain>> accessed 17 July 2012.

<sup>1385</sup> La condición de refugiado se reconoce a toda persona que, debido a fundados temores de ser perseguida por motivos de raza, religión, nacionalidad, opiniones políticas, pertenencia a determinado grupo social, de género u orientación sexual, se encuentra fuera del país de su nacionalidad y no puede o, a causa de dichos temores, no quiere acogerse a la protección de tal país.

<sup>1386</sup> Emphasis added.

equality between men and women.<sup>1387</sup> Already in 2005, in an unreported case, the Spanish Inter-ministerial Asylum Commission granted refugee status to a victim of domestic violence who had escaped a forced marriage.<sup>1388</sup> This was a precedent-setting decision and the first time that refugee status had been granted on the basis of gender in Spain.<sup>1389</sup>

Similarly, many of the Latin American states, including Costa Rica,<sup>1390</sup> El Salvador,<sup>1391</sup> Guatemala,<sup>1392</sup> Mexico,<sup>1393</sup> Nicaragua,<sup>1394</sup> Paraguay,<sup>1395</sup>

<sup>1387</sup> CEAR-Euskadi, 'Asylum and gender' (CEAR-Euskadi, October 2014) <<http://cear-euskadi.org/guia/en/asilo-y-genero-2/>> accessed 19 October 2014.

<sup>1388</sup> UNHCR, 'Spain grants asylum to battered woman' (UNHCR, 9 June 2005) <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=42a849eb4&query=spain%20asylum>> accessed 19 October 2014.

<sup>1389</sup> UNHCR, 'Spain grants asylum to battered woman' *UNHCR*.

<sup>1390</sup> Ley de Migración y Extranjería, Ley No 8764 (19 August 2009), Art 106(1) includes gender as an independent ground of persecution. Art 106(1) states: 'Se entenderá como refugiado a la persona que: 1) Debido a fundados temores de ser perseguida por motivos de raza, religión, nacionalidad, *género*, pertenencia a determinado grupo u opiniones políticas, se encuentre fuera del país de su nacionalidad y no pueda o, por causa de dichos temores, no quiera acogerse a la protección de tal país'.

<sup>1391</sup> Decreto No. 918 de 2002, Ley para la determinación de la condición de personas refugiadas (18 July 2002), Art 4(a) includes gender as an independent ground of persecution. Art 4(a) States:

'Para los efectos de aplicación de la presente Ley, se considera refugiado: a) A toda persona que debido a fundados temores de ser perseguida por motivos de raza, etnia, *género*, religión o creencia, nacionalidad, pertenencia a determinado grupo social u opiniones políticas, se encuentre fuera del país de su nacionalidad, y no pueda, a causa de dichos temores, o no quiera acogerse a la protección de tal país'

<sup>1392</sup> Acuerdo Gubernativo 383-2001, Reglamento para la protección y determinación del Estatuto de Refugiado en el Territorio del Estado de Guatemala, Art11(d) recognises as refugees victims of sexual violence or of other forms of gender-based violations of human rights enshrined in international instruments amounting to persecution. According to Art 11(d): 'Tendrán derecho a que les sea otorgado el Estatuto de Refugiado, de conformidad con lo establecido en el presente Reglamento'

d) Al que sufra persecución a través de *violencia sexual u otras formas de persecución de género basada* en violaciones de derechos humanos consagrados en instrumentos internacionales.

<sup>1393</sup> Ley sobre Refugiados y Protección Complementaria (27 January 2011) Art 13(1) includes gender as an independent ground of persecution. Art 13(1) states:

La condición de refugiado se reconocerá a todo extranjero que se encuentre en territorio nacional, bajo alguno de los siguientes supuestos: (1) Que debido a fundados temores de ser perseguido por motivos de raza, religión, nacionalidad, *género*, pertenencia a determinado grupo social u opiniones políticas, se encuentre fuera del país de su nacionalidad y no pueda o, a causa de dichos temores, no quiera acogerse a la protección de tal país; o que, careciendo de nacionalidad y hallándose, a consecuencia de tales acontecimientos, fuera del país donde antes tuviera residencia habitual, no pueda o, a causa de dichos temores, no quiera regresar a él.

<sup>1394</sup> Ley No. 655 de 2008, Ley de Protección a Refugiados (9 July 2008) Art 1(A) includes gender as an independent ground of persecution. According to Art 1(A):

Para los efectos de esta Ley, se considera refugiado a toda persona a quien la autoridad competente le reconozca dicha condición cuando concurra alguna de las circunstancias siguientes: A) Que debido a fundados temores de ser perseguida por motivos de raza, religión, nacionalidad, *género*, pertenencia a determinado grupo social u opiniones políticas,

Uruguay<sup>1396</sup> and Venezuela<sup>1397</sup> have included gender as an independent ground for persecution in their domestic refugee legislation. An indication of the commitment to true inclusion of gender in the ambit of refugee law can be seen, for example, in a 2008 case from Costa Rica. In *Resolution No 1023-2008*,<sup>1398</sup> the court granted refugee status to a woman from the United States who was seeking asylum on the basis of domestic violence. In granting the asylum, the court held that “domestic violence can be the basis for refugee status” and that it would be “inconsistent with international refugee rights to deny protection on this basis”.<sup>1399</sup>

Significantly, in 2014, two substantial steps were taken towards the inclusion of gender as an independent ground in the international refugee definition. The first one was the entry of force of the Council of Europe Convention on preventing and combatting violence against women and

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se encuentre fuera del país de su nacionalidad y no pueda o, a causa de dichos temores, no quiera acogerse a la protección de tal país.

<sup>1395</sup> Ley No. 1938 – General Sobre Refugiados (9 July 2002) Art 1(a) includes sex as an independent ground of persecution. According to Art 1(a):

‘A los efectos de la presente ley, el término refugiado se aplicará a toda persona que: a) se encuentre fuera del país de su nacionalidad, debido a fundados temores de ser perseguida por motivos de raza, sexo, religión, nacionalidad, pertenencia a determinado grupo social u opiniones políticas, y que, a causa de dichos temores, no pueda o no quiera acogerse a la protección de tal país; o que, careciendo de su nacionalidad y hallándose como consecuencia de tales acontecimientos fuera del país donde tuviera su residencia habitual, no pueda o, a causa de dichos temores, no quiera regresar a él’.

<sup>1396</sup> Ley N° 18.076, Derecho al Refugio y a los Refugiados (2006) Art 2(A) includes gender as an independent ground for persecution. Art 2(A) states: Será reconocido como refugiado toda persona que: (a) Debido a fundados temores de ser perseguida por motivos de pertenencia a determinado grupo étnico o social, género, raza, religión, nacionalidad, u opiniones políticas se encuentre fuera del país de su nacionalidad y no pueda o -a causa de dichos temores- no quiera acogerse a la protección de tal país, o que careciendo de nacionalidad y hallándose a consecuencia de tales acontecimientos, fuera del país donde antes tuviera su residencia habitual, no pueda o -a causa de dichos temores-, no quiera regresar a

<sup>1397</sup> Ley Orgánica sobre Refugiados o Refugiadas y Asilados o Asiladas (3 October 2001), Art 5 includes sex as an independent ground for persecution. Art 5 states: ‘El Estado venezolano considerará como refugiado o refugiada a toda persona a quien la autoridad competente le reconozca tal condición, en virtud de haber ingresado al territorio nacional debido a fundados temores de ser perseguida por motivos de raza, sexo, religión, nacionalidad, pertenencia a determinado grupo social u opinión política, y se encuentre fuera del país de su nacionalidad y no pueda o no quiera acogerse a la protección de tal país; o que, careciendo de nacionalidad, no pueda o no quiera regresar al país donde antes tuviera su residencia habitual.’

<sup>1398</sup> Ministry of the Interior and Police (Ministerio de Gobernación y Policía), Resolution No 1023-2008 (23 July 2008).

<sup>1399</sup> Center for Gender & Refugee Studies (CGRS), ‘Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdiction: A resource for U.S. Attorneys’ (CGRS, May 2014)

<[http://cgrs.uchastings.edu/sites/default/files/Review\\_Foreign\\_Gender\\_Guidelines\\_Caselaw\\_0.pdf](http://cgrs.uchastings.edu/sites/default/files/Review_Foreign_Gender_Guidelines_Caselaw_0.pdf)> accessed 17 August 2015, p.20.



domestic violence (Istanbul Convention).<sup>1400</sup> The Istanbul Convention is the first legally binding treaty in Europe that specifically addresses violence against women, including female genital mutilation.<sup>1401</sup> Furthermore, with regard to its scope, it is currently the most comprehensive international treaty to address violence against women.<sup>1402</sup>

The Istanbul Convention was created following the acknowledgement by the Council of Europe that half of the 33 million of the world refugees are women and girls, many of whose asylum claims involve fear of gender-based violence.<sup>1403</sup> Furthermore, the Council of Europe recognised that available asylum systems often fail women and that “all too often, when applying the United Nations 1951 Geneva Convention relating to the Status of Refugees, states fail to acknowledge and take into account the differences in how women and men experience persecution”.<sup>1404</sup> According to the Council of Europe, it is this gender blindness that “results in inconsistent asylum decisions and deprives many women of international protection”.<sup>1405</sup>

Remarkably, Article 60 of the Istanbul Convention contains provisions directly addressing asylum applications relating to gender-related persecution. Article 60(1) states that all parties “shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of Article 1 A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection”.<sup>1406</sup> Furthermore, Art 60(2) requires the parties to “ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant

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<sup>1400</sup> CETS No. 210

<sup>1401</sup> Petitpas and Nelles, ‘The Istanbul Convention: new treaty, new tool’ (2015) *Forced Migration Review* 83.

<sup>1402</sup> Council of Europe, ‘Refugee Women and the Istanbul Convention’ (*Parliamentary Assembly of the Council of Europe*, 23 January 2013) <[www.assembly.coe.int/Communication/Campaign/DomesticViolence/20130123\\_RefugeeWomenIstanbulConvention\\_E.pdf](http://www.assembly.coe.int/Communication/Campaign/DomesticViolence/20130123_RefugeeWomenIstanbulConvention_E.pdf)> accessed 27 September 2015.

<sup>1403</sup> 3.

<sup>1404</sup> 3.

<sup>1405</sup> 3.

<sup>1406</sup> Art 60(1) of the Council of Europe Convention on preventing and combatting violence against women and domestic violence.

instruments”.<sup>1407</sup> Article 60(2) is further supplemented by Art 60(3), which requires the parties to take “necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection”.<sup>1408</sup> The creation of a specific legal instrument addressing the violence against women as a form of persecution is a big step in the right direction and “gives hope for real change in how women and girls are protected from gender-based violence.”<sup>1409</sup> However, what makes the convention problematic is that it does so in the form of complementary protection rather than as part of the international refugee law framework.

A second great leap forward towards the full recognition of gender as an independent ground was taken in November 2014, when the CEDAW Committee, in its General Recommendation 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women (Recommendation No 32), acknowledged the need to modernise the refugee definition by adding gender as an independent ground of persecution.

Recommendation No 32 begins by highlighting that CEDAW, as a gender-specific human rights instrument, “covers other rights that are not explicitly mentioned therein, but that have an impact on the achievement of equality of women and men”<sup>1410</sup>, including the protection offered by international refugee law. Recommendation No 32 further stresses that CEDAW is “part of a comprehensive international human rights legal framework that operates simultaneously with international refugee law”.<sup>1411</sup>

In recognising the lack of gender dimension in the current refugee law framework, Recommendation No 32 specifically notes the importance of the provisions of CEDAW in reinforcing and complementing the international legal protection regime for women and girl refugees and asylum-seekers due to “explicit gender equality provisions [being] absent from relevant international

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<sup>1407</sup> Art 60(2)

<sup>1408</sup> Art 60(3)

<sup>1409</sup> Petitpas and Nelles (2015) *Forced Migration Review* 83.

<sup>1410</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, CEDAW/C/GC/32, para. 5

<sup>1411</sup> para. 9.

[refugee] agreements”.<sup>1412</sup>

While discussing the substance of the current international refugee law regime, Recommendation No 32 specifically notes that gender-related persecution is absent from the text<sup>1413</sup> and expresses concern about “many asylum systems continu[ing] to treat the claims of women through the lens of male experiences, which can result in their claims to refugee status not being properly assessed or being rejected”.<sup>1414</sup>

Consequently, in order to ameliorate the existing protection gap, Recommendation No 32 clearly identifies the addition of gender as an independent ground of persecution to the state parties’ domestic asylum legislation as the way forward. In paragraph 13, while discussing the aim of Recommendation No 32, the CEDAW Committee states that the intention of the recommendation is to:

“[E]nsure that States parties apply a gender perspective when interpreting all five grounds, use gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951 Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers”.<sup>1415</sup>

Similarly, in paragraph 30, the CEDAW Committee highlights the obligation of the state parties to eliminate discrimination against women by stating that the states parties are “required to take proactive measures to ensure that the legally recognized grounds of persecution, including those enumerated in the 1951 Convention relating to the Status of Refugees (...) are given a gender-sensitive interpretation”.<sup>1416</sup> Furthermore, paragraph 30 again encourages the state parties to “add sex and/or gender as an additional ground for refugee status in their national legislation”.<sup>1417</sup> Finally, under the Specific Recommendations of Recommendation No 32, the CEDAW Committee

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<sup>1412</sup> para. 10.

<sup>1413</sup> para. 13.

<sup>1414</sup> para. 16.

<sup>1415</sup> para. 13. Emphasis added by the author.

<sup>1416</sup> para. 30.

<sup>1417</sup> Emphasis added by the author.

emphasises the need to include gender as an independent ground to the domestic legislations by stating that the state parties are to consider “adding sex and/or gender (...) to the list of grounds for refugee status in their national asylum legislation”.<sup>1418</sup> In conclusion, as clearly indicated in Recommendation No 32, the addition of gender as an independent ground of persecution is the only way to guarantee a non-discriminatory refugee protection framework for both men and women.

## 6 5 Conclusion

The reconceptualisation of the refugee definition is long overdue. For over 60 years, gender discrimination has persisted in international refugee law, contrary to Article 2 of the Universal Declaration of Human Rights, which calls for “all necessary changes to be made in the law to end discrimination against women”.<sup>1419</sup> Under the current international legislative framework, women continue to face a disproportionate burden with regard to gender-related asylum claims. Without modernisation, the international refugee law framework will continue to fail tens, if not hundreds, of thousands of women who have experienced often serious violence amounting to persecution because of their gender and are in desperate need of protection. While the development of gender guidelines and the emergence of complementary protection might alleviate the plight of some victims of gender-related persecution, these are not durable solutions and will not guarantee adequate protection to one of the most vulnerable groups of refugees, women.

In order to acknowledge the true extent and seriousness of violence against women amounting to persecution and to provide sufficient protection to the victims in this regard, the addition of gender as an independent category is necessary. The addition of gender as an independent ground of persecution to the international refugee law framework would not only make international refugee legislation more gender-equal, recognise the persecution faced by women for what it truly is and afford it greater attention and respect, but it would also improve the protection afforded to women worldwide

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<sup>1418</sup> para. 38. Emphasis added by the author.

<sup>1419</sup> Schenk (1994) *Indiana Journal of Global Legal Studies* 340.

because of the persuasive authority wielded by UN determinations in the field of human rights and refugee law globally.<sup>1420</sup> It would also bring international refugee law on par with other international human rights treaties that have evolved continuously to afford greater protection to women's human rights. Ultimately, as Stevens argues, the addition of 'gender' as an independent refugee category is no less of "a moral and political imperative".<sup>1421</sup>

As discussed above, in 2014, the CEDAW Committee called on the state parties to start adding gender as a sixth ground to their domestic legislation. While the addition of 'gender' as an independent ground to the 1951 Refugee Convention would be a good solution to closing the gender protection gap in the current international legal framework, it is a risky endeavour, as opening the 1951 Convention for modifications under the current dominant restrictionist atmosphere could backfire with the state parties further limiting the scope of protection of the existing international legislation.

Consequently, one of the main avenues for the inclusion of gender as an independent category would be to hold states accountable for their obligations under CEDAW to "refrain from engaging in any act of discrimination against women that directly or indirectly results in the denial of the equal enjoyment of their rights with men"<sup>1422</sup> by encouraging them to add gender as an independent ground of persecution to their domestic refugee legislation.

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<sup>1420</sup> 340.

<sup>1421</sup> Stevens (1993-1994) *Cornell Journal of Law and Public Policy* 218.

<sup>1422</sup> Committee on the Elimination of Discrimination against Women, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, CEDAW/C/GC/32, para. 8.

## Chapter 7

### Conclusion

Violence against women is a global phenomenon. As I have demonstrated in this dissertation it is a well-established fact that women face brutal violence, often tantamount to torture and persecution. Violence against women is habitually linked to their social, economic and political position as women.<sup>1423</sup> The Commission on the Status of Women acknowledged this in its 2013 Conclusions as I indicated in the introduction and under sub-chapter 3 2.<sup>1424</sup> As I have established in this dissertation, despite the brutality and frequency of this violence uniquely aimed at women because of their gender, the international refugee law framework continues to exclude gender as an independent ground for asylum.

Women make up approximately half of the world's 33 million persecuted and forcibly displaced people.<sup>1425</sup> Many of them have experienced gender-related violence, amounting to persecution. Nevertheless, as I have repeatedly showed in my research, and as supported by the Council of Europe, asylum procedures often fail these women and leave them outside the scope of the protection offered by international refugee law.<sup>1426</sup>

This dissertation was based on the fundamental feminist theoretical standpoint, as set out under sub-chapter 1 4, that all women share certain experiences that fundamentally differentiates them from men.<sup>1427</sup> I further acknowledged that there exists a universal practice of gender inequality that

<sup>1423</sup> Freedman *Gendering the International Asylum and Refugee Debate* 45.

<sup>1424</sup> In paragraph 10 of the 2013 Conclusions on Elimination and Prevention of All Forms of Violence Against Women and Girls, the Commission on the Status of Women "affirms that violence against women and girls is rooted in historical and structural inequality in power relations between women and men, and persists in every country in the world as a pervasive violation of the enjoyment of human rights. Gender-based violence is a form of discrimination that seriously violates and impairs or nullifies the enjoyment by women and girls of all human rights and fundamental freedoms. Violence against women and girls is characterized by the use and abuse of power and control in public and private spheres, and is intrinsically linked with gender stereotypes that underlie and perpetuate such violence, as well as other factors that can increase women's and girls' vulnerability to such violence".

<sup>1425</sup> Council of Europe, 'Refugee Women and the Istanbul Convention' 3 (*Parliamentary Assembly of the Council of Europe*, 23 January 2013) <[www.assembly.coe.int/Communication/Campaign/DomesticViolence/20130123\\_RefugeeWomenIstanbulConvention\\_E.pdf](http://www.assembly.coe.int/Communication/Campaign/DomesticViolence/20130123_RefugeeWomenIstanbulConvention_E.pdf)> accessed 27 September 2015

<sup>1426</sup> 3.

<sup>1427</sup> Hunter (1996) *Australian Feminist Law Journal* 135.

affects all women around the world. Within the context of the scope of my research, considering the fields of international refugee and human rights law, my overarching assumption was that while women's rights are not adequately protected under the current refugee law framework, this could be ameliorated with the addition of gender as an independent ground for persecution. This, I argued throughout, would considerably enhance the protection of women's human rights and reduce existing gender discrimination under international refugee law.

Based on the in-depth examination of various aspects of international refugee law that I have undertaken in this dissertation, I conclude that gender inequality indeed exists in international refugee law. Consequently, based on the analysis that I have undertaken in this dissertation, I furthermore conclude that the inability of international refugee law to provide adequate protection victims of gender-related persecution is rooted in its failure to include gender as a ground for persecution, which has created a deeply concerning protection gap.

In this final concluding chapter I attempt to bring together the answers to the research questions as I have analysed them throughout each chapter of this dissertation. I end this dissertation by suggesting a practical way forward through a number of recommendations based on the research findings.

## **7 1 Historical origins and the gender-bias nature of the refugee law framework**

In chapter 2 I analysed the causes behind the gender protection gap under international refugee law. I illustrated how the historical events of post-WWII Europe and the Cold War had a deep impact on the drafting process of the 1951 Convention, leading to its disproportionate focus on the protection of civil and political rights.<sup>1428</sup> During this process, the drafters focused especially on the plight of the millions of principally male refugees following the events of WWII and the Holocaust. I indicated that as a consequence, the refugee definition, which emerged at the end of the drafting process, became heavily focused on the male experience of persecution, leaving any form of

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<sup>1428</sup> See chapter 2 2.

protection from persecution based on gender completely absent from the 1951 Convention.

Accordingly, I concluded that the narrow definition of a ‘refugee’ embedded in the 1951 Convention, is especially challenging to women asylum-seekers, whose experiences of persecution are often unique to their gender and fall outside of the current definition. As a consequence, victims of gender-related persecution are often denied the protection awarded by the international refugee law.

Furthermore, I demonstrated how, during the *travaux préparatoires*, the drafters of the 1951 Convention did not deliberately omit gender-related persecution from the convention’s jurisdiction but rather did not deem gender important enough to be considered to any appreciable extent during the drafting process.<sup>1429</sup> Similarly, I demonstrated how the lack of international human rights instruments safeguarding women’s rights at the time of drafting the 1951 Convention had a detrimental effect on the protection of refugee women.<sup>1430</sup>

I further concluded that since the drafting of the 1951 Convention, the understanding and acknowledgement of concepts such as gender discrimination, women’s rights, and the structural inequalities in gendered power relations have evolved considerably. Specifically, international and regional human rights instruments that provide women with specific rights have emerged. These instruments have been crucial in the protection of women’s human rights and have proved to be “a valuable tool for supplementing the more obvious deficiencies in international refugee law”.<sup>1431</sup> Overall, I concluded that despite certain positive developments that have taken place in the interpretation of international refugee law since the emergence of women’s rights instruments, international refugee law continues to be stagnant and stand in stark contrast to the rest of the international human rights framework protecting women. The gap between the protection offered by international refugee law and international human rights law is especially disquieting, as international refugee law is often the last resort for

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<sup>1429</sup> See chapter 2 4.

<sup>1430</sup> See chapter 2 4.

<sup>1431</sup> Harvey (1998) *Journal of Civil Liberties* 162.



individuals seeking to escape serious human rights violations. International refugee law only takes effect when all other methods to protect human rights have failed.

Furthermore, in chapter 2, I drew the important conclusion that one of the main causes of the failure of international refugee law to protect women is its biased and inherently patriarchal nature.<sup>1432</sup> In this regard, I illustrated how, regardless of unprecedented changes in the causes of refugee flows, the international refugee law framework itself has remained stagnant and hence become obsolete. I further concluded that, owing to the out-dated and male-centred definition of 'refugees' and 'persecution', the definition is inadequate and incapable of providing protection to modern-day female asylum-seekers.

Consequently, aided by this definition, state parties' narrow and restrictive interpretation of the grounds of persecution in the 1951 Convention continue to leave victims of gender-related persecution without adequate protection. Accordingly, the framework, in both its substance and its practical application, is blind to the experiences of refugee women.

## **7 2 Persecution under international refugee law**

In chapter 3, I examined whether the current interpretation of what constitutes 'persecution' can encompass the unique form of persecution that women often face because of their gender. In this regard I demonstrated how violence against women is often normalised and belittled in asylum adjudication processes due to underlying deep-rooted structural injustices. I importantly concluded that due to the existing universal structural violence against women, even severe violence against women do not seem serious enough for the asylum adjudicators to amount to persecution.

Although the requirement of non-discrimination and equality is solidly embedded in international human rights law, as demonstrated in chapter 2, the practice under international refugee law is still unsuccessful in implementing these principles in a meaningful way. The failure of the 1951 Convention to provide adequate protection to women asylum-seekers fleeing gender-related persecution is demonstrated in the discriminatory construction

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<sup>1432</sup> See Chapter 2 5.

and interpretation of the term 'persecution'. This is further exacerbated by the nexus requirement and the limited grounds set out in Article 1(A)(2) as further analysed in chapter 4.

In chapter 3, I moreover highlighted how the general construction of what 'persecution' entails under Article 1(A)(2) of the 1951 Convention has been unclear at best. The undefined nature of the term can be explained by recognising that the aim of the drafters was to leave the definition of term open-ended, as concluded under chapter 2, in order to accommodate future forms of persecution that were inconceivable at the time of the drafting. This, however, has not been the case with regard to gender-related persecution. Rather, the undefined nature of 'persecution' has exacerbated the discrimination faced by women asylum-seekers due to the lack of express recognition of gender-related persecution.<sup>1433</sup>

Relatedly, I in chapter 3 exemplified how, under the current dominant construction of 'persecution', primacy is given to the protection of civil and political rights, as confirmed in chapter 2. This narrow construction has been harmful to women applying for asylum based on gender-related persecution as the persecution they face is part of a larger structural inequality that makes them vulnerable to abuses that cannot be defined as neither entirely political nor exclusively caused by states.<sup>1434</sup> In this discussion, I also demonstrated how the lack of recognition of non-physical harm amounting to persecution has placed women at a disadvantage, as the cumulative effect of non-physical harm is often a strong element of gender-related persecution. Due to the difficulty of objectively assessing whether or not non-physical harm amounts to persecution, courts have been reluctant to make such assessments. For example, in the US case of *Niang v Gonzales*<sup>1435</sup>, the Fourth Circuit concluded that persecution cannot be based on fear of psychological harm alone. This has led to a situation where the courts simply disregard the existence of non-physical harm in asylum claim cases.

Furthermore, in chapter 3 5, I illustrated how the heavy bias in favour of the male experience has made women's unique experiences of persecution

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<sup>1433</sup> Neal (1988) *Columbia Human Rights Law Review* 206.

<sup>1434</sup> Bunch (1990) *Human Rights Quarterly* 488.

<sup>1435</sup> 492 F.3d 505, 512 (4th Cir. 2007).

seem non-credible to adjudicators as these experiences differ heavily from the 'traditional' male-centred forms of persecution. Overall, in chapter 3 I concluded that a considerable obstacle to gender-related persecution claims relates to the question of credibility. Specifically the manner in which the evidence of gender-related persecution is presented can adversely affect the applications of women asylum-seekers. As I established in sub-chapter 3 5 narrative discrepancies, calm manner or late revelation of evidence by the applicant are often viewed suspiciously by the adjudicators when credibility of the claim is assessed. Despite the emergence of gender guidelines, as I further analysed in sub-chapter 6 2, I demonstrated how asylum-seeking women continue to face particular difficulties in establishing credibility in asylum application cases. This, I argued, significantly hinders the applications' chances of success, due to the importance placed on the credibility of the applicant's claim by the asylum system and the highly discretionary nature of the asylum adjudication process.

In a related finding, I concluded that asylum-seeking women often face problems relating to communication when their asylum application is based on sexual violence amounting to persecution. The situation is further complicated by the fact that matters of a sexual nature are considered taboo in many cultures, and victims of sexual violence often experience guilt, isolation and fear. Consequently they avoid basing their claim on sexual violence. This unwillingness often leads to situations where the victim of gender-related persecution fails to correctly describe the nature and severity of the sexual violence they have experienced and as a consequence, are denied asylum by the adjudicators.<sup>1436</sup>

In sub-chapter 3 5, I moreover highlighted how women are often subjected to double persecution. In addition to facing persecution based on 'traditional' grounds, women are often subjected to unique persecution based solely on their gender. I importantly established that gender-related persecution takes various forms that range from physical and sexual violence to severely discriminatory laws that severely limit women's rights and freedoms. Despite the different kinds of gender-based persecution, I

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<sup>1436</sup> See chapter 3 5.

demonstrated that an element common to all of the forms is that either the motive or the form, or in certain cases, both, are gendered.

Despite overwhelming evidence of the violence against women amounting to persecution, asylum adjudicators have been reluctant to recognise it such. Rather than assessing the violence experienced by refugee women on its face value, courts often trivialise the violence. This is especially true with regard to sexual violence, as demonstrated by the US cases of *Campos-Guardado v INS*<sup>1437</sup> and *Klawitter v INS*<sup>1438</sup>. I concluded that especially the US courts have had a tendency to diminish political oppression to constitute personal harm only, specifically where persecution contains a sexual element. Overall, I established that the normalisation takes place with regard to all of forms of persecution that women are uniquely subjected to, physical and sexual violence, as well as severe gender discrimination.

Within this context I also concluded that states' vigilant protection of their sovereignty in the form of trying to eliminate any asylum ground that may lead to the 'opening of floodgates', has been one of the main causes behind the gap between the human rights rhetoric and the lack of protection offered to victims of gender-related persecution.<sup>1439</sup> As I highlighted in sub-chapter 3 4, the willingness of especially Western states to grant asylums has been limited particularly with regard to human rights violations amounting to gender-related persecution. There is a strong resistance to the inclusion of gender as an independent ground of persecution, especially among states that "fear that this might result in a critique of their national gender relations".<sup>1440</sup>

As I moreover demonstrated in sub-chapter 3 4 the wide discretion granted to the asylum adjudicators has a negative impact on women's asylum claims. I concluded that both the narrow definition of a 'refugee' under international law and the wide discretion given to the courts adjudicating asylum claims have contributed to the failure to include women asylum-seekers' unique experiences of persecution.<sup>1441</sup> In this regard I further

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<sup>1437</sup> 809 F.2d 285 (5th Cir. 1987).

<sup>1438</sup> 970 F.2d 149 (6th Cir. 1992).

<sup>1439</sup> 970 F.2d 149 (6th Cir. 1992).

<sup>1440</sup> Indra (1989) *Refuge* 3.

<sup>1441</sup> Love (1994) *Harvard Women's Law Journal* 133.

concluded that the process of determining a 'well-founded fear of persecution' is deeply subjective. Ultimately, the adjudicator decides whether there is a fear of persecution, whether it is credible and well-founded, and whether it is based on one of the five categories of persecution recognised under international refugee law, as I further analysed in chapter 4.

In chapter 3, I also established that domestic violence is frequently linked to the perceived 'proper role' of a woman in the relevant society, and that it often takes place when the social or religious mores ascribing 'proper behaviour' are broken. This is especially true of 'honour crimes', where women are subjected to brutal violence or murdered when they are viewed as having transgressed the norms of acceptable behaviour and 'brought shame' to their families and societies.<sup>1442</sup> Generally speaking, domestic violence is a product of unequal power-relations between men and women and the dominant constructions of masculinity and femininity.<sup>1443</sup> For this reason, domestic violence is often dismissed because of reasons linked to perceived 'proper' behaviour and the gender roles of men and women.<sup>1444</sup>

Similarly, in sub-chapter 3 4 3, I concluded that 'honour crimes' are strongly linked to the control of women's sexuality in particular and are a powerful tool through which male dominance is exercised. Male dominance over women's sexual expression and reproductive rights is further reinforced by the tolerating attitudes of the states in which honour crimes and domestic violence frequently take place. As I highlighted in sub-chapter 3 1 it has been suggested that gender guidelines be adopted in order to include gender-related persecution in the realm of international refugee law.<sup>1445</sup> I argue, however, that these guidelines have proven to be inefficient as well as problematic, as gender guidelines have been adopted only in a minority of jurisdictions worldwide, and their effectiveness, where adopted, continues to be disputed. This specific issue was further discussed in chapter 6.

Ultimately, I concluded in chapter 3 that the dominant construction of 'persecution' under the current international refugee law does not ensure adequate protection of women asylum seekers fleeing gender-related

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<sup>1442</sup> Freedman *Gendering the International Asylum and Refugee Debate* 48.

<sup>1443</sup> 57.

<sup>1444</sup> 57.

<sup>1445</sup> See discussion in Chapter 5 2.

persecution. I further concluded that with regard to the protection of asylum seeker women, the main problem with the current regime is its failure to recognise gender as a cause of persecution. Consequently, I drew the conclusion that the current refugee regime is not adequately equipped to include gendered forms of persecution and is in a dire need of re-conceptualisation.

### **7 3 Gender-related persecution and the nexus requirement of the 1951 Convention**

In chapter 4, I investigated whether the five existing grounds of persecution in Article 1(A)(2) are capable of capturing persecution based solely on gender. I demonstrated that the requirement of a nexus between the persecution experienced and one of the five grounds embedded in the 1951 Convention is one of the most difficult hurdles faced by women applying for gender-related asylum. I concluded that the reason behind the difficulties is not only the legitimacy of the persecution experienced, as discussed in chapter 3, but the lack of gender as an express ground for persecution under the refugee definition. As a consequence, victims of gender-related persecution have been forced to try to fit their claims under the existing grounds, namely PSG, political opinion and religion. This, I argue, have resulted in mixed outcomes and more importantly legal uncertainty.

I further concluded that the situation is exacerbated by the domestic courts' reluctance to expand the existing categories to include gender-related claims. This was demonstrated in the analysis of US jurisprudence especially with regard to PSG, the most commonly used ground for gender-related persecution cases. As discussed in sub-chapter 4 2, cases such as *In re R-A*<sup>1446</sup> demonstrate the US adjudicator's unconcealed reluctance to acknowledge gender as a basis of persecution under the PSG category. This has created a situation, where in the few cases that PSG has been accepted as a ground, the courts have had to resort to heavy legal manipulation of the category in order to keep the definition as narrow as possible. This has led to a complex and highly constricted construction of the PSG.

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<sup>1446</sup> 22 I. & N. Dec. 906 (B.I.A. 1999)

Similarly, my analysis of the French jurisprudence illustrated that while the French courts do occasionally accept PSG as a ground for gender-related persecution claims, they limit its applicability by adopting a cumulative approach leading to a requirement much higher threshold of evidence of persecution. I finally concluded that further problems have been generated by the unclear definition of the category, which has been described as ambiguous, narrow and contrived.<sup>1447</sup> Overall, I concluded, based on case law from Australia, New Zealand, US, UK and Canada that no uniform interpretation of what constitutes a PSG has emerged among the Western jurisdictions making its application to gender-related persecution highly complex.

I similarly concluded that also the 'political opinion' ground has proven to be unsuitable for majority of gender-related persecution claims. While there have been successes in some gender-related asylum applications, the results of the cases in which it has been used are rife with inconsistencies especially in the US jurisprudence. As I illustrated in sub-chapter 4 3, while *Lazo-Majano v INS*<sup>1448</sup> demonstrated that gender-related persecution cases could be successful under the 'political opinion' category, this was overturned in various cases since, including *Campos-Guardado v INS*<sup>1449</sup>, *In re Kuna*<sup>1450</sup> and *In re R-A*<sup>1451</sup>. Similarly, I demonstrated that while some European countries, such as Belgium, Hungary, Italy and Malta, have occasionally included gender-based persecution under the 'political opinion' category, various other European countries, such as France, Spain and Sweden, continue to fail to include gender-related cases under this ground, leading to diverse outcomes depending on the jurisdiction where the application was lodged and consequential legal uncertainty.

While examining 'religion' as a potential ground under which to include gender-related persecution, I reached the same conclusion as with regard to the utilisation of PSG and political opinion categories. While there has been some recognition by the UNHCR, Australia and Canada that gender-related

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<sup>1447</sup> Chan (2011) *Boston University International Law Journal* 180.

<sup>1448</sup> 13 F.2d 1432 (9th Cir. 1987).

<sup>1449</sup> 809 F.2d 285 (5th Cir. 1987).

<sup>1450</sup> A76491421 (unpublished) (B.I.A. 2000).

<sup>1451</sup> 22 I. & N. Dec. 906 (B.I.A. 1999).

persecution can take place for religious reasons, in practice gender-related persecution cases are very rarely included into the concept of religion. Therefore, I concluded that including gender-related persecution cases under the 'religion' ground remains an inadequate response.

Ultimately, I determined that none of the existing grounds can provide appropriate protection to women fleeing persecution due to their gender which is why the addition of gender as a sixth ground under domestic legislation is of such importance, as I further discussed in chapter 6 and will further address below. I further concluded that by attempting to fit gender-related persecution claims under the existing grounds rather than expressly acknowledging gender as an independent ground for persecution, Article 1 (A) (2) provides an insufficient, piecemeal, micro-level solution to a global and multidimensional problem.<sup>1452</sup> More worryingly, due to the unsuitable use of the current persecution grounds, inappropriate focus has been placed on fitting gender-related persecution under the PSG, political opinion and religion categories rather than on gender itself leading to highly fabricated and often logically questionable results.

### **7 3 The complex context of gender-based persecution**

In chapter 5 I added further context to the inadequate nature of Article 1(A)(2) by examining whether the dichotomous construction of persecutory acts into 'public' and 'private' has aggravated gender inequality under the current refugee law framework. I highlighted how this deeply entrenched dichotomy, which can be found in both domestic and international refugee law, has had a detrimental effect on the gender-related asylum claims of women asylum-seekers. Because gender-related persecution faced by women is often deemed to take place in the 'private' realm, it consequently falls outside the protection of international refugee law, which traditionally only concerns itself with human rights violations taking place in the public sphere.

This inequality is further exacerbated by the gender-bias construction of what 'public acts' entail. As demonstrated in sub-chapter 5 2, courts often misconstrue the nature of gender-related persecution and deem, for example,

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<sup>1452</sup> See chapter 4 5.



sexual violence by military officials to be a ‘private’ act.<sup>1453</sup> The stereotypical construction of refugee women as ‘vulnerable’ and apolitical has also had a negative impact on the success of the women asylum-seekers’ claims under the current refugee law framework, which focuses heavily on the protection of civil and political rights as I established in chapter 3.

I additionally recognised that with regard to asylum applications based on domestic violence, one of the most prominent feature of the decisions of the courts analysed under 5 2, is a very limited reference to the developments in international human rights law with regard to women’s rights and the prohibition of violence against women.<sup>1454</sup> Overall, with regard to violence against women amounting to persecution, the spheres of refugee and human rights law continue to remain separate.<sup>1455</sup>

I demonstrated that this separation is manifested in the manner in which the political nature of specifically sexual and domestic violence, as well as resistance to gender-related persecution, continues to be challenged by the Western domestic courts. These courts often regard such matters as ‘personal’, which leads to a denial of the political nature of gender-related persecution and the ‘political opinion’ ground of persecution in gender-related asylum claims.<sup>1456</sup> This was demonstrated, for example, in the US case *In re R-A*<sup>1457</sup>, where the BIA rejected the asylum application because the applicant failed to demonstrate the political motivation behind the domestic violence she had been subjected to by her husband. In reaching this conclusion, the BIA ignored the nature of domestic violence as a mechanism of patriarchal control over women, ‘built on male superiority and female inferiority, sex-stereotyped roles and expectations, and economic, social, and political predominance of men and dependency of women’.<sup>1458</sup>

In chapter 5, I also established that Western domestic courts have traditionally been reluctant to recognise persecution committed by non-state actors as falling under the purview of international refugee law. However, with

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<sup>1453</sup> See chapter 5 2.

<sup>1454</sup> See the discussion on rights contained in CEDAW, CAT, ICESCR, ICCPR, UDHR and the UN Charter in chapter 2 4.

<sup>1455</sup> 482.

<sup>1456</sup> 482.

<sup>1457</sup> 22 I. & N. Dec. 906 (B.I.A. 1999).

<sup>1458</sup> Blanck (2000) *Women’s Rights Law Reporter* 63.

the emergence of the concept of indirect state responsibility and the so-called 'bifurcated approach', first formulated and applied by the Supreme Court of Canada in 1993 in *Ward v Canada*<sup>1459</sup>, there seems to be a gradual change towards a more gender-inclusive interpretation of actors capable of committing persecution. For example, the possibility of non-state persecution has been accepted in Australia in the case of *Minister for Immigration and Multicultural Affairs v Ibrahim*,<sup>1460</sup> as well as in Canada in the case of *Zalzali v Canada*<sup>1461</sup> and in the UK by the House of Lords in *Adan v Secretary of State for the Home Department*<sup>1462</sup> and *Horvath v Secretary of State for the Home Department*.<sup>1463</sup> Ultimately, I argue, by enforcing the bifurcated approach, states will move towards a more equitable treatment of women before law.

In chapter 5 I furthermore highlighted how in addition to the discriminatory legal framework, asylum-seeking women are faced with further acts of discrimination due to their lower socio-economic status as well as their race. I demonstrated how increased xenophobia and protectionism in receiving states have led to the refugee policies often stressing the refugees' utility and their ability to blend in with the main population. This has caused serious obstacles to asylum-seeking women, as their limited access to education or work experience again places them at an unfair disadvantage.

In chapter 5, I further showed how applicants basing their claims on gender-related persecution often find themselves in a 'double bind'.<sup>1464</sup> I concluded that the racial 'othering' and the gendered stereotypes of 'Third World women' often used in Western asylum jurisdiction, combined with the Western states' eagerness to protect their sovereignty, pose further obstacles to gender-related asylum claims.<sup>1465</sup> This is manifested by the courts' reluctance to recognise domestic violence as a legitimate ground for asylum because of its prevalence in many societies and the related fear of the 'opening of floodgates'.<sup>1466</sup>

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<sup>1459</sup> [1993] 2 SCR 689.

<sup>1460</sup> [2000] HCA 55.

<sup>1461</sup> [1991] 3 FC 605.

<sup>1462</sup> [1999] 1 AC 293.

<sup>1463</sup> [2000] 3 All ER 577.

<sup>1464</sup> Mullally (2011) *International and Comparative Law Quarterly* 479.

<sup>1465</sup> 479.

<sup>1466</sup> 479.

I demonstrated how the culturalist approach adopted by many jurisdictions has had an impact on gender-related persecution claims. I concluded that, because of the dominant neo-colonial approach of the Western domestic courts vis-à-vis asylum-seeker women from the developing world, gender-related persecution claims are more likely to succeed if the applicant presents herself as a victim of a dysfunctional and patriarchal society. Ultimately, this neo-colonial approach is detrimental to the asylum claims of women refugees, as it focuses not on the actual crime of gender-related persecution but instead on the 'moral superiority' of the First World.

Finally, in sub-chapter 5.8, I concluded that instead of the Western domestic courts' currently adverse and narrow constructions of gender-related persecution, such persecution should rather be understood as resulting from the convergence between individual or state persecution and the structural injustice faced by women. Consequently, I concluded that it is the normalising effect of the combination of these two factors that ultimately results in the invisibility and minimisation of gender-related persecution.

## **7.5 Acknowledging gender-related persecution**

Following the demonstration of the deficiency of the current international refugee law framework with regard to gender-related persecution, I proceeded, in chapter 6, to examine the alternative approaches that states have adopted to mitigate the apparent protection gap. These alternative approaches included the adoption of gender guidelines, complementary protection and ultimately, the addition of gender as an independent ground under domestic legislation.

With regard to the adoption of gender guidelines, I concluded that while it can be interpreted as a sign of the gradually emerging transformation in the states' attitude towards gender-related persecution, in many cases the domestic asylum jurisprudence has been slow to change and remains restrictive towards gender-related asylum claims, despite the introduction of gender guidelines. Overall, the extent to which the domestic courts comply with the gender guidelines varies considerably as was demonstrated in sub-chapter 6.2.

With respect to gender guidelines, I further concluded that as a result of their non-binding nature, their weakness lies in their vulnerability of being repealed. Consequently, gender guidelines are unable to guarantee real legal certainty or continuous protection to victims of gender-related persecution. On the whole, the application of gender guidelines across different jurisdictions remains very diverse and is characterised by ad hoc implementation at the discretion of the adjudicating immigration judge, leading to legal uncertainty.

I further concluded that while the utilisation of complimentary protection, which is based on obligations arising out of general humanitarian principles and international human rights instruments, in cases involving gender-related persecution might provide temporary relief to some of the victims, it is not a sustainable solution. I also established that, similarly to gender guidelines, the utilisation of complementary protection has been characterised by highly varied, ad hoc responses at the domestic jurisdiction level, which are made almost exclusively at the discretion of the executive. Additionally, I established that what renders complementary protection an inappropriate protection tool with regard to gender-related persecution is the secondary nature of the status afforded by complementary protection if compared with that of a refugee status. Even with the emergence of complementary protection and the consequent push for protection limits, international refugee law is not keeping pace with the development of women's human rights and states' positive legal obligations as discussed in sub-chapter 2 4.

As I have showed, despite the emergence of alternative approaches to gender-related persecution, women continue to face a disproportionate burden with regard to gender-related asylum claims under the current international legislative framework. While the development of gender guidelines and the emergence of the complementary protection might alleviate the plight of some victims of gender-related persecution, they are, I as I have demonstrated, not durable solutions and will not guarantee adequate protection victims of gender-related persecution.

Finally, in chapter 6, I importantly examined whether the inclusion of gender as an independent ground for persecution in domestic legislation would enhance women's rights to non-discrimination, equality, dignity, life and

security of person and whether the current international refugee law regime should be similarly amended to include gender as a ground for persecution in order to ensure adequate protection for women asylum-seekers. I ultimately concluded that without modernisation, the international refugee law framework would continue to fail tens, if not hundreds, of thousands of women who have experienced serious violence amounting to persecution due to their gender and are in desperate need of protection. I further concluded that in order to acknowledge the true extent and seriousness of violence against women amounting to persecution and to provide sufficient protection to the victims, the addition of gender as an independent category is mandatory. The addition of gender as an independent ground of persecution to the international refugee law framework would not only make international refugee law more gender-equal, recognise the persecution faced by women for what it truly is and afford it greater attention and respect, but also improve the protection afforded to women worldwide. It would furthermore bring international refugee law on par with other international human rights treaties, which have continuously evolved to afford greater protection to women's human rights.<sup>1467</sup>

This conclusion is supported by the CEDAW General Recommendation No 32, which calls on state parties to add gender as a sixth ground to their domestic legislation. The Istanbul Convention has taken a similar approach and calls for all state parties to "take the necessary legislative or other measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of Article 1 A(2), of the 1951 Convention relating to the Status of Refugees".<sup>1468</sup> In the same vein, although on a more general level, the Commission on the Status of Women urged governments in its 2013 Conclusions to "review and where appropriate revise, amend or abolish laws, regulations, policies, practices and customs that discriminate against women or have a discriminatory impact on women, and ensure that [they] comply with international human rights obligations, commitments and principle of non-discrimination".<sup>1469</sup>

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<sup>1467</sup> See chapter 6 4.

<sup>1468</sup> Art 60(1), Convention on preventing and combatting violence against women and domestic violence (2014) CETS No. 210.

<sup>1469</sup> Section A (h) of the 2013 Conclusions on Elimination and Prevention of All Forms of Violence Against Women and Girls.

While the addition of 'gender' as an independent ground to the 1951 Convention would be the optimal solution to closing the gender protection gap in the current international legal framework, it is a risky endeavour, as opening the 1951 Convention for modifications under the current dominant restrictionist atmosphere could backfire, with state parties further limiting the protection scope of the existing international legislation.

Consequently, in sub-chapter 6 4, I concluded that one of the main avenues for the inclusion of gender, as an independent category would be by holding states accountable under their obligations in the CEDAW, as set out in sub-chapter 2 4 and encouraging them to add gender as an independent ground of persecution to their domestic refugee legislation. In time, with the inclusion of gender as an independent ground for persecution in a sufficient number of domestic jurisdictions, positive state practice could begin to emerge as an important element of the formation of customary international law. This conclusion is supported by Goodman and Jinks' 'acculturation theory' according to which change in state behaviour takes places through the "general process of adopting the beliefs and behavioural patterns of the surrounding culture".<sup>1470</sup> While examining the development of women's rights in general, and women's right to vote specifically, Goodman and Jinks conclude that "after an initial stage of early adopters the number of states providing women the right to vote increased steeply and included most states before the rate of adoption tapered off".<sup>1471</sup> Ultimately, according to Goodman and Jinks, "once a norm was institutionalised, a strong predictor for whether an individual state would enact women's [rights] was whether other states in the region had done so in the past five years".<sup>1472</sup> Based on Goodman and Jinks' theory and the recent developments, such as the recognition of gender-related persecution as an independent ground for asylum by various pioneering countries<sup>1473</sup> as well as the recent entry into force of the Istanbul Convention, there is real hope for gender to emerge as an independent ground of persecution under the international refugee law.

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<sup>1470</sup> R. Goodman and D. Jinks "How to Influence States: Socialization and International Human Rights Law" (2004) 54 *Duke Law Journal* 638

<sup>1471</sup> 650.

<sup>1472</sup> 650.

<sup>1473</sup> South Africa, Spain, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela.

## **7 6 Concluding remarks and recommendations**

In this dissertation I have argued that international refugee law is in dire need of modernisation and re-conceptualisation in order to become a truly gender-equal protection framework. While various domestic jurisdictions have attempted to ameliorate the gendered protection gap under the current refugee law framework in various different ways, either by attempting to include the gender-related claims under the existing grounds of persecution or by adopting gender guidelines and complementary protection mechanisms, I argue that these methods have not achieved the desired gender-equal result. In addition to having resulted in a diverse jurisprudence in various domestic jurisdictions and subsequent legal uncertainty, the utilisation of the described methods presents a deeper theoretical problem.

Some of the highly contrived and often logically dubious methods currently used to diminish the gender gap under international and domestic refugee law might provide a restricted solution to a limited amount of gender-related asylum claims, but they misconstrue the actual reason behind the persecution and ultimately render the persecution experienced exclusively by women due to their gender invisible. For international refugee law to be on par with other international human rights instruments in combatting gender inequality and violence against women, it is necessary to acknowledge the existence and widespread nature of gender-related persecution and embed it in the legal framework in order to guarantee a non-discriminatory and effective protection framework for those who need it most. In this regard it is particularly important to highlight regional instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Istanbul Convention in addition to the international human rights instruments discussed above.

The final conclusion of this dissertation is that the change that is needed for more equal protection of victims of gender related persecution is slowly taking place. Based on my research with regard to the general expansion of the protection afforded to women's rights by the international human rights regime as a whole, and specifically, to the recent developments

in the field of refugee law, I argue that there is evidence of emerging state practice in recognising gender as an independent ground of persecution. This evidence includes the entry into force of the Istanbul Convention, the first legally binding international treaty recognising violence against women as a form of persecution; the CEDAW Committee's General Recommendation No 32, which calls on states to include gender as a legally binding ground for persecution in their domestic jurisdictions; and importantly, the recognition of gender-related persecution as an independent ground for asylum by South Africa, Spain, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela.

Similarly, the emergence of the UNHCR and domestic gender guidelines as well as the use of complementary protection by various states indicates that the tide is slowly changing with regard to the acceptance of gender-related persecution as a ground for refugee status. This is also reflected in case law from countries such as Australia, Canada, UK, New Zealand accepting the 'bifurcated approach' and persecution committed by non-state actors as falling under the realm of international refugee law.

Overall, as the gradual development of gender as an independent ground from emerging state practice to a full-fledged customary law, takes place international refugee law will begin to fall in line with the rest of the human rights law framework and become a non-discriminatory protection tool, as was arguably envisaged in the Preamble to the 1951 Convention.

The primary recommendation advanced in this dissertation is therefore that the 189 states parties to the CEDAW be held accountable for their obligations under the CEDAW, as is evident from the General Recommendation 32, to ensure a gender-equal and non-discriminatory treatment of female asylum-seekers by adding gender as an independent ground to their domestic asylum legislations. Additionally, the entry to force of the Istanbul Convention provides an excellent example and a point of departure with regard to the legitimisation of gender as an independent ground of persecution on a regional level. Consequently, I recommend the creation of further regional legal instruments embedding gender as an express ground of persecution into to law, together with the acknowledgement of violence committed by non-state actors as a form of persecution.



Secondly, I recommend that the international community recognise the emerging state practice of gender as an independent ground of persecution, based on recent developments including the Istanbul Convention's entry into force, General Recommendation No 32 calling for states to include gender as an independent ground for persecution under their domestic jurisdiction, and importantly, the amendments to domestic jurisdiction already undertaken by states such as South Africa, Spain, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela.

Thirdly, I recommend that domestic courts continue developing their jurisprudence with the aim of reaching a more gender-neutral interpretation of what 'persecution' entails, while being mindful of the dominant male-centred understanding of the term and paying specific attention to the uniqueness and political nature of gender-related persecution as set out in this dissertation.

Lastly, with regard to gender-related persecution committed by non-state actors, I recommend that domestic courts adopt the bifurcated approach based on the best practises examined in the dissertation. In adopting this approach, the courts recognise that gender-related persecution committed by non-state individuals is linked to the government's failure to protect its citizens from gender-related human rights abuses and ultimately to the failure to protect its citizens' core right to life, liberty and security of person as set out in the CEDAW, ICCPR and the UDHR. By adopting the bifurcated approach, domestic courts will furthermore ensure the equal treatment of men and women before the law.

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