



Ensuring Gender Sensitivity in the Context of Refugee Status Determination and Resettlement

**Module 1: Ensuring Gender Sensitivity in
Refugee Status Determination**

RESOURCE PACKAGE

This training package was produced by UNHCR's Bureau for Europe for guidance to refugee status determination as a follow-up to the *Regional Analysis of Gender-Related Persecution in European National Legislation and Practice*, published in May 2004. One of the findings and recommendations of the regional analysis was to improve the knowledge and practical capacities of regional and national stakeholders to assess and analyze gender-related refugee claims and to produce relevant resource materials. The second objective is to promote the implementation of the 2002 UNHCR guidelines on gender-related persecution.¹ Moreover, this package was developed to provide readily-usable, user-friendly materials to encourage UNHCR offices, relevant authorities, legal advisory services and NGOs to mainstreaming gender aspects into all training activities related refugee status determination and asylum system development.

This training package has three books which can be used for either one or two day training events, depending on the time available and level of the trainees. Sessions and exercises from the modules can be incorporated easily into other training agendas and activities. Each of the modules can be used separately. The first and second modules on gender and refugee status determination can be used for UNHCR and other audiences. However, the third module on resettlement and gender is intended primarily for internal UNHCR use.

The first module is focused on substantive, gender-sensitive analysis of gender-related and gender-specific asylum claims. It seeks to increase the knowledge and analytical skills of asylum workers in relation to gender-related asylum claims by providing a framework for understanding and analyzing how gender and persecution are linked. The module also includes a review of international human rights conventions and the links between women's human rights and refugee protection. The issues are explained and demonstrated through visual presentations, handouts (including checklists) and exercises. Detailed facilitator's notes and case study analysis, as well as relevant case law are included.

The second module addresses procedural and evidentiary issues with regard to gender-related claims. The module provides clear guidance for gender-sensitization of the refugee status determination procedures which will meet international standards. Particular emphasis is put on addressing credibility and gender-sensitive interviewing. The module uses case studies and role plays as the primary method of training. Visual presentations and handouts (including checklists) are provided to highlight certain issues and to supplement the participatory learning materials.

The third package aims at ensuring gender-sensitivity in resettlement procedures. It is based on UNHCR's Resettlement Handbook and Resettlement Criteria, as well as women-at-risk programmes. The module provides visual training materials, handouts (including checklists) and exercises for UNHCR field offices and for staff guidance which can be used in all capacity-building activities aimed at understanding gender, protection and resettlement issues.

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UNHCR, Bureau for Europe
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¹ 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, HRC/GIP/02/01, 7 May 2002.

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MODULE 1:

Ensuring Gender Sensitivity in Refugee Status Determination

Target group: RSD workers, NGOs, lawyers, anyone interested or involved with refugee issues

Duration: 4 hours and 20 minutes

AGENDA

Ensuring Gender Sensitivity in Refugee Status Determination

Introduction to the Workshop

- 9.00-9.05 Welcome
9.05-9.15 Introduction of participants
9.15-9.30 Summary of expectations and possible relevant problem areas, including two exercises highlighting these issues
9.30-9.35 Introduction of the agenda
9.35-9.40 Establishment of workshop rules

Gender and Sex

- 9.40-9.50 Presentation on the concept of gender and sex
9.50-10.00 Exercise on sex and gender
Option 1: True or false – a Quiz on Gender and Sex
Option 2: Gendered lives – wishing for a son or a daughter?

UNHCR Gender Guidelines

- 10.00-10.20 Introduction to the background and purpose of the UNHCR Gender Guidelines (2002) as well as to an exercise on the guidelines
10.20-10.40 Coffee break while working on the exercise
10.40-10.50 Continuing work on the exercise
10.50-11.20 Review of the exercise

Analyzing Gender Related Asylum Claims

- 11.20-12.00 Framework of analysis for gender-related asylum claims
12.00-12.30 Case study #1: Exercise on how to analyze gender-related asylum claims
Case study #2: Domestic violence/discriminatory laws, policies, practices and norms
12.30-12.50 Review of the case study exercise

Closure of the workshop

- 12.50-13.00 Conclusions and closing of the workshop

INTRODUCTION TO THE WORKSHOP

9.00-9.05	Welcome
9.05-9.15	Introduction of participants
9.15-9.30	Summary of expectations and possible relevant problem areas, including two exercises highlighting these issues (to be done in plenary)
9.30-9.35	Introduction to the agenda
9.35-9.40	Establishment of workshop rules

WELCOME

Purpose - Why are you doing it?

The purpose of this section is to make participants feel welcome and interested in participating in the gender training workshop.

Time – How long will it take?

It will take 5 minutes.

Method – How will you be doing it?

You will make a short presentation, and you may choose to illustrate it by either writing on a flip chart or using a PowerPoint presentation, as appropriate.

Equipment and type of training material needed:

Flip chart, pen, PowerPoint projector and presentation.

PowerPoint slides:

- No. 1 Ensuring Gender Sensitivity in Refugee Status Determination;
- No. 2 Workshop objectives.

Facilitator's notes

While waiting for people to arrive, show PowerPoint slide no.1. Start the workshop by briefly introducing the basic objectives of the workshop and give an overview of the asylum situation in the relevant country of asylum from an international comparative perspective.

The basic objectives of the training are (as shown in PowerPoint slide no.2):

- To raise awareness of the link between international human rights law and refugee protection;
- To review guidelines relevant to gender-related asylum claims;
- To raise awareness of the more complex legal and procedural issues which may arise in relation to gender-related asylum claims, and to provide some tools to handle these issues;

- To increase knowledge and applied analytical skills in relation to gender-related asylum claims;
- To fulfil the overall purpose of assisting the participants with tools to avoid common traps and to ensure a refugee status determination that corresponds to international standards.

The overview of the asylum situation could include a listing of countries from where most asylum seekers originate; the number of asylum seekers arriving categorised by sex and age, compared to other countries and regions as well as the UNHCR practice; and, the recognition rate categorised by sex and age, compared to other countries and regions, as well as the UNHCR practice.²

Conclude by highlighting that the overall goal of the training is to assist the participants with tools to avoid common traps and to ensure a refugee status determination that corresponds to international standards. Consequently, the purpose of the training is to assist the participants in their work.

² You will find relevant information at the UNHCR website www.unhcr.ch.

INTRODUCTION OF PARTICIPANTS

Purpose - Why are you doing it?

The purpose of this section is to introduce the participants to one another and they can give an overview of their background.

Time – How long will it take?

It will take 10 minutes.

Method – How will you be doing it?

You will let the participants briefly introduce themselves to each other. Distribute a ready-made list of participants where they can mark their presence, or distribute the handout where they may fill in their contact details.

Equipment and type of training material needed:

Handout, pen.

Handout:

- No. 1 List of participants and their contact details.

Facilitator's notes

Distribute a participant list with contact details when the participants have introduced themselves to each other. If there is no such list, distribute handout no. 1.

**SUMMARY OF EXPECTATIONS AND POSSIBLE RELEVANT PROBLEM AREAS,
INCLUDING TWO PLENARY EXERCISES HIGHLIGHTING THESE ISSUES**

Purpose - Why are you doing it?

The purpose of this section is to avoid unnecessary difficulties and misunderstandings during the workshop by trying to highlight expectations and possible problems before the training starts. Accordingly, use the section to agree on and clarify the expectations and the agenda.

Time – How long will it take?

It will take 15 minutes.

Method - How will you be doing it?

You will use exercises in plenary as the prime training method in this section. Let participants anonymously fill in their answers to the questions posed. Collect their answers and summarize them by writing on a flip chart. Discuss and link the discussion to the agenda. You may also choose to use a PowerPoint slide showing the two questions.

Equipment and type of training material needed:

Flip chart, pen, PowerPoint projector and presentation.

PowerPoint slide:

- No. 3 Expectations and possible problem areas.

Facilitator's notes

Ask the participants to write down their answers individually and anonymously for the following two sets of questions:

- 1) What expectations do you have of this training workshop?
- 2) What problematic issues could create obstacles for good training results?

You may want to show PowerPoint slide no. 3 while they are writing.

Collect their answers and write them down on the flip chart, structuring the answers in the course of reading them.

Be prepared to deal with resistance, for example relating to gender issues or professional skills put into question.³

Remember to sum up and link the answers to the agenda; agree on and identify issues to be addressed, parking lot issues and non-issues. Consequently, this section is closely interlinked with the next one.

³ For more information and advices on how to deal with resistance, see UNHCR Gender Training Kit on Refugee Protection and Resource Handbook (December 2002), Chapter 1: Gender Training as a Tool for Change, p. 8-9.

INTRODUCTION TO THE AGENDA

Purpose - Why are you doing it?

The purpose of this section is to make sure the participants have an overview of the day's programme.

Time – How long will it take?

It will take 5 minutes.

Method - How will you be doing it?

You will make a short presentation, which may be illustrated by a PowerPoint presentation. You will distribute the agenda to those who do not have it.

Equipment and type of training material needed:

PowerPoint projector and presentation, handout.

PowerPoint slides:

- No. 4.1 Workshop agenda;
- No. 4.2 Agenda cont.

Handout:

- No. 2 Workshop agenda.

Facilitator's notes

Introduce the agenda and make sure everybody has one. You may show PowerPoint slides nos. 4.1 and 4.2 and distribute handout no. 2.

ESTABLISHMENT OF WORKSHOP RULES

Purpose - Why are you doing it?

The purpose of this section is to facilitate the practical arrangements surrounding the workshop and thus to avoid disturbing elements, which could have an impeding effect on the training result.

Time- How long will it take?

It will take 5 minutes.

Method - How will you be doing it?

You will ask the participants for answers which you may write on a flip chart.

Equipment and type of training material needed:

Flip chart, pen.

Facilitator's notes

Ask the participants to initiate and agree on workshop rules, for example that cell phones should be off; time schedule should be respected; everyone should participate fully in the workshop etc. Write the rules on a flip chart in order to make them visible. Make sure that the rules are initiated by the participants.

THE CONCEPT OF GENDER AND SEX

9.40-9.50 Presentation on the concept of gender and sex

9.50-10.00 Exercise on gender and sex to be done in plenary

PRESENTATION ON THE CONCEPT OF GENDER AND SEX

Purpose - Why are you doing it?

The purpose of this section is to introduce the concept of gender and sex to the participants and to get an idea of their level of understanding of the concept of gender.

Time – How long will it take?

It will take 10 minutes.

Method - How will you be doing it?

You will make a short PowerPoint presentation. At the end, distribute the handout.

Equipment and type of training material needed:

PowerPoint projector and presentation, handout.

PowerPoint slide:

- No. 5 Sex and gender – basic definitions.

Handout:

- No 3. Sex and gender – basic definitions.

Facilitator's notes

Ask the group what they understand as the difference between gender and sex.

Explain the difference between gender and sex and show PowerPoint slide no. 5⁴.

Distribute handout no. 3.

⁴ For further information on the concept of gender you may want to read UNHCR Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, Chapter 1., p. 11-12; UNHCR Gender Training Kit on Refugee Protection and Resource Handbook (December 2002), Chapter 2: Gender Concepts and Strategies, p. 28-30.

EXERCISE ON GENDER AND SEX

Purpose - Why are you doing it?

The purpose of the exercise is to enhance the participants' understanding of the difference between gender and sex and thus also the understanding of women's and men's various experiences of persecution which will be the framework of their asylum claims.

Time – How long will it take?

It will take 10 minutes.

Method - How will you be doing it?

You will use an exercise in plenary as the prime training method in this session. There are two exercise options. For option 1 you may both use a PowerPoint presentation and distribute a handout. For option 2 you may use a PowerPoint presentation.

Equipment and type of training material needed:

PowerPoint projector and presentation, handout.

PowerPoint slides:

- No 6.1 True or false – a quiz on gender and sex;
- No. 6.2 True or false...cont;
- No. 7 Gendered lives – wishing for a son or a daughter?
- No. 8 Gender roles.

Exercise:

- No 1. True or false – a quiz on gender and sex.

Facilitator's notes

Choose one of the exercises.

Option 1 – True or false - a quiz on gender and sex

Show PowerPoint slides 6.1 and 6.2 and ask the participants which statements they consider true or false. Look for similarities between their answers. Probably they will be most united in their opinions on statements relating to physical characteristics. Conclude that pure physical characteristics can be referred to sex, while others could not as they may differ over time, space and among individuals. Make sure it is added to the discussion that even those statements which appear purely sex-based may be dubious, e.g. considering that not all women give birth to children or breast feed.

The quiz...

- 1) Women give birth to babies, men don't. (S/G)
- 2) Girls and women are polite, caring, listening and smooth in behaviour and attitude. (G)
- 3) In ancient Egypt men stayed home and did weaving. Women handled family business. Women inherited property and men did not. (G)
- 4) Men's voices often break more obvious than women's voices do in puberty. (S)
- 5) More men than women have seats and powerful positions in political parties, governments, parliaments, universities, international organisations, NGOs, companies, municipality or village councils and other decision-making bodies. (G)
- 6) Women and men do compulsory military service (G)
- 7) According to UN statistics, women do 67% of the world's work, yet their earnings for it amount to only 10% of the world's income. (G)
- 8) Men are using make-up and hair products. (G)
- 9) Men have more sexual needs and lust than women. (G)

10) Women can breast feed babies; men can bottle feed babies. (S/G)

Option 2 – Gendered lives – wishing for a son or a daughter?

Tell the participants this story:

A couple is struggling to conceive a child. They go to a diviner who tells them they will have child, but only after they have decided which sex they want it to be.

Ask them to imagine being in this situation, and thus to choose a sex for their child and to think about the reasons lying behind their choice. Show PowerPoint slide no. 7. Give them 3-4 minutes of individual reflection before discussing in plenary their choices and arguments, the kinds of assumptions underlying different choices and possible implications of how male and female children are socialized and treated to prepare them for the roles they will play in society.

Following the chosen exercise, you may underline that:

- Gender roles are socially constructed and not determined by biological differences between women and men;
- Gender roles vary and change across societies, cultures and historical periods;
- Both women and men are responsible for reproducing gender stereotypes;
- The different values we assign to gender roles and responsibilities in society are linked to inequalities in power relations between women and men.

While showing PowerPoint slide no. 8 you may also explain that gender roles are affected by age, class, ethnicity, religion or other ideologies, and by the geographical, economic and political environment. Moreover you may draw attention to the fact that by looking at these factors, it is possible to detect asylum grounds reflected in the 1951 Refugee Convention. Gender roles influence the activities of women and men, for example how different forms of opposition are shaped, where the opposition takes place and how it is counteracted. They affect women's and men's experiences of persecution and thus their asylum claims.

UNHCR GENDER GUIDELINES (2002)

10.00-10.20	Introduction to the background and purpose of the UNHCR Gender Guidelines (2002) ⁵ as well as to an exercise on the guidelines (to be done in groups)
10.20-10.40	Coffee break while working on the exercise
10.40-10.50	Continuing work on the exercise in the meeting room
10.50-11.20	Review of the exercise in plenary

INTRODUCTION TO THE BACKGROUND AND PURPOSE OF THE UNHCR GENDER GUIDELINES AND TO AN EXERCISE ON THE GUIDELINES

Purpose - Why are you doing it?

The specific purpose of this section, including the exercise, is to make the participants aware of the UNHCR Gender Guidelines (2002) as a tool providing key points to consider during refugee status determination (RSD). At the end of the exercise they should have an overview of the content of the guidelines and thus be able to consult relevant parts in the course of their work. It should also provide a basis for further discussions about gender-sensitive analysis of asylum claims.

Time – How long will it take?

The introduction will take 20 minutes, while the presentation and exercise will take 1 hour and 20 minutes altogether.

Method - How will you be doing it?

You will make a 20 minute presentation which will lead into your introduction of the exercise, distribution of handouts needed for the exercise and division of the participants into groups of 4-5 persons. Each group should choose a rapporteur. The groups then get 30 minutes to work on the exercise, including 20 minutes during the coffee break and 10 minutes back in the meeting room. At the plenary review of the exercise, each group (rapporteur) gets about 5 minutes to make their presentation, which leaves 10 minutes for additional comments and discussion and makes it possible for you to make a brief summary of the UNHCR Gender Guidelines (2002) before continuing with the framework of analysis in the next section. You may use a PowerPoint presentation, as appropriate.

Equipment and type of training material needed:

PowerPoint projector and presentation, handouts.

PowerPoint slides:

- No. 9 UNHCR gender guidelines (2002);
- No. 10 Convention refugee definition;
- No. 11 The engendering of international refugee law;
- No. 12 Gender-related claims could include (but not be limited to);
- No. 13 Gender guidelines (2003) exercise – instructions to groups;
- No. 14 Review of the UNHCR Gender Guidelines (2002).

⁵ 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, HRC/GIP/02/01, 7 May 2002, henceforth UNHCR Gender Guidelines, (2002).

Handouts:

- No. 4 UNHCR gender guidelines (2002);
- No. 5 Age and gender dimensions in international refugee law.⁶

Facilitator's notes

You may show PowerPoint slide no. 9 while starting the section. Then show PowerPoint slide no. 10 to remind the participants of the UN refugee definition and continue by showing PowerPoint slide 12 while referring to the fact that even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. As previously shown in PowerPoint slide 8, (see previous section Gender and Sex), gender is correlated with a number of factors explicitly constituting convention grounds, such as political opinion, particular social group, religion, nationality, and ethnicity. Consequently, there is no need to add a convention ground to the 1951 Convention definition. The refugee definition, properly interpreted, covers gender-related claims.⁷ As shown in PowerPoint no. 12, gender-related claims could include (but are not limited to) cases of gender-based violence and gender discrimination such as:

- o rape, domestic violence, forced prostitution and trafficking, female genital mutilation, forced abortion, social ostracism, etc;
- o gender-discriminatory laws, policies and practice as well as discriminatory social norms and punishments for not complying with certain norms and laws.

Gender-related claims may be brought by either women or men although, due to particular types of persecution, they are more commonly brought by women.

You may continue by stating that a gender-sensitive interpretation of the 1951 Convention definition requires comprehensive guidance. The UNHCR Gender Guidelines (2002) were established to fill that need as their purpose is to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field. They specifically focus on the interpretation of the refugee definition contained in Article 1A (2) of the 1951 Convention relating to the Status of Refugees (hereinafter 1951 Refugee Convention) from a gender perspective. They also propose some procedural practices in order to ensure that proper consideration is given to women claimants as well as to lesbians, gay, bi-

⁶ The article appears in *Refugee protection in international law: UNHCR's global consultations on international protection*/ Feller, E. (ed.); Türk, V. (ed.); Nicholson, F. Cambridge (United Kingdom); New York (NY); Geneva: Cambridge University Press; UNHCR (2003).

⁷ See *Summary Conclusions, Gender-Related Persecution, Global Consultations on International Protection, San Remo Expert Roundtable*, nos. 1 and 3 (*Summary Conclusions, Gender-Related Persecution*), (2001).

sexual, and transgender (LGBT) persons in refugee status determination procedures and that the range of gender-related claims are recognized as such.

Finally, it may be fruitful to emphasize that the UNHCR Gender Guidelines (2002) are not the result of a few persons' ideas and work. On the contrary, they are the outcome of the Second Track of the Global Consultations on International Protection process, which examined this subject at its expert meeting in San Remo in September 2001. The Global Consultations involved a variety of persons. Participants included 33 experts from 23 countries, drawn from governments, NGOs, academia, the judiciary and the legal profession, with UNHCR organizing the meeting. The Gender Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (re-edited, Geneva, January 1992), henceforth UNHCR Handbook (1992). They further replace UNHCR's Position Paper on Gender-Related Persecution (Geneva, January 2000).

Distribute the UNHCR Gender Guidelines (2002) handout no. 4. Divide the participants into groups of 4-5 participants and ask each group to prepare a summary of the content in a specific part of the guidelines. As indicated in PowerPoint slide no. 13, the tasks could be divided as follows:

- Group 1 covers the paragraphs under Introduction and substantive analysis;
- Group 2 covers the paragraphs under Well-founded fear of persecution;
- Group 3 covers the paragraphs under The casual link;
- Group 4 covers the paragraphs under Procedural issues.

Ask them to start the exercise during the coffee break and to finish it in the meeting room. They should select a group rapporteur.

COFFEE BREAK WHILE WORKING ON THE EXERCISE

CONTINUING WORK ON THE EXERCISE IN THE MEETING ROOM

REVIEW OF THE EXERCISE IN PLENARY

Facilitator's notes

Give each group rapporteur about 5 minutes to present their summary of their designated part of the guidelines; this gives you 10 minutes for additional comments and discussion and for you to make a brief summary before continuing with the framework of analysis (see next section). During the presentation you may want to show PowerPoint slide no. 14.

Finish by distributing handout no. 5.

ANALYZING GENDER-RELATED ASYLUM CLAIMS

- 11.20-12.00 Framework of analysis for gender-related asylum claims:
- Does the harm feared amount to persecution?
 - Is the fear well-founded?
 - If the persecutor is not an agent of the state, is the state still able and willing to offer protection?
 - Is the fear of persecution linked to a convention ground?
- 12.00-12.30 Case study exercises on how to analyze gender-related asylum claims (to be done in groups)
- 12.30-12.50 Review of the case study exercises in plenary

FRAMEWORK OF ANALYSIS FOR GENDER-RELATED ASYLUM CLAIMS⁸

Purpose - Why are you doing it?

The purpose of this exercise and section is to deepen the participants' understanding of gender-sensitive RSD and to provide them with a framework of analysis for gender-related asylum claims. The framework could be applied during the following case study exercise (see next section) and in their daily work.

Time – How long will it take?

The presentation will take 40 minutes.

Method - How will you be doing it?

You will be using a PowerPoint Presentation. As the presentation is structured around four main questions forming the analytical framework, you will be indicated the relevant handouts, PowerPoint slides in connection to each question:

- Does the harm feared amount to persecution?
- Is the fear well-founded?
- If the persecutor is not an agent of the state, is the state still able and willing to offer protection?
- Is the fear of persecution linked to a convention ground?

Please note that you will not have the time to include the contents of each handout in the 40 minute presentation.

Equipment and type of training material needed:

Handouts, PowerPoint projector and presentation.

PowerPoint slide:

- No. 15 Gender-sensitive interpretation of the UN refugee definition. It can be shown during the introduction to the framework. Several other PowerPoint slides will be suggested to use under each question.

Handouts:

- Relevant handouts will be suggested to use under each question.

⁸ The content of the framework of analysis is inspired/adapted from various UNHCR gender guidelines and documents, the UNHCR Handbook (1992) and from gender guidelines produced by various countries or national NGOs (see various guidelines listed in handout no. 21 or no. 6).

Facilitator's notes

Present the analytical framework by introducing the four questions in focus when analyzing a gender-related asylum claim:

- Does the harm feared amount to persecution?
- Is the fear well-founded?
- If the persecutor is not an agent of the state, is the state still able and willing to offer protection?
- Is the fear of persecution linked to a convention ground?

Use PowerPoint slide no. 15 while introducing the above questions.

Continue the presentation by systematically going through each of the four questions, referring to key gender considerations and using PowerPoint slides and handouts when indicated.

Throughout the presentation, you may refer to considerations generally made in the analysis of a refugee claim, and then suggest what corresponding additional considerations would be needed in order for an accurate assessment of a gender-related claim. This could make participants recall that the traditional framework of analysis is applicable in gender-related claims, but that in addition, a gender-related claim requires specific knowledge and considerations in order to give every person, irrespective of sex and/or sexual orientation, the same prerequisites for asylum. Consequently, gender sensitivity is not about favouring certain individuals, it is an integral part in the process of creating equal rules of the game for everyone. By contrast, lack of gender sensitivity risks favouring certain individuals, while discriminating against others.

DOES THE HARM FEARED AMOUNT TO PERSECUTION?

Purpose - Why are you doing it?

The purpose of this section is to make participants aware of the minimum considerations which should be made when analyzing whether the harm feared amounts to persecution.

How long will it take?

It will take about 5 minutes.

Method - How will you be doing it?

You will make a presentation, and you may want to use a PowerPoint presentation to illustrate it. The purpose of this section is not to talk at length about the human rights framework, but to indicate the main points to consider during the assessment of a gender-related claim and to provide handouts which the participants can further explore at home as well as partly during the case study exercise to follow. Distribute the handouts in the end of the section.

Equipment and type of training material needed:

Handouts, PowerPoint projector and presentation.

PowerPoint slides:

- No. 16 Does the harm feared amount to persecution?
- No. 17 Harm and persecution;
- No. 18 Agents of persecution.

Handouts:

- No. 6 References to UN and other international and regional documents on human rights and the issue of gender-based violence and discrimination;
- No. 7 The International Human Rights Framework: the link with refugee protection and women's rights, (excerpts);
- No. 8 Discrimination against Women and Violence against Women in International Law;
- No. 9 Individuals' Human Rights and the Laws that Protect Them;
- No. 10 Causes and Consequences of Sexual and Gender-Based Violence, excerpts from Sexual and Gender-Based Violence against Refugees, Returnees, Internally Displaced Persons - Guidelines for Prevention and Response.

Facilitator's notes

Introduce the section by showing PowerPoint slide no. 16. In the course of showing PowerPoint slide no. 17, you may underline that a gender-sensitive assessment of serious harm requires at least the following considerations:

- Gender-based violence and discrimination may constitute serious harm amounting to persecution, irrespective of the agent of persecution or where the harm takes place;
- Gender-based violence may amount to torture and other cruel, inhuman or degrading treatment or punishment;

- The concept of persecution should be assessed with reference to relevant international human rights instruments, e.g. both general human rights treaties and decisions by international and regional bodies and courts.⁹

In order to emphasize that the agent of persecution could be either a state or a non-state agent, you may also show PowerPoint slide no. 18.

As stated in the UNHCR Gender Guidelines (2002):

There is a scope within the refugee definition to recognize both state and non-state actors of persecution. While persecution is most often perpetrated by the authorities of a country, 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.¹⁰

The recognition of both state and non-state agents of persecution corresponds with the principle, enshrined in international law, that states may be responsible for acts of violence committed by both state and non-state actors, hereafter summarized by the UN Special Rapporteur on Violence against Women:

Except for categories such as pirates and international war criminals, private individuals and agencies are not generally bound by international human rights law. But States may be responsible for their failure to meet international obligations even when violations originate in the conduct of private individuals. State responsibility for the violation of women's human rights by private actors is anticipated by customary international law. States are held legally responsible for acts or omissions of private persons in the following instances:

- a) The person is an agent of the state;
- b) Private acts are covered by provisions of a treaty obligation;
- c) There is State complicity in the wrongs perpetrated by private actors;
- d) State failure to exercise due diligence in the control of private actors.¹¹

⁹ E.g. International Covenant on Civil and Political Rights (ICCPR) and its supervisory committee; International Covenant on Economic, Social and Cultural Rights (ICESCR) and its supervisory committee; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its supervisory committee; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its supervisory committee; Convention on the Rights of the Child (CRC) and its supervisory committee; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its supervisory committee; Declaration on the Elimination of Violence against Women (DEVAW); Beijing Declaration and Platform for Action, Fourth World Conference on Women (PFA); Rome Statute of the International Criminal Court and the European Convention on the Human Rights and Fundamental Freedoms as well as the European Court of Human Rights.

¹⁰ UNHCR Gender Guidelines (2002) para. II.B.19. See also UNHCR Handbook para.65.

¹¹ Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, 1994/45; E/CN.4/1995/42 para.102, November 22, 1994.

However, despite clear provisions in various human rights documents which require states not only to refrain from committing human rights violations, and also to prevent and respond to human rights abuses without discrimination, the issue of states' inaction to prevent and punish violations committed by private actors is often overlooked.¹² The Special Rapporteur on Violence against Women in 1995 outlined three doctrines put forward by scholars and experts in international law in attempting to deal with the issue of violence against women by private actors. As summarized by the Special Rapporteur on Violence against Women, "The first, taken from the international law doctrine of State responsibility, was that States have a *due diligence (emphasis added)* duty to prevent, investigate and punish international law violations and pay just compensation. The second doctrine is related to the question of equality and *equal protection (emphasis added)*. If it can be shown that law enforcement discriminates against the victims in cases involving violence against women, then States may be held liable for violating international human rights standards of equality"¹³. Finally, as for the third doctrine the Special Rapporteur also highlights that scholars also have "argued that domestic violence is a form of *torture (emphasis added)* and should be dealt with accordingly"¹⁴, an argument which has increasingly been widened to include many different forms of gender-based violence. The argument that gender-based violence, including domestic violence, may amount to torture has increasingly been put forward by key UN bodies in the process of gender-mainstreaming the policy and practice of the UN¹⁵.

Finish the section by distributing handouts nos. 6,7,8,9 and 10.

¹² See for example Report of the Special Rapporteur on violence against women, its causes and consequences, 1995/85, E/CN.4/1996/53, para. 30-31, February 6, 1996.

¹³ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1999/68 para. 22, March 10, 1999.

¹⁴ See for example Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1999/68 para.22, March 10, 1999. However, you may specifically wish to highlight the similarities argued to exist between certain forms of violence against women perpetrated by private individuals, including domestic violence, on the one hand and torture and ill-treatment by state officials on the other: The physical and psychological abuse is often similar in nature and severity; rape is common and the acts of violence are often inflicted for similar purposes which are listed in Article 1 of the Convention against Torture, e.g. in cases of domestic violence, it may be to punish women for alleged transgression of social norms, to obtain information, to intimidate and to break their will and enforce their submission. Furthermore, although the state perpetrators may not be state officials, the pervasive impunity surrounding such violence involves states as impunity is contrary to states' responsibility under international human rights law. The complicity, consent or acquiescence of public officials could be present where women do not obtain effective and legal protection against e.g. beatings, marital rape, death threats, and deprivations of the freedom of movement. The failure to exercise due diligence in cases of domestic violence could also breach the obligation to ensure the right to live a life in freedom from torture and ill-treatment.

¹⁵ See for example Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/55/290, para 1.5.8. August, 11, 2000; Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/59/324, para. 19, September 1, 2004; General Comment No. 31 (2004), para. 8, of the UN Human Rights Committee. Trends regarding the integration of a gender perspective into the work of United Nations human rights treaty bodies para. 43-56, Gender Integration into the Human Rights System, Report of the Workshop, United Nations Office in Geneva, 26 to 28 May, 1999.

IS THE FEAR WELL-FOUNDED?

Purpose - Why are you doing it?

The purpose of this section is to make participants aware of the minimum considerations which should be made when analyzing whether there is a well-founded fear of persecution.

Time – How long will it take?

It will take about 10 minutes.

Method – How will you be doing it?

You will make a presentation, and you may use a PowerPoint presentation to illustrate it. You will systematically go through the objective element as well as the subjective element, pointing at key minimum considerations in a gender-sensitive interpretation of an asylum claim. Distribute the handouts at the end of the section.

Equipment and type of training material needed:

Handouts, PowerPoint projector and presentation.

PowerPoint slides:

- No. 19 Is the fear well-founded?
- No. 20 Subjective element;
- No. 21 Objective element – personal circumstances;
- No. 22 Objective element – country of origin situation.

Handouts:

- No. 11 Common burdens and standards: legal elements in assessing claims to refugee status;
- No. 12 The Michigan Guidelines on Well-Founded Fear.

Facilitator's notes

In the course of showing PowerPoint slide no. 19, you may point out that a gender-sensitive assessment of well-foundedness encompasses special considerations as regards to both:

- the subjective element (the existence of a genuine fear); and,
- the objective element (the existence of an objective fear on the basis of personal circumstances and country of origin situation).

Subjective element¹⁶

For the subjective element you may show PowerPoint slide no. 20 and underline the need to at least make the following consideration:

- There is a need for a holistic assessment taking into account the absence of a stereotyped behaviour and expression of fear as well as possible psychological effects of torture, including gender-based violence by state and non-state agents.

Objective element - personal circumstances

For the objective element, in light of personal circumstances you may show PowerPoint slide no. 21 and underline the need to at least make the following considerations:

- There is a need to explore personal characteristics, experiences, thoughts and feelings about gender relations, gender-based violence and discrimination, and the experiences of similarly situated women, for example:
 - personal characteristics such as age, class, cast, ethnicity, educational level, health status, political opinion and religion, etc;
 - personal experiences, thoughts and feelings of gender relations in his or her family, the community and the state as from the time of childhood until flight;
 - personal experiences of past persecution in the form of gender-based violence and discrimination; and/or whether
 - female relatives, or other similarly situated women in society, have experienced the type of violence and discrimination she fears, but also other forms of gender-based violence and discrimination including state or non-state punishment for transgression of gendered social mores or laws.

¹⁶ Please note that the UNHCR, according to its 1992 handbook, includes in assessment of the subjective element an examination of “a state of mind and a subjective condition” (UNHCR Handbook [1992], para.38) as well as of “the personality of the applicant” (para. 40) and an “assessment of credibility is indispensable where the case is not sufficiently clear from the facts of the record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified” (para.42). In the framework analysis, the assessment of credibility and thus the examination of the applicants personal and family background, his various ideological or other belongings as well as his personal experiences are all issues which are rather dealt with under the objective element (in light of personal circumstances) than under the subjective element, in order to illustrate how the applicant’s statements is not considered in the abstract but “viewed in the context of the relevant background situation.” (Handbook [1992] para. 42). Please also note the critical views of many academics on the subjective element, as summarized in the Michigan Guidelines on well-founded fear (2004).

- There is a need to recall the principle of the benefit-of-the-doubt as survivors of gender-based violence all over the world, including in European countries, often lack documentary evidence such as medical certificates, police reports, witness' reports of threats, sexual, physical and psychological violence committed by agents of the state or the husband, a family member or other non-state agents of persecution;
- Past persecution is neither a requirement for the granting of refugee status, nor a criteria automatically leading to refugee status, but a factor which would create an assumption that there is a well-founded fear of (future) persecution;
- It is important to have thorough knowledge of the issue of gender-based violence and discrimination in order to limit the risks of unreasonably questioning a woman's experiences and fear of persecution.¹⁷

As stated in the UNHCR Gender Guidelines (2002):

Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.¹⁸

Objective element – Country of origin situation

For the objective element in light of the country of origin situation, you may show PowerPoint slide no. 22 and underline the need to at least consider the following:

- There is a need to collect detailed information of the prevalence of the specific form of persecution feared, e.g. domestic violence, forced marriage, social ostracism;
- There is a need to collect detailed information of the different forms of gender state discriminatory laws, policies and/or practices, discriminatory social norms, prevalence of different forms of gender-based violence by state and non-state agents and the authorities' ability and willingness to provide effective and durable protection.

¹⁷ This includes knowledge on different forms of gender-based violence and discrimination, its causes as well as possible psychological, physical, social and legal consequences and how the psychological consequences may affect the ability to present an asylum claim.

¹⁸ UNHCR Gender Guidelines (2002) para III.35.

As stated in the UNHCR Gender Guidelines (2002):

Country of origin information that has relevance in women's claims should be collected, such as:

- the position of women before the law;
- the political rights of women;
- the social and economic rights of women;
- the cultural and social mores of the country and consequences for non-adherence;
- the prevalence of such harmful traditional practices;
- the incidence and forms of reported violence against women;
- the protection available to them;
- any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country-of-origin after making a claim for refugee status.¹⁹

As stated in the UNHCR Guidelines on the Protection of Refugee Women:

Adjudicators should be familiar with the status and experiences of women in the country from which a refugee claimant has fled. Among the issues of which interviewers should be aware are:

- the position of women before the law, including their standing in court, the right to lay a complaint and give evidence, divorce and custody law, the right to own property, the right to have or refuse an abortion;
- the political rights of women, including the right to vote, to hold office and to belong to a political party;
- the social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, and a job or remunerated activities, the status of a widow or divorcee, and freedom of dress;
- the incidence of reported violence against women, the forms it takes (such as sexual assaults, honour killings, bride burnings), protection available to women and the sanctions or penalties on those who perpetrate the violence; and
- the consequences that may befall a woman on her return in light of the circumstances described in her claim.²⁰

- There is a need to collect country of origin information which includes information correlating with gender, such as age, educational level, ethnicity, class, caste, place of residence, political opinion and religion.

¹⁹ UNHCR Gender Guidelines (2002) para. III.36x. Please note that the text is identical with the one in the guidelines, although the layout is different.

²⁰ UNHCR Guidelines on the Protection of Refugee Women, para.73, Geneva 1991. Please note that the text is identical with the one in the guidelines, although the layout is different.

- There may be little or no information supporting a gender-related claim, however this should not unreasonably contribute to a rejection of refugee status. Consequently, there is a need to recall the benefit-of-the-doubt principle and that an applicant's testimony may stand alone and form the basis of a grant of refugee status.

As stated in the UNHCR Gender Guidelines (2002):

No documentary proof as such is required in order for the authorities to recognize a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognize that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution...²¹

- Alternative forms of collecting information may be of assistance, such as the collection of testimonies from similarly situated women. The applicant may also choose to write down her testimony if it is too hard to talk about the traumatic experiences.

As stated in the UNHCR Gender Guidelines (2002):

...The testimonies of other women similarly situated in written reports or oral testimony of non-governmental or international organisations or other independent research.²²

As stated in the UNHCR Gender Guidelines (2002):

The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that the cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is not necessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers civilians) etc. as well as the motivation of the perpetrators may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.²³

²¹ UNHCR Gender Guidelines (2002) para. III.37.

²² UNHCR Gender Guidelines (2002) para. III.37.

²³ UNHCR Gender Guidelines (2002) para III.36xi.

- Where a woman's fear relates to personal status laws or where her human rights are being violated by private citizens, an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution;
- Concluding there is a well-founded fear of state persecution would mean that there is a presumption of state protection being absent and that no internal flight alternative would exist.

Finish the section by distributing handouts nos. 11 and 12. As for the particular problems women may face in their meetings with law enforcement personnel and thus the state which is supposed to give them protection, you may advise them to read reports from human rights organizations such as Amnesty International and Human Rights Watch, *inter alia*:

- It's in our hands – Stop Violence against Women, Chapter 7. Amnesty International (AI Index: ACT 77/001/2004);
- Making rights a reality: The duty of states to address violence against women. Amnesty International (AI Index: ACT 77/049/2004).

IF THE PERSECUTOR IS NOT AN AGENT OF THE STATE, IS THE STATE ABLE AND WILLING TO OFFER PROTECTION?

Purpose - Why are you doing it?

The purpose of this section is to make participants aware of the minimum considerations which should be made when analyzing whether the state is willing or able to offer protection from persecution by non-state actors, be it an armed group or a private individual (if the agent of persecution is a state actor the analysis finished with the assessment of well-founded fear as there would have been a presumption of state protection being absent).

Time – How long will it take?

It will take 10 minutes.

Method - How will you be doing it?

You will make a presentation, and you may use a PowerPoint presentation to illustrate it. Distribute the handout at the end of the section.

Equipment and type of training material needed:

Handouts, PowerPoint projector and presentation.

PowerPoint slides:

- No. 23 If the persecutor is not an agent of the state, is the state able and willing to offer protection?
- No. 24 State protection;
- No. 25 State protection – reasonability analysis;
- No. 26 State protection – IFA.

Handout:

- No. 13 UNHCR Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1 A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.

Facilitator’s notes

Introduce the section while showing PowerPoint slide no. 23. In the course of showing PowerPoint slide no. 24, you may underline the need to at least make the following considerations in cases where the applicant claims a fear of non-state agents of persecution and that the state is unable or unwilling to offer effective and durable protection. Note that it is relevant to assess the availability of state protection, although it is equally important to bear in mind that a woman qualifies for refugee status if she, in addition to meeting the other criteria, can show that *she is unable or, because of her fear, unwilling to avail herself of the protection of the state* (emphasis added).

Unwillingness and/or inability of the State to give protection

- States are obliged by international law to give individuals effective and durable protection against human rights abuses including gender-based violence and discrimination, irrespective of who the perpetrator is or where the abuse takes place;
- An assessment of the availability of state protection requires relevant country of origin information, with focus on state laws, policies and practices relating to the protection a person can obtain against different forms of gender-based violence and discrimination committed by non-state agents.

The assessment of the state's willingness and/or ability to give protection - how to make it?

In the course of assessing whether the applicant is unable to, or because of her fear, is unwilling to avail herself of the protection of the state, assistance can be provided from provisions outlined in CEDAW and DEVAW as well as from the concept of due diligence mentioned in DEVAW and elaborated on by, *inter alia*, the Inter-American Court of Human Rights and the CEDAW Committee recommendation no 19.

One tool to establish whether the state has acted with due diligence would be to see to what extent the state has followed the recommendation no 19 (1992) of the Committee on the Elimination of Discrimination against Women, and thus whether the state has launched:

- Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace;
- Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
- Protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or who are at risk of violence.

Another tool to further evaluate the existence of state protection could be to answer the following questions, originally put up by the UN Special Rapporteur on Violence against Women in her 1999 report:

- Has the State Party ratified all the international human rights instruments including the Convention on the Elimination of All Forms of Discrimination against Women?
- Is there constitutional authority guaranteeing equality for women or the prohibition of violence against women?
- Are there national legislation and/or administrative sanctions providing adequate redress for women victims of violence?

- Are there executive policies or plans of actions that attempt to deal with the question of violence against women?
- Is the criminal justice system sensitive to the issue of violence against women? In this regard, what is the police practice? How many cases are investigated by the police? How are victims dealt with by the police? How many cases are prosecuted? What types of judgements are given in such cases?
- Are the health professionals who assist the prosecution sensitive to issues of violence against women?
- Do women who are victims of violence have support services such as shelters, legal and psychological counselling, specialized assistance and rehabilitation provided either by the government or by non-governmental organizations?
- Have appropriate measures been taken in the field of education and the media to raise awareness of violence against women as a human rights violation and to modify practices that discriminate against women?
- Are data and statistics being collected in a manner that ensures that the problem of violence against women is not visible?

Yet another tool would be to check whether the state has acted in accordance with the Declaration on the Elimination of Violence against Women, Article 4:²⁴

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
- Refrain from engaging in violence against women;
- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

- The country of origin information collected on the issue of state protection should include information correlating with gender, such as age, education, ethnicity, class, caste, place of residence, political and/or religions etc;
- There may be little or no documentary evidence presented with regards to the inadequacy of state protection as concerns gender-related persecution, which should not unreasonably contribute to a rejection of refugee status. Consequently, there is a need to recall the principle of the benefit-of-the-doubt and that an applicant's testimony may stand alone and form the basis of a grant of refugee status;

²⁴ Please note that text is identical to the text in article 4 of DEDAW, as only the design has changed.

- A reasonability analysis concerning the availability of state protection should be made on the basis of the applicant's personal circumstances and of relevant country of origin information;
- Show PowerPoint slide no. 25 while discussing the reasonability analysis.

According to Dr Heaven Crawley, a tool to assess the reasonability could be to consider:

- a) Whether the applicant sought and was denied protection by the government;
- b) Whether the governing institutions and/or government agents were aware of the harm to the applicant and did nothing to protect her or were unable to;
- c) Whether the applicant has reasons to believe that it was or would be futile to seek the protection of the government (e.g. if the government has denied protection to similarly situated women, or if the government has systematically failed to apply existing laws).²⁵

- The claimant needs not to have approached non-state organizations for protection. NGOs can never replace state responsibility;
- Where a woman's fear relates to personal-status laws or where her human rights are being violated by private citizens, an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution;
- It is important to have a thorough knowledge of the issue of gender-based violence and discrimination in order to limit the risks of unreasonably questioning a woman's experiences and fear of persecution, e.g. including her persuasion that state protection would not be available for women.²⁶

Internal Flight Alternative

Show PowerPoint slide no. 26 while discussing the issue of internal flight (protection) alternative.

²⁵ Crawley, Heaven. *Refugees and Gender: Law and Process*, Jordan Publications, London, 2001, p. 53.

²⁶This includes knowledge on different forms of gender-based violence and discrimination, its causes as well as possible psychological, physical, social and legal consequences and how the psychological consequences may affect the ability to present an asylum claim etc.

For the assessment of the existence of an internal flight alternative (IFA), there is a need to at least consider the following:

- International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort;
- The 1951 Convention does not require or even suggest that the fear of being persecuted needs always extend to the *whole* territory of the refugee's country of origin;
- Religious, economic, social and cultural factors, among others, may be relevant in determining the reasonableness of an IFA for a woman fearing gender-related persecution;
- There is a need to make a relevance analysis, which is further elaborated on in the UNHCR guidelines on internal flight or relocation alternative (2003).

IFA - Relevance analysis

The main questions to be answered are:

- Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant;
- Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available;
- Is the agent of persecution a non-state agent? Where there is a risk that the non-state actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether state protection from the harm feared is available there;
- Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.²⁷

²⁷Guidelines on International Protection: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 and/or 1967 Protocol relating to the Status of Refugees, July, 2003, para. II.A.7.

- There is a need to make a reasonableness analysis, which is further elaborated on in the UNHCR guidelines on internal flight or relocation alternative (2003).

IFA- Reasonableness analysis

The main question to be answered is:

- Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.²⁸

Finish the section by distributing handout no. 13.

IS THE FEAR OF PERSECUTION LINKED TO A CONVENTION GROUND?

Purpose - Why are you doing it?

The purpose of this section is to make participants aware of the minimum considerations which should be made when analyzing the five convention grounds from a gender perspective.

How long will it take?

It will take 10 minutes.

Method – How will you be doing it?

You will make a presentation, and you may use a PowerPoint presentation. You are recommended to particularly focus on the convention grounds political opinion and particular social group. Finish by distributing the handouts.

Equipment and type of training material needed:

Handouts, PowerPoint projector and presentation.

PowerPoint slides:

- No. 27 Is the fear linked to a convention ground?
- No. 28 Political opinion;
- No. 29 Particular Social Group.

Handouts:

- No. 14 Gender Sensitivity and the 1951 Refugee Definition - a checklist;
- No. 15 Framework of analysis – a guide to a gender sensitive RSD;
- No. 16 The Michigan Guidelines on Nexus to a Convention Ground;
- No. 17 UNHCR Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 196 Protocol relating to the Status of Refugees;
- No. 18 Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees;
- No. 19 UK Immigration Appellate Authority Asylum Gender Guidelines (excerpts focusing on the convention ground of political opinion).

²⁸ UNHCR Guidelines on Internal Flight Alternative (2003), para. II.A.7.

Facilitator's notes

Introduce the section while showing PowerPoint slide no. 27. While making an assessment regarding the applicable convention ground, there is a need to at least consider the following:

- The claimant is not required to identify accurately the reasons why he or she has a well-founded fear of being persecuted;
- The convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause;
- Attribution of a convention ground to the claimant by the state or non-state agent of persecution is sufficient to establish the required causal connection;
- In cases where there is a risk of being persecuted at the hands of a non-state agents (e.g. husband, partner or other non-state agent) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of state protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-state agent is unrelated to a convention ground, but the inability or unwillingness of the state to offer protection is for reasons of a Convention ground, the causal link is also established.

Political opinion

Introduce the convention ground of political opinion while showing PowerPoint slide no. 28. Explain that when making an assessment of political opinion as a ground, there is a need to consider the following:

- The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies;
- Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the state, government, society or policy may be engaged. This may include an opinion related to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her;
- You may mention that this implies that a woman may fear persecution as a result of her actual or perceived organized political activity e.g. activity or support of a political party, organization or grassroots group. It could also imply that she may fear persecution because of her actual or perceived individual political activity such as the transgression of the social

norms or laws on gender roles by consciously or unconsciously speaking and/or acting in opposition to prevailing gender norms in the family and/or the community and/or the state;

- A claim on the basis of political opinion does however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant;
- 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 such as nursing sick rebel soldiers, cooking for rebel soldiers, recruiting sympathisers or preparation and dissemination of leaflets;
- Women are frequently attributed with the political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives;
- The state failure to extend protection could be highly influenced by a person having an actual or imputed political opinion. Being a woman or homosexual man who consciously or unconsciously transgresses the laws or norms on gender roles may therefore result in a risk of state persecution.

Religion

When making an assessment of religion as a ground, there is a need to consider the following:

- There is an overlap between the grounds of religion and political opinion, especially in the realm of imputed political opinion;
- 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 practice a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion;
- The state failure to extend protection could be highly influenced by a person's religion. Being a woman or homosexual man who consciously or unconsciously transgresses the laws or norms on gender roles may therefore result in a risk of state persecution.

Race

When making an assessment of race as a ground, there is a need to consider the following:

- Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and therefore be persecuted in a different way, such as through sexual violence or control of reproduction;
- The state failure to extend protection could be highly influenced by a person belonging to a particular ethnic group. Being a woman or homosexual man of a specific ethnicity could therefore indicate a greater risk of persecution.

Nationality

When making an assessment of nationality as a ground, there is a need to consider the following:

- Nationality is not to be understood only as citizenship. It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term "race";
- Although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls;
- State failure to extend protection could be highly influenced by a person belonging to a particular nationality or ethnic group. Being a woman or homosexual man of a specific ethnicity could therefore indicate a greater risk of persecution.

Particular Social Group (PSG)

Introduce the convention ground particular social group while showing PowerPoint slide no. 29. Explain that when making an assessment of a PSG, there is a need to consider the following:

- UNHCR definition of a PSG: A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived

as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights;

- A PSG thus includes:
 - Characteristics which are historical and therefore cannot be changed;
 - Characteristics which ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.

- A PSG cannot be defined from persecution;

- Sex can properly be within the ambit of the PSG category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men;

- There is no requirement that the group be cohesive;

- There is no need to demonstrate that all members of a PSG are at risk of persecution;

- The size of the purported social group is not a relevant criterion.

Finish the section by distributing handouts nos. 14, 15, 16, 17, 18, and 19.

CASE STUDY EXERCISE ON GENDER-RELATED ASYLUM CLAIMS

Purpose - Why are you doing it?

The purpose of this exercise is to enhance participants' capacity to analyze asylum cases from a gender perspective by using the UNHCR Gender Guidelines (2002) and the previously discussed analytical framework.

Time – How long will it take?

The case study will take 50 minutes, including 30 minutes of preparations in groups and 20 minutes of case review in plenary.

Method - How will you be doing it?

You will use a case study exercise as the primary method of training. See below for two options (both refer to exercises to be done in groups before the review takes place in plenary). You may use a PowerPoint presentation, as appropriate. Analyses of both case studies are available below and could assist you (the facilitator) as appropriate.

Equipment and type of training material needed:

Handouts, PowerPoint projector and presentation.

PowerPoint slides:

- No. 29 Case study exercise – instructions;
- No. 30 Case study exercise – the analytical framework.

Handouts:

- No. 2 Case study#1: exercise – Domestic violence/Discriminatory laws, policies, practices and social norms;
- No. 3 Case study #2: exercise – Sexual orientation/Discriminatory laws, policies, practices and social norms.

Facilitator's notes

The purpose of this exercise is to enhance participants' capacity to analyze asylum claims from a gender-perspective by using the UNHCR Gender Guidelines (2002) and related analytical framework.

This case study exercise could be used in at least two different ways.

Exercise - Option 1.

Divide the participants into groups of 4-6 participants and, depending on the total number of groups, give one or more groups a case study focusing on gender and persecution related to domestic violence and the other group/s a case study focusing on gender and persecution related to sexual orientation. Distribute the exercises nos. 2 and 3 where the cases are summarized and ask them to prepare answers to the questions provided. Emphasize the importance of using the analytical framework and referring to the UNHCR Gender Guidelines (2002) where appropriate. They may also use the previously distributed handouts (e.g. No. 9 relating to the legal [human rights] framework) as appropriate. Each group should choose a rapporteur who would upon request be prepared to present the conclusions of the group in plenary.

Exercise - Option 2.

Divide the participants into groups of 4-6 participants and give all groups the same case study to analyze; either the one focusing on gender and persecution related to sexual orientation or the one focusing on gender and persecution related to domestic violence. Distribute the exercises no. 2 or 3 (depending on which case you choose) where the case is summarized. One group should get instructions to argue for a grant of refugee status whereas the other group should argue a denial. They may use the previously distributed handouts as appropriate (e.g. no. 9 relating to the legal human rights framework). Each group should choose a rapporteur who would, upon request, be prepared to present the conclusions of the group in plenary.

PLENARY REVIEW OF THE CASE STUDY EXERCISE

Facilitator's notes

The review of the case study exercise in plenary could be done in two different ways:

Review of the case study - Option 1.

Ask one group to present their conclusions regarding the domestic violence case in plenary (5 min). Discuss the case and make clarifications, as necessary (5 min). Ask another group to present their conclusions regarding the sexual orientation case in plenary (5 min). Discuss the case and make clarifications, as necessary (5 min).

Review of the case study – Option 2.

Ask one group to argue, without interruption, for a grant of refugee status (5 min) and another to argue for refusal of refugee status (5 min). Then let the groups debate with each other (5 min). Summarize the debate and make some final comments on the case. (5 min)

CASE STUDY #1: DOMESTIC VIOLENCE
GENDER DISCRIMINATORY LAWS, POLICIES, PRACTICES AND SOCIAL NORMS

The case

The applicant, Sonia, is a 40-year old woman belonging to an ethnic minority in country X, who has been subjected to control, isolation, threats of violence and killing, intimidation, beatings and rape by her husband for a period of more than ten years. The abuses began some time after their wedding and escalated as time went on. When she protested, he responded, as he often did, "you are my woman, you do what I say". He always criticised her, beat her when he thought she was not a good wife, when she did not behave as he expected her to e.g. wore the wrong dress, did not cook fast or good enough, spoke to someone he did not want her to speak to, defended herself against accusations of adultery or daily wrongdoings in the kitchen or elsewhere. He requested sex irrespective of her wishes and he often slapped her, bumped her head against the floor and called her a whore while raping her. It did not matter if she cried, screamed or was silent; he wouldn't stop. Although Sonia tried to run away, her husband always found her and the abuse continued and even escalated; he beat and kicked her unconscious after she tried to escape; whipped her with an electrical cord; broke windows and a mirror with her head; pistol-whipped her and threatened to deface her, cut off her arms and legs, and leave her in a wheelchair if she ever tried to leave him; and warned her that he would be able to find her wherever she was. When she asked for his motivation, he would reply: "I can do it if I want to". He said he was "going to hunt her down and kill her if she comes back to X". Her attempts to secure protection were futile. Sonia's pleas to the police did not gain her protection. On three occasions, the police issued summonses for her husband to appear, but he ignored them, and the police did not take further action. Twice, she called the police, but they never responded. When she appeared before a judge, the judge told her that he would not interfere in domestic disputes. Her husband told her that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials. Sonia knew of no shelters or other organizations in X that could protect her.

Finally she managed to cross the border and she applied for asylum. She fears further domestic violence and being killed by her husband. Her opinion is that she had no chance to get state protection for many reasons; her being a woman in a country where violence and discrimination against women continue with impunity and the state laws, policies and practice as well as the prevailing social norms are discriminating against women, because of her belonging to an ethnic minority and because of her husband's connections to law enforcement officials. She is severely traumatised after more than ten years of physical, sexual and psychological abuse and constant death threats.

Human rights reports covering the years during which Sonia was abused condemn states that fail to protect women suffering abuse at the hands of their husbands and states that have an official policy of discrimination against women. During the relevant time period, there was *de jure* gender discrimination reflected in the civil code, which recognized the male "as the married couple's legal representative". These laws were accompanied by a social norm discriminating against women. Recent country reports confirm that domestic violence in X remains pervasive and, despite positive legal changes and some other efforts to address this problem, in year X "violence against women, including domestic violence, remained common among all social classes." A study estimated that for every reported case of domestic violence, there are 10 more that are not reported. Reports issued in year X indicated that, "in many cases the police do not respond to calls for help . . . [and] officers who do arrive often chastise female victims for behaviours that provoke their husbands'."²⁹

Questions to answer:

1. Does the harm feared amount to persecution?
2. Is the fear well-founded?
3. If the persecutor is not an agent of the state, is the state able and willing to offer protection?
4. Is the fear of persecution linked to a convention ground?

CASE STUDY ANALYSIS #1: DOMESTIC VIOLENCE
GENDER DISCRIMINATORY LAWS, POLICIES, PRACTICES AND SOCIAL NORMS³⁰

Explanatory note

An analysis of the case is available below and could assist you (the facilitator) as appropriate. The framework for analysis for the case studies will entail assessing and responding to the following questions:

- Does the harm feared amount to persecution?
- Is the fear well-founded?
- If the persecutor is not an agent of the state, is the state able and willing to offer protection?
- Is the fear of persecution linked to a convention ground?

³⁰ The content of the framework of analysis in the analysis is inspired by various UNHCR gender guidelines and documents, the UNHCR Handbook (1992) and from gender guidelines produced by various countries or national NGOs such as:

The Australian Department for Immigration and Multicultural Affairs (ADIMA) (1996) Guidelines on Gender Issues for Decision-Makers, Refugee and Humanitarian Visa applications.

Home Office (2004) Asylum Policy Instructions (APIs) Gender Issues in the Asylum Claim, Available at: www.ind.homeoffice.gov.uk.

Immigration Appellate Authority (2000) Asylum Gender Guidelines, Available at: www.iaa.gov.uk

Immigration and Refugee Board of Canada (1996), Women Refugee Claimants Fearing Gender-Related Persecution Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act. Available at: www.cisr.gc.ca.

Refugee Women's Legal Group (1998) Gender Guidelines for the Determination of Asylum Claims in the UK London: RWLG Available on www.rwlg.org.uk.

Swedish Migration Board (2001) Gender-Based Persecution: Guidelines For Investigation And Evaluation Of The Needs Of Women For Protection Available at: www.migrationsverket.se.

Swedish Migration Board (2002) Guidelines for the Investigation and Evaluation of Asylum Cases in which Persecution based on Given Sexual Orientation is Cited as Ground Available at: www.migrationsverket.se/english.html.

Considerations for Asylum Officers Adjudicating Asylum Claims From Women, US Immigration and Nationality Service (1995).

UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. Available at: www.unhcr.org.

UNHCR Guidelines on international protection: Membership of a Particular Social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. Available at: www.unhcr.org.

Sexual and Gender-based Violence against Refugees, Returnees and Internally-Displaced People: Guidelines for Prevention and Response Available at www.unhcr.org UNHCR (1992).

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (originally published in 1979), Geneva. Available at: www.unhcr.org UNHCR (1995).

Sexual Violence against Refugees: Guidelines on Prevention and Response UNHCR, Geneva. UNHCR Guidelines on the Protection of Refugee Women, UNHCR, Geneva. Available at: www.unhcr.org.

You will also find some suggested additional remarks you may want to make, if you have time, in the end of the case study exercise. Please note that the analysis is *not* meant to be discussed in detail during the plenary review of the case, as there is no scope for that considering the limited amount of time available. The analysis is rather meant to serve as a guide to you as a facilitator in order to make you feel comfortable and well prepared to discuss the case study in plenary.

The cases from different countries, which are referred to in the analysis, are not necessarily precedent cases and should only be treated as examples of how gender-related claims can be analyzed. Be sure to check the websites indicated in order to ensure that you are updated on relevant national and international case law and the most recent decisions.

1) DOES THE HARM FEARED AMOUNT TO PERSECUTION?³¹

If the participants do not mention it, recall that a gender-sensitive assessment of serious harm requires several considerations, *inter alia*: that the concept of persecution should be assessed with reference to relevant international human rights instruments, i.e. human rights treaties and decisions by international and regional bodies and courts.³²

Domestic violence, rape and other forms of violence and the concept of persecution

The experiences and fear of domestic violence in the hands of Sonia's husband (a non-state agent of persecution) involves, for example, physical, sexual and psychological violence, death threats, faked killings, discrimination based on sex, restrictions on movement and punishment for different forms of expression of beliefs and political opinions as to gender roles. The rights at issue are, *inter alia*:

The right to freedom, equality and physical integrity

- The right to life, liberty and security of person.
UDHR 2 • ICCPR 2:1 • ICESCR 2: 2 • CRC 2 • DEVAW 3a, c
- The right to live without suffering, torture or any form of cruel, inhuman or degrading treatment or punishment.
UDHR 5 • ICCPR 7 • CRC 37 • CAT 12 • DEVAW 3h
- The right to live without discrimination of any kind based on sex.
ICCPR 3 • ICESCR 3 • CEDAW 1, 2, 3 • PFA 214, 232 • DEVAW 3e
- The right not be treated differently, or have any rights denied, because of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³² e.g. International Covenant on Civil and Political Rights (ICCPR) and its supervisory committee; International Covenant on Economic, Social and Cultural Rights (ICESCR) and its supervisory committee; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its supervisory committee; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its supervisory committee; Convention on the Rights of the Child (CRC) and its supervisory committee; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its supervisory committee; Declaration on the Elimination of Violence against Women (DEVAW); Beijing Declaration and Platform for Action, Fourth World Conference on Women (PFA); Rome Statute of the International Criminal Court and the its ; European Convention on the Human Rights and Fundamental Freedoms as well as the European Court of Human Rights.

UDHR 2 • ICCPR 2:1 • ICESCR 2:2 • CRC 2 • PFA 232

- The right to move freely within the borders of the country of origin. The right to leave and return to any country, including the country of origin

UDHR 13 • ICCPR 12 • ICERD 5d, i, ii

- The right to freedom of thought, conscience and religion.

UDHR18 • ICCPR18 • ICERD 5d, vii • CRC14

- The right to freely express an opinion without fear of punishment, both within the country of origin and to people in other countries.

UDHR 19 • ICCPR 19 • ICERD 5d, viii • CRC 12,13,17

- The right to the highest attainable level of physical and mental health and the right to equal access to health services, including family planning.

ICESCR 12 • CEDAW 12 • CRC 24 PFA 89,106b • DEVAW 3f

Violence against women by non-state agents and torture or inhuman, degrading treatment or punishment

The right to freedom from torture or other cruel, inhuman, degrading treatment or punishment include the right to freedom from abuses committed by either state or non-state agents, (such as domestic violence), as recognized by key UN bodies, such as the UN Human Rights Committee and UN Special Rapporteur on Violence against Women.³³

Domestic violence – harm amounting to persecution

Considering the human rights provisions at issue, it can be concluded that Sonia has both experienced and fears different forms of harm amounting to persecution. Murder, constant death threats, rape, domestic violence and inter-linked treatment are examples of treatment which can clearly constitute harm amounting to persecution within the meaning of the 1951 Convention definition of a refugee. The reasoning behind this conclusion can be traced back to the UNHCR Handbook (1992) as well as to the UNHCR Gender Guidelines (2002). The former states that the term persecution involves threats to life and freedom and other grave violations of basic human rights, but also involves threats of various measures which may not in themselves amount to persecution (e.g. discrimination in different forms), but which may on cumulative grounds amount to persecution³⁴. The latter elaborates further on the concept of persecution in relation to gender-related claims and declares:

³³ You may wish to specifically highlight the similarities argued to exist between certain forms of violence against women perpetrated by private individuals, including domestic violence, on the one hand and torture and ill-treatment by state officials on the other: The physical and psychological abuse is often similar in nature and severity; rape is common and the acts of violence are often inflicted for similar purposes which are listed in Article 1 of the Convention against Torture, e.g. in cases of domestic violence, it may be to punish women for alleged transgression of social norms, to obtain information, to intimidate and to break their will and enforce their submission. Furthermore, although the state perpetrators may not be state officials, the pervasive impunity surrounding such violence involves states as impunity is contrary to states' responsibility under international human rights law. The "complicity", "consent" or acquiescence" of public officials could be present where women do not obtain effective and legal protection against e.g. beatings, marital rape, death threats, deprivations of the freedom of movement. The failure to exercise due diligence in cases of domestic violence could also breach the obligation to ensure the right to live a life in freedom from torture and ill-treatment.

³⁴ UNHCR Handbook (1992) para 51-55.

International law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, 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.³⁵

As gender-based violence may amount to torture or other cruel, inhuman or degrading treatment or punishment, it is worth noting that these abuses are human rights violations which clearly fall within the concept of persecution under the 1951 UN Refugee Convention.

Relevant case law

Domestic violence and related abuses

The following list contains examples of grant decisions concerning domestic violence and interlinked human rights abuses.

USA

- Matter of S C, (Boston, MA, Immigration Court, Feb. 19, 1998), USA. w3.uchastings.edu/cgrs/law/ij/58.html
- Matter of R A
w3.uchastings.edu/cgrs/campaigns/alvarado.htm
- Anonymous
w3.uchastings.edu/cgrs/summaries/600+/summary1204.html

Please see a number of summarized decisions of relevance from the US concerning gender-related persecution, including domestic violence and interlinked abuses, at the website of Center for Gender and Refugees:

w3.uchastings.edu/cgrs/summaries/summaries.html

New Zealand

- Refugee Appeal No 71427/99,
(Refugee Status Appeals Authority, August 16, 2000)
www.refugee.org.nz/Fulltext/71427-99.htm#IRAN:%20INEQUALITY%20OF%20MARRIAGE

Please see a number of other relevant decisions from New Zealand concerning gender-related persecution, including domestic violence and interlinked abuses, at the website of the Refugee Status Appeals Authority: www.refugee.org.nz

³⁵ UNHCR Gender Guidelines (2002) para II.B.9.

Canada

- No. dossier SPR VA3-01886, (Immigration and Refugee Board, February 24, 2004) Canada
www.irb.gc.ca/rtf/reflex/fulltext/242c/rpd/VA301886S_e.rtf
- No dossier SPR: AA3-00181/00185/00186 (Immigration and Refugee Board, 21 May 2004), Canada
www.irb.gc.ca/rtf/reflex/fulltext/242c/rpd/AA300181S_e.rtf
- No dossier TA 2-20842, (Immigration and Refugee Board, May 14, 2003, Canada
www.irb.gc.ca/rtf/reflex/fulltext/218c/rpd/TA220842S_e.rtf
- No. dossier SPR / RPD file #: MA2-04687, (Immigration and Refugee Board, January 8, 2003) Canada
www.irb.gc.ca/rtf/reflex/fulltext/209c/rpd/MA204687S_e.rtf
- No dossier TA 1-21612, (Immigration and Refugee Board, September 9, 2002) Canada
www.irb.gc.ca/en/decisions/reflex/index_e.htm?action=article.view&id=10106
- No dossier CRDD VA0-01624 et al., (Immigration and Refugee Board, March 8, 2001) Canada
www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm
- No dossier AA0-01226 et al., (CRDD, March 19) 2001) Canada
www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm
- No dossier V98-02797, (CRDD January 10, 2000). Canada
www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm
- No dossier M93-08606, (CRDD May 22, 1996.) Canada
www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm
- *Narvaez v. Canada* (Minister of Citizenship and Immigration), [1995] 2 F.C. 55 (T.D.).
www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm
- *Keleta v. Canada* (Minister of Citizenship and Immigration), IMM-4378-04, 2005 FC 56, Ontario January 17. 2005, Canada
decisions.fct-cf.gc.ca/fct/2005/2005fc56.shtml

Please see a number of other relevant decisions from Canada concerning gender-related persecution, including domestic violence and inter-linked abuses, at the webpage of the Canadian Immigration and Refugee Board (CIRB), www.irb-cisr.gc.ca/en/. The CIRB has published a compendium of decisions concerning women refugee claimants fearing gender-related persecution,

www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm.

Australia

- Minister for Immigration and Multicultural Affairs (MIMA) v. Khawar (High Court, April 11, 2002) Australia
www.austlii.edu.au/au/cases/cth/HCA/2002/14.html
- N02/41961 RRT (Refugee Review Tribunal), November 12, 2002
www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/rrt/N0241961.html?query=title+%28+%22+n02+41961+%22+%29
- N03/45774 RRT (Refugee Review Tribunal), November, 26 2003
www.rrt.gov.au/publications/bulletin/decbull03.01.pdf

Please see a number of other relevant decisions from Australia concerning gender-related persecution, including domestic violence and interlinked abuses, at the website of the Refugee Review Tribunal www.austlii.edu.au/au/cases/cth/rrt/ and of the High Court of Australia www.austlii.edu.au/au/cases/cth/high_ct/ and of the Administrative Appeals Tribunal www.aat.gov.au/AATdecisions/AboutAATdecisions.htm

UK

- Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v. [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545 (25th March, 1999)

www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1999/20.html&query=gender+persecution+refugee&method=all

Please see a number of other relevant decisions from UK concerning gender-related persecution, including domestic violence and inter-linked abuses, at the website of the United Kingdom Immigration Appeals Tribunal, www.bailii.org/recent-decisions-uk.html#uk/cases/UKIAT, and of the Immigration Appellate Authority, www.iaa.gov.uk/.

Discriminatory laws, policies practices and failure to extend protection to women

Sonia was subject to gender discriminatory laws, policies and practices as well as gender discriminatory social norms and, more specifically, discrimination by the state in failing to extend protection to women. This resulted in gender-based violence (e.g. physical, sexual, and psychological violence) being inflicted upon her with impunity. The right at issue is:

The right to legal equality:

- The right to be treated by the law in the same way as everyone else, and to be protected by the law without discrimination.

UDHR 7 • ICCPR 14:1,26 • CEDAW 2c, 15:1 • ICERD 5a

- PFA 232 • DEVAW 3d.

State failure to extend protection to women – harm amounting to persecution

Considering the human rights provisions at issue, it may be concluded that Sonia has experienced/fears serious harm amounting to persecution in the form of state failure to extend protection to women (and especially to women belonging to an ethnic minority). The right to legal equality and equal protection from all forms of human rights violations, such as gender-based violence and discrimination is at issue and the following paragraph in the UNHCR Gender Guidelines (2002) could be referred to, where it is stated that failure to extend protection to women, could constitute harm amounting to persecution under the 1951 UN Refugee Convention on:

Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. 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. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analyzed in this context.³⁶.

³⁶ UNHCR Gender Guidelines (2002), para. II.B.15.

Relevant case law

Discrimination - failure to extend protection to women

The following cases are examples of grant decisions where the state has been found to discriminate against women by failing to extend protection to women who would be at risk of violence by non-state agents.

New Zealand

- Refugee Appeal No. 71427/99, (Refugee Status Appeals Authority, August 16, 2000), New Zealand
www.refugee.org.nz/Fulltext/71427-99.htm#IRAN:%20INEQUALITY%20OF%20MARRIAGE,

Australia

- Minister for Immigration and Multicultural Affairs (MIMA) v. Khawar (High Court, April 11, 2002) Australia
www.austlii.edu.au/au/cases/cth/HCA/2002/14.html

Various countries

Please note that a number of other relevant decisions from different countries, concerning gender-related persecution, may be found on various websites, e.g. on www.asylumlaw.org as well as on those mentioned above.

Discriminatory laws, policy and practice – harm amounting to persecution

Considering the *de jure* gender discrimination reflected in the civil code, e.g. recognizing the male as the married couple's legal representative, as well as other gender discriminatory state policies, practices and social norms, one may draw the conclusion that Sonia's fear of gender discrimination by state and society could at least on cumulative grounds constitute harm amounting to persecution. The basis for this argument would be that gender-based discrimination, as other forms of discrimination, may alone or on cumulative grounds constitute harm amounting to persecution. While it depends on the specifics of the case, the following paragraphs in various UNHCR documents relating to refugee women should be of relevance:

While it is agreed that "mere" discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or to access to available educational facilities.³⁷

³⁷ The UNHCR Gender Guidelines (2002) para. II.B.14.

Women may also flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution in some cases, the dividing line between discrimination and persecution is not a clear one.³⁸

Whether or not various measures may amount to persecution must be evaluated in light of all the particular circumstances of each case including the geographical, historical, and ethnological context and the psychological make-up of the individual. Various discriminatory elements may, when taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution. Consequently, interpretations of what amounts to persecution are bound to vary. These aspects may be specifically relevant to bear in mind in cases where women fear institutionalised discrimination as well as discriminatory norms as well as possible punishments for transgression of these laws and norms. Some general considerations are mentioned in the UNHCR Handbook, *inter alia*:

Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

...In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on cumulative grounds. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less fa-

³⁸ The UNHCR Guidelines on the Protection of Refugee Women (1991), paragraph 55.

avourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.

Where measures of discrimination are rare, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.³⁹

It is also important to bear in mind that the UNHCR Gender Guidelines also states that discriminatory legislation can also constitute persecution.

Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.⁴⁰

Relevant case law

Gender discriminatory laws, policies and practices

The following cases are examples of grant decisions in cases of gender discriminatory laws, policies and practices.

USA

- Fisher v INS 37 F. 3d 1379-1381 (9th Cir.1994) , USA
sierra.uchastings.edu/cgrs/law/fed/fisher.html

New Zealand

- Refugee Appeal No 2039/93, (Refugee Status Appeals Authority, February 12, 1996), New Zealand
www.refugee.org.nz/rsaa/text/docs/2039-93.htm

³⁹ UNHCR Handbook, para. 52-55.

⁴⁰ UNHCR Gender Guidelines (2002), para. II.B.10

Various countries

Please note that a number of other relevant decisions from different countries concerning gender-related persecution may be found on various websites, e.g. on www.asylumlaw.org as well as on those mentioned above.

Single women and discriminatory social norms, social ostracism and socio-economic hardship

Furthermore, you may add that women who have fled from an abusive relationship often claim fear of the situation as a single woman or as a single woman with children. They may fear social ostracism and thus discriminatory social norms and laws resulting in economic and social hardship with a risk of being forced into prostitution to support their living. In such a case, the rights at issue could be, *inter alia*:

- Economic, social and cultural rights in order to allow for dignity and freedom to develop as an individual.
UDHR 22 • CEDAW11: 1e • ICERD 5e • CRC 27 • PFA 220
- The right to an adequate standard of living, including food, clothing, housing and medical care.
ICESCR11 • CEDAW 14h • ICERD 5e, iii • CRC 27:1 • PFA 58
- The right to social security.
**UDHR 22 • ICESCR 9 • CEDAW 11: 1e, 14c, 13a ICERD 5e, iv .
CRC 26 • PFA 580**
- The right to social services and security in the event of sickness, old age or other circumstances, including child-care for working parents.
UDHR 25 • CEDAW11: 2c • ICERD 5e, iv • CRC18:2, 3 • PFA 58o
- The right to adequate housing.
UDHR 25:1 • ICESCR 11:1 • CEDAW 14:2h
- The right to the highest attainable level of physical and mental health and the right to equal access to health services, including family planning.
ICESCR 12 • CEDAW 12 • CRC 24 PFA 89,106b • DEVAW 3f
- The right to live without suffering, torture or any form of cruel, inhuman or degrading treatment or punishment.
UDHR 5 • ICCPR 7 • CRC 37 • CAT 12 • DEVAW 3h.

Single women, social ostracism and socio-economic hardship – harm amounting to persecution

Irrespective of Sonia's case, it may be noted that where women fear these abuses, reference can be made to UNHCR policy documents regarding discrimination and state failure to extend protection to women⁴¹, as well as to the following statement regarding trafficking, social ostracism and forced prostitution:

⁴¹ The UNHCR Gender Guidelines (2002) para. II B.14-15; the UNHCR Guidelines on the Protection of Refugee Women [1991, paragraph 55].

...In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the state has been unable or unwilling to provide protection against such harm or threats of harm.⁴²

The quotation below from a UNHCR policy document is also of relevance:

In certain societies, a rape victim may be killed or banished, or considered to have no alternative but to marry her attacker or become a prostitute - all additional human rights violations. Where the return to the country of origin would have one of these results, and where no other basis for her recognition has been identified, she may be considered a refugee *sur place*.⁴³

Relevant case law
Discriminatory social norms resulting in social ostracism
and/or a difficult socio-economic situation

The following case is an example of grant decisions in cases of gender discriminatory laws, policies and practices.

Canada

- Decision no, TA2 – 20842 (Canadian Immigration and Refugee Board, May 26, 2003), Canada
www.irb.gc.ca/rtf/reflex/fulltext/218c/rpd/TA220842S_e.rtf

Various countries

Please note that a number of other relevant decisions from different countries, concerning gender-related persecution, may be found on various websites, e.g. on www.asylumlaw.org as well as on those mentioned above.

⁴² UNHCR Gender Guidelines (2002) para. II B. 18.

⁴³ UNHCR Sexual Violence against Refugees, Guidelines on Prevention and Response, 1995, Geneva, p. 45.

Discriminatory custody rights

In some cases, women who claim fear of domestic violence also claim fear of losing custody over children in case of divorce. The rights at issue would thus be:

The right to legal equality

- The right to be treated by the law in the same way as everyone else, and to be protected by the law without discrimination.

UDHR 7 • ICCPR 14:1,26 • CEDAW 2c, 15:1 • ICERD 5a • PFA 232 • DEVAW 3d

- The right to marry, and both partners have equal rights in their marriage, in their family responsibilities, and at the dissolution of marriage. Both women and men must give their free and full agreement to marriage. The family is entitled to protection by the state.

UDHR16 • ICCPR 23 • ICESCR10:1 • CEDAW16: 1a, b, c ICERD 5d, iv • PFA 274e, 277a

- The right of both parents to have the same rights in all matters relating to their children.

CEDAW 16: 1d, e, f • CRC18.

Discriminatory custody rights – harm amounting to persecution

Irrespective of Sonia's claim, it may be noted that the fear of losing custody over children because of discriminatory laws, e.g. laws stipulating unequal custodial rights, could constitute serious harm amounting to persecution, as referred to the above quotations from above UNHCR paragraphs regarding discrimination in laws. It could also be defined as harm amounting to persecution, by reasoning that losing custody of a child is a disproportionately severe penalty targeting women who divorce i.e. who divorce from their husbands because of domestic violence or other forms of gender-based violence or discrimination or who leaves for other reasons. By leaving they transgress the discriminatory laws and social norms concerning the recommended behaviour of "proper" women, and therefore risk to be punished through losing their child/children. This reasoning could be traced back to the UNHCR Gender Guidelines (2002) which state:

Where a penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution. Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.⁴⁴

⁴⁴ UNHCR Gender Guidelines (2002) para II.B.12.

Relevant case law
Discriminatory custodial rights

The following cases are examples of grant decisions in cases of discriminatory custodial rights.

Canada

- Anonymous CRDD T94-00001, July 26, 1994.
www.cisr.gc.ca/en/decisions/reflex/index_e.htm?action=article.viewanddid=5031

- Anonymous T96-03251, October 24, 1997
www.cisr.gc.ca/en/decisions/reflex/index_e.htm?action=article.viewanddid=7482

Various countries

Please note that a number of other relevant decisions from different countries concerning gender-related persecution may be found on various websites, e.g. on www.asylumlaw.org.

James Hathaway's framework for determining serious harm

It is also worthwhile mentioning that, although not part of UNHCR's doctrine, Professor James Hathaway's framework arguments found in his book *The Law of Refugee Status* (Batterworths, 1991) may be helpful in assessing whether a specific form of harm amounts to persecution.

Three levels of rights and the concept of serious harm

Hathaway refers to three levels of human rights and the situations in which their breach may constitute a serious harm amounting to persecution. He explains that:

The three levels of human rights are:

Level One Rights:

Rights stated in the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR) which countries may not derogate from even in times of compelling national emergency. They include:

- freedom from arbitrary deprivation of life (Art 6 ICCPR);
- freedom from torture, cruel, inhuman or degrading punishment or treatment (Art 7 ICCPR);
- freedom from slavery and servitude (Art 8 ICCPR);
- freedom from imprisonment for inability to fulfil a contractual obligation (Art 11 ICCPR);
- protection from retroactive criminal prosecution (Art 15 ICCPR);
- right to be recognized as a person in law (Art 16 ICCPR); and
- freedom of thought, conscience and religion (Art 18 ICCPR).

According to Hathaway failure of the state of origin to ensure these first level rights will, under any circumstances be considered harm amounting to persecution.

Level Two Rights:

Rights stated in the UDHR and in the ICCPR from which states may derogate during a state of emergency which has been officially proclaimed. These rights include:

- freedom from arbitrary arrest and/or detention (Art 9 ICCPR);
- right to equal protection for all (Art 26 ICCPR);
- rights, in criminal hearings, to a fair and public hearing and a presumption of innocence (Art 14 ICCPR);
- protection of family and privacy (Art 17 ICCPR);
- right to freedom of movement inside a country and to choice of residence (Art 12 ICCPR);
- freedom to leave and return to one's country of origin (Art 12 ICCPR);
- liberty of opinion, expression, assembly and association (Arts 19, 21, 22 ICCPR);
- right to form and join trade unions (Art 22 ICCPR);

- right and opportunity to take part in the conduct of public affairs, and vote in periodic and genuine elections (Art. 25 ICCPR); and
- right to have access to public employment without discrimination (Art 25 ICCPR).

A failure to ensure these rights will generally be a violation of a state's basic duty of protection of its nationals unless 1) the government's derogation was strictly required by the problems of a real emergency situation, and 2) the derogations are not applied in a discriminatory way and 3) that the derogation was not inconsistent with other aspects of international law. Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted.

Level Three Rights:

Rights in the UDHR and carried forward in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) 25. The state will be in breach if it secures the rights in a discriminatory manner or where it takes no steps to ensure the rights despite having adequate finances to do so. These rights include:

- right to work, including just and favourable conditions of employment, remuneration and rest (Arts 6 and 7 ICESCR);
- right to an adequate standard of living including: food, clothing, housing (Art 11 ICESCR);
- right to enjoyment of highest attainable standard of health (Art 12 ICESCR);
- right to education (Arts 13 and 14 ICESCR);
- protection of the family, especially children and mothers (Art 10 ICESCR); and
- right to engage in and benefit from cultural, scientific, literary and artistic expression (Art 15 ICESCR).

According to Hathaway:

A state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond or where it excludes a minority of its population from their enjoyment. Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.⁴⁵

⁴⁵ Hathaway as quoted from IAA Asylum Gender Guidelines para. 2A4, UK, (2000).

Agents of persecution – state or non-state?

It may be recalled that agents of persecution can be both state and non-state agents, which is further outlined in several UNHCR policy documents, *inter alia*:

- There is a scope within the refugee definition to recognize both state and non-state agents of persecution. While persecution is most often perpetrated by the authorities of a country, 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.⁴⁶
- Acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish.⁴⁷
- There may be a basis for granting refugee status where a government cannot or will not protect women who are subject to abuse for transgressing social standards. The government need not itself have been the instigator of the abuse.⁴⁸

2) IS THE FEAR WELL-FOUNDED?

The subjective element of well-founded fear⁴⁹

You may state that presupposing Sonia is credible, it can be accepted that she has a genuine fear of persecution and thus fulfil the subjective element of well-founded fear. The issue of credibility will be discussed more thoroughly later on in this section, although one may conclude that no reasons have appeared which put her credibility into question.

Regarding the subjective element, you may mention that a possible questioning of the subjective element must be done with great sensitivity and from a holistic perspective.⁵⁰ To take an example, it sometimes happens that the subjective fear is questioned on the basis of the applicant's delay in presenting her asylum application to the authorities in the country-of-asylum. Thus the fear is perceived to be less genuine. In order to avoid an unnecessary questioning of the genuineness of the applicant's fear, it is relevant to stress the importance of looking at the claim holistically and also of whether the applicant has presented a reasonable explanation to her delay. The psychological effects of torture, including gender-based violence by state or non-state agents, may well be a reasonable explana-

⁴⁶ UNHCR Guidelines (2002) para. II.B.19. See also UNHCR Handbook, Geneva, (1992) para.6.

⁴⁷ UNHCR Guidelines on the Protection of Refugee Women, Geneva (1991) para.71.

⁴⁸ UNHCR Guidelines on the Protection of Refugee Women, Geneva (1991) para.71.

⁴⁹ See for example the Michigan Guidelines on well-founded fear (2004), for a summary of the various ways of applying the subjective element of the criteria of well-founded fear.

⁵⁰ See for example UNHCR Handbook para 40-41 and 201, UNHCR Gender Guidelines (2002) para II A.7.

tion to delays in this regard.⁵¹ However, it is also worth noting that the perception of fear will differ from person to person and that applicants may even not themselves be fully aware of the fact that they should be afraid. This could be the case of children or persons who are severely traumatised or mentally unfit.⁵²

The objective element of well-founded fear – Personal circumstances

Sonia claims that she has experienced serious and repeated acts of gender-based violence and discrimination and that she has not received due assistance and protection from the relevant authorities. She does not have any documentary evidence in the form of medical records, police reports etc. However, it may be recalled that this is a very common phenomena in general, particularly in gender-related claims, and that where it is not possible to obtain supportive documentation an applicant's credible and unrefuted testimony standing alone is sufficient to establish a well-founded fear of being persecuted. The applicant's testimony may thus stand alone.

Furthermore, in the process of assessing Sonia's claim for asylum, the RSD worker would have explored Sonia's personal characteristics as well as her personal experiences, thoughts and feelings and that of other women, regarding gender-relations and violence in the family, community and the state as from the time of flight to arrival in the country-of-asylum in more depth. However, the RSD worker would have kept in mind that he/she may not be able to get information revealing the true extent of the persecution suffered or feared:

Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.⁵³

The objective element of well-founded fear – Country of origin information

Considering the information provided, Sonia's personal experiences and fear are supported by country of origin information regarding the prevalence of gender discriminatory laws and policies, social norms, domestic violence and failure of state protection, at present and at the time of her flight.

⁵¹ See for example UNHCR Gender Guidelines (2002) para III.35.

⁵² Gorlick, Brian Common burdens and standards: legal elements in assessing claims to refugee status, p.6 in New Issues in Refugee Research, Working paper No. 68 (October 2002), published by Evaluation and Policy Analysis Unit, UNHCR, Geneva and available at: www.unhcr.ch.

⁵³ UNHCR Gender Guidelines (2002) para III.35.

Fear of gender discriminatory laws, policies and practices

In the process of assessing Sonia's claim that she fears gender discriminatory laws, policies and practices, one could initially conclude that she has shown that she has experienced past persecution. There thus exists a presumption of a well-founded fear of future persecution, given that the country of origin situation has not changed significantly since her flight. Considering the country of origin information available, some positive changes seem to have taken place with regard to state laws and policies which discriminate against women, but not to the extent that one may consider the situation to have changed significantly. Consequently, Sonia may be considered to have a well-founded fear of future state persecution in the form of discriminatory laws, policy and practice, which may alone or on cumulative grounds amount to persecution. Concluding a well-founded fear of state persecution implies that state protection would be considered absent all over the country.

Fear of gender-based violence and discrimination in the hands of her husband

As regards Sonia's fear of being subjected to further violence or even to be killed by her husband, one may conclude that the country of origin information available supports her notion that she was subjected to serious mental, physical and sexual abuses by her husband in the past, without getting effective state protection. This leaves a presumption of future state and non-state persecution, given that the country of origin situation has not changed significantly after her flight. Based on the country of origin information available, the situation does not seem to have changed significantly compared to the time she left her country of origin and she may thus be considered to have a well-founded fear of being subjected to violence or even being killed by her husband.

However, the information available does not reveal whether there exists detailed documentary evidence supporting the notion that domestic violence is also frequent in the specific area where she comes from and among the minority community she belongs to, but this absence of information should not be held against her as it is an internationally recognized fact that it may be difficult to obtain detailed country of origin information in gender-related claims and as there are yet no argument put forward which indicate that women in certain parts of the country would not be targets of domestic violence and the state inaction.

Procedural aspects considered in the course of assessing the claim

Referring to the above conclusions on whether Sonia's fear of state and non-state persecution could be characterised as well-founded, it may be recalled that in the

process of assessing her claim for asylum, the RSD worker would have collected information on the human rights situation in the country of origin in general, and specifically concerning the prevalence of spousal violence, gender-discriminatory laws and practices including the state's failure to extend protection to women, as stated in several UNHCR policy documents.

Adjudicators should be familiar with the status and experiences of women in the country from which a refugee claimant has fled. Among the issues of which interviewers should be aware are:

- the position of women before the law, including their standing in court, the right to lay a complaint and give evidence, divorce and custody law, the right to own property, the right to have or refuse an abortion;
- the political rights of women, including the right to vote, to hold office and to belong to a political party;
- the social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, and a job or remunerated activities, the status of a widow or divorcee, and freedom of dress;
- the incidence of reported violence against women, the forms it takes (such as sexual assaults, honour killings, bride burnings), protection available to women and the sanctions or penalties on those who perpetrate the violence; and,
- the consequences that may befall a woman on her return in light of the circumstances described in her claim.⁵⁴

Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.⁵⁵

He or she would perhaps also have systematically compared the country of origin information available with the relevant articles in CEDAW and DEDAW. Nevertheless, it should be kept in mind that the RSD worker would have considered that all the required information may not be readily available in gender-related claims and that there may instead be a need for collecting testimonies from similarly situated women, as described in the UNHCR Gender Guidelines (2002):

⁵⁴ UNHCR Guidelines on the Protection of Refugee Women, para.73, Geneva (1991).

⁵⁵ UNHCR Gender Guidelines (2002) para. III.36x.

No documentary proof as such is required in order for the authorities to recognize a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognize that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.⁵⁶

The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that the cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is necessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers civilians) etc. as well as the motivation of the perpetrators may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.⁵⁷

The RSD worker would also have remembered that although the burden of proof lies with the applicant, i.e. Sonia, there is a shared responsibility for fact-finding and the burden of proof can shift, as for example shown in the following decision from the UN Committee against Torture⁵⁸:

UN Committee against Torture Communication No. 149/1999:

8.5. The Committee notes that the State party questions the author's credibility primarily because of her failure to submit verifiable information and refers in this context to international standards, i.e. the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, according to which an asylum-seeker has an obligation to make an effort to support his/her statements by any available evidence and to give a satisfactory explanation for any lack of evidence...

⁵⁶ UNHCR Gender Guidelines (2002) para. III.37.

⁵⁷ UNHCR Gender Guidelines (2002), para III.36xi.

⁵⁸ See for example UNHCR Handbook, para. 195-205. For an extensive discussion about standards of proof and related issues, please read Gorlick, Brian. Common burdens and standards: legal elements in assessing claims to refugee status, p.6 in New Issues in Refugee Research, Working paper No. 68 (October 2002), published by the Evaluation and Policy Analysis Unit, UNHCR, Geneva. Available at: www.unhcr.ch.

The Committee notes the State party's position that the author has not fulfilled her obligation to submit the verifiable information that would enable her to enjoy the benefit of the doubt. However, the Committee is of the view that the author has submitted sufficient details regarding her sighe or mutah marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station, etc., that could have, and to a certain extent have been, verified by the Swedish immigration authorities, to shift the burden of proof. In this context the Committee is of the view that the State party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture.

8.7. The State party does not dispute that gross, flagrant or mass violations of human rights have been committed in Iran. The Committee notes, *inter alia*, the report of the Special Representative of the Commission on Human Rights on the situation of human rights in Iran (E/CN.4/2000/35) of 18 January 2000, which indicates that although significant progress is being made in Iran with regard to the status of women in sectors like education and training, "little progress is being made with regard to remaining systematic barriers to equality" and for "the removal of patriarchal attitudes in society". It is further noted that the report, and numerous reports of non-governmental organizations, confirm that married women have recently been sentenced to death by stoning for adultery.

9. Considering that the author's account of events is consistent with the Committee's knowledge about the present human rights situation in Iran, and that the author has given plausible explanations for her failure or inability to provide certain details which might have been of relevance to the case, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Iran or to any other country where she runs a risk of being expelled or returned to Iran.⁵⁹

Furthermore, in the process of assessing the well-founded fear criteria, the RSD-worker would have recalled that the testimony of the applicant may stand alone in the absence of documentary proof, and give rise to a grant decision, as the applicant should be given the benefit-of-the-doubt if her testimony is coherent and plausible, and does not run counter to generally known facts.⁶⁰ Equally im-

⁵⁹ UN Committee against Torture Communication No. 149/1999.

⁶⁰ UNHCR Gender Guidelines (2002) para. III.37, UNHCR Handbook, para. 203, but also para. 195-205. For an extensive overview and discussion on standards of proof and related issues, please read Gorlick, Brian "Common burdens and standards: legal elements in assessing claims to refugee status" p.6 in *New Issues in Refugee Research*, Working paper No. 68 (October 2002), published by Evaluation and Policy Analysis Unit, UNHCR, Geneva and available at www.unhcr.ch.

portant for the RSD worker would have been to recall that survivors of torture, including sexual and other forms of gender-based violence, may often be severely psychologically affected by their experiences; something which in general terms may influence their possibilities to give consistent and coherent testimonies and thus, according to UNHCR policy documents, should be considered while making the refugee status determination:

Recognize that women who have been sexually assaulted exhibit a pattern of symptoms that are described as Rape Trauma Syndrome. These symptoms include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion. These symptoms will influence how a woman applicant responds during the interview. If misunderstood, they may be seen wrongly as discrediting her testimony.⁶¹

The UN Committee against Torture has also acknowledged the need to consider effects of torture on applicant's possibilities of giving coherent and consistent testimonies, *inter alia*:

UN Committee against Torture Communication no. 41/1996

The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims.⁶²

www1.umn.edu/humanrts/cat/decisions/CATVWS41.htm

Another relevant decision is:

USA

Matter of S- A-, 22 I. and N. Dec. 1328 (Board of Immigration Appeals [BIA]), 2000, USA

www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3433.pdf

In the course of assessing Sonia's claim, it would also have been crucial for the RSD worker to have a thorough knowledge of the issue of gender-based violence and discrimination and to have an understanding of its causes and possible consequences. This is in order to limit the risks of unreasonably questioning her fear during the RSD, e.g. by arguing that she had returned to her abusive husband

⁶¹ UNHCR Guidelines on the Protection of Refugee Women, para.72, Geneva (1991).

⁶² UN Committee against Torture (CAT) Communication no. 41/1996, para. 9.3; all decisions by CAT can be found at www.unhcr.ch.

several times, that she should have tried harder to divorce her husband or get state protection or that she should have been able to present medical records or other written evidence in support for her claim.

A need for further assessment:

Sonia is considered to have a well-founded fear of state persecution, which leaves a presumption of state inability or unwillingness to give protection. However, as for Sonia's well-founded fear of her husband, a non-state agent, there is a need to look more deeply into the issue of the availability of state protection and whether a substantial change of the country of origin situation has occurred since she left with regard to the authorities' willingness or ability to offer her effective and durable protection against domestic violence.

3) IF THE PERSECUTOR IS NOT AN AGENT OF THE STATE, IS THE STATE ABLE AND WILLING TO OFFER PROTECTION?

Based on available information, discriminatory laws, policies and practices allowing violence against women by non-state agents to occur with impunity, and presupposing that no new contradictory information of relevance is known, it may be concluded that it would not be reasonable to expect Sonia to turn to the authorities for protection against her husband or to move to another part of the country.

In the course of assessing whether or not Sonia would be unable or, because of her fear, unwilling to avail herself of the protection of the state, the RSD worker would have recalled the content of several UNHCR policy documents outlining the need to collect relevant country of origin information on the availability of state protection and to be aware that the required information is often unavailable, one explanation being that statistical data and reports of incidents of gender-based violence may be absent due to underreporting of cases, lack of persecution in gender-related claims etc. In addition, international and national human rights organisations may not have detailed information either, as research on the human rights of women is a relatively recent phenomena and focus has long been on human rights abuses occurring in the so called public sphere. The relevant paragraphs are quoted above under the heading Is the Fear Well-founded? e.g. UNHCR Gender Guidelines (2002) para. III.36x and III.37 and UNHCR Guidelines on the Protection of Refugee Women (1991), para.73. Paragraphs outlined in documents from other UN bodies may also assist in the assessment of availability of state protection.

Assistance during an assessment of the availability of state protection can be provided from provisions outlined in CEDAW and DEVAW as well as from the concept of due diligence elaborated on by *inter alia* the Inter-American Court of Human Rights. One tool to establish whether the state has acted with due diligence would be to see to what extent the state has followed the recommendation no. 19

(1992) of the Committee on the Elimination of Discrimination against Women, and thus has launched:

Excerpt of recommendation no. 19, of CEDAW:

- Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace;
- Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
- Protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or who are at risk of violence.

Another tool to further evaluate the existence of state protection could be to answer the following questions, originally posed by the UN Special Rapporteur on Violence against Women.

Questions formulated by the UN Special Rapporteur on Violence against Women with the purpose of evaluating states' responses to gender-based violence:

- Has the State Party ratified all the international human rights instruments including the Convention on the Elimination of All Forms of Discrimination against Women?
- Is there constitutional authority guaranteeing equality for women or the prohibition of violence against women?
- Is there national legislation and/or administrative sanctions providing adequate redress for women victims of violence?
- Are there executive policies or plans of actions that attempt to deal with the question of violence against women?
- Is the criminal justice system sensitive to the issue of violence against women? In this regard, what is the police practice? How many cases are investigated by the police? How are victims dealt with by the police? How many cases are prosecuted? What type of judgements is given in such cases? Are the health professionals who assist the prosecution sensitive to issues of violence against women?
- Do women who are victims of violence have support services such as shelters, legal and psychological counselling, specialized assistance and rehabilitation provided either by the government or by non-governmental organizations?
- Have appropriate measures been taken in the field of education and the media to raise awareness of violence against women as a human rights violation and to modify practices that discriminate against women?

- Are data and statistics being collected in a manner that ensures that the problem of violence against women is not visible?

Yet another tool could be to check whether the state has acted in accordance with the Declaration on the Elimination of Violence against Women (DAVAW), Article 4.

DEVAW, Article 4:

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
- b) Refrain from engaging in violence against women;
- c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

...and remember that the required information is often absent in gender-related claims, in order for it not to affect the applicant negatively.

Unreasonableness of requesting the applicant to turn to the authorities for protection, considering past experiences

It would not be reasonable to expect Sonia to turn to the authorities, considering that she has previously tried in vain. Considering the available country of origin information and a common rational fear of retaliation among women subjected to domestic violence and interlinked violations, it would even have been unreasonable to expect it if she hadn't tried to report to the police before, as illustrated by the following excerpt from an Australian decision:

RRT Reference: V02/14674 February 13, 2004:

In the situation before it, the Tribunal is satisfied as to the reasons provided by the applicant as to why she did not report her rape to the police, namely that she genuinely feared retaliation and further assault if she reported the attack and, secondly, that police protection is in any rate unavailable and ineffective.

Unreasonable as no significant changes in the country of origin

As for the assessment of whether any substantial changes have occurred with regard to availability of state protection for women subjected to domestic violence, the following decision from Australia is of relevance.

RRT Reference: N03/45774, November 26, 2003, Australia:

It is the Tribunal's view that the applicant did not make a meaningful attempt to obtain assistance from the authorities in Brazil. Nevertheless, the information from external sources regarding the state's failure to protect women from domestic violence points to factors such as endemic graft, a large case backlog, inefficiency, and lack of resources, funding and training.

The independent evidence also indicates that systematic attempts have been made to improve the position of victims of gender based violence, for example with the establishment of a large number of delegacias across Brazil.

On the other hand, the applicant also gave evidence as to the status of women in Brazil. She stated that Brazil is a male dominated society, and that women have no access to protection from a violent husband because the authorities do not intervene in so-called domestic disputes. The applicant claimed that men who kill their wives are rarely if ever convicted because it is considered acceptable for husband's to beat their wives. Information from external sources supports these claims. It indicates that despite attempts by the government to promote protection for all women, and a 1991 decision by the Superior Tribunal of Justice, Brazil's highest court of appeal in criminal and civil matters, regarding the 'honour defence', the police and courts continue to deny married women protection from abusive husbands. Attitudes within these agencies, and to some extent reflected in the wider community, are based on the view that a man essentially has the right to treat his wife as he wishes. The police are reluctant to intervene when a woman is battered by her husband and, on the rare occasion when action is taken, the courts are reluctant to act against the perpetrator.

The Tribunal accepts the assessment of Human Rights Watch that the "continued application of the honour defence, which has no basis in law, is inherently biased, and is almost exclusively applied to wife murder... represents a pattern of discriminatory treatment by the criminal justice system of female victims of domestic violence. This pattern demonstrates that [the government of] Brazil does not meet its international obligations to guarantee to its female citizens the equal enjoyment of their civil and political rights and the equal protection of the law".⁶³

⁶³ Human Rights Watch, 1995, The Human Rights Watch Global Report on Women's Human Rights available at: www.hrw.org.

The Tribunal is satisfied by the evidence that the level of protection available to women in Brazil, who are at risk of serious harm by their husbands, is significantly lower than the protection offered to other citizens in the community who are also the victims of violence. The Tribunal has formed the view, from the external information summarized above, that this differential treatment of women by the authorities demonstrates a discriminatory view towards women by the police and courts that they are undeserving of equal protection under the law.

www.austlii.edu.au/cgibin/disp.pl/au/cases/cth/rrt/N0345774.html?query=title+%28+%22rrt+reference+%20n03+45774%22+%29

Unreasonable considering her being severely traumatized

Furthermore it would be unreasonable to expect Sonia to turn for protection considering that she is severely traumatised after having been subjected to physical, mental and sexual violence during such a long period, as illustrated by the following excerpt from a Canadian decision as well as from a UK decision further down:

Decision no. TA2-20842, (Canadian Immigration and Refugee Board)
May 26, 2003:

The panel finds that the claimant's psychological vulnerability and the evidence of incidents of persecution do merit a positive determination. In the case at bar, the psychological vulnerability has arisen because of a series of traumatic and stressful incidents of physical assaults and verbal abuse throughout her relationship with X.

Could the claimant have continued to stay there? The panel thinks not. The panel finds that it is not objectively reasonable for her to continue to stay in St. Vincent for the reasons stated previously in this decision. The cumulative effect of the abuse she suffered at the hands of X, her economic dependency on him and her unsuccessful attempts to obtain effective protection from the police resulted in a nervous breakdown, as attested by the psychological report.

The panel found the testimony of the claimant to be credible. The demeanour of the claimant when testifying about this period in her life was indeed very genuine and credible. She stated that the past events in her life had resulted in a nervous breakdown. The demeanour of the claimant throughout the hearing demonstrated a sense of fear, even of the panel member. Her testimony was credible, and her reason for not seeking help from the authorities was simply that she was scared.

The claimant's situation has to be assessed against the standard of protection required of a nation, and is described in the Federal Court of

Appeal decision Zalzali as: "...adequate though not necessarily perfect."

There is some information before the panel regarding legal avenues that are open to women, although only a small amount actually addresses the issue of protection. In the Response to Information Request there is a reference to the Domestic Violence Act in 1995. The claimant was asked at the hearing if she was aware of the avenues open to abused women in her country of origin. She stated that she has never heard of these avenues and she only went to the police and when they did not help, she just took the abuse.

Documentary evidence on state protection available for abused women is mixed. In the panel's view the claimant is not capable of accessing even what is available.

In conclusion the panel finds that there is a serious possibility in the particular circumstance before the panel that the claimant would continue to face persecution for which she would not receive adequate protection from the state.

www.irb.gc.ca/rtf/reflex/fulltext/218c/rpd/TA220842S_e.rtf

Additional factors influencing the reasonability analysis

The fact that Sonia's husband has connections with law enforcement officers would make it even more unreasonable to request her to turn to the authorities as would the fact that she reportedly belongs to an ethnic minority, considering that it could also negatively influence her (practically non-existent) possibilities to get effective and durable state protection. It would not be unreasonable to believe that her belonging to an ethnic minority could make her a target of double discrimination as regards the state's failure to give her protection.

Three questions to assist in making the reasonability test with regard to state persecution

Generally, the RSD worker assessing Sonia's claim would have recalled that three questions have been suggested by Dr Heaven Crawley to assist in the assessment of whether it would be reasonable or not to turn to the authorities for protection against gender based violence and discrimination by non-state agents:

a) Whether the applicant sought and was denied protection by the government;

b) Whether the governing institutions and/or government agents were aware of the harm to the applicant and did nothing to protect her or were unable to;

c) Whether the applicant has reasons to believe that it was or would be futile to seek the protection of the government (e.g. if the government has denied protection to similarly situated women, or if the government has systematically failed to apply existing laws).⁶⁴

The answers to these questions all support the notion that it would be unreasonable to expect Sonia to turn to the authorities for state protection against her husband.

Factors which may make it reasonable for a woman not to seek state protection

Moreover, in the course of assessing Sonia's claim, as well as other claims concerning domestic violence, the RSD worker would have remembered that there might be several reasons for why it may even be reasonable for a woman *not* to report domestic violence and other forms of gender-based violence to the police, *inter alia* fear for retaliation by the perpetrator/s, persuaded that a report would not result in protection, fear to be subjected to violence by the police authorities, fear of being subjected to criminal charges (for example in countries where women may fear being rightfully or wrongfully accused of extra-marital sexual relations and thus risk corporal and sometimes capital punishment from the state, and perhaps also from non-state agents), fear of being socially ostracised for transgressing the social norms by reporting to the police etc.⁶⁵

The fact that a state cannot transfer its responsibilities to NGOs

The RSD worker would furthermore have recalled that the responsibility to offer effective and durable protection could never be transferred from a state to NGOs or other non-state agents, according to international human rights law.

Internal flight alternative – a reasonability and relevance analysis

In the course of assessing Sonia's claim, the RSD worker would have recalled UNHCR Guidelines on Internal Flight or Relocation Alternative (2003) which state the need to make reasonability and relevance analysis with regard to the possibility of finding an internal flight alternative. A gender-sensitive assessment is needed in order to avoid placing a woman at risk of further persecution, for example considering that single women may in many contexts be vulnerable to ostracism, harassment and exploitation due to gender discriminatory social norms

⁶⁴ Crawley, Heaven. Refugees and Gender: Law and Process, p. 53, Jordan Publications, London, (2001).

⁶⁵ For an extensive discussion about barriers to justice, see for example It's in our hands, Stop Violence against Women, Chapter 7, Amnesty International (AI Index: ACT 77/001/2004).

and that a socio-economic difficult situation may force women into prostitution in order to sustain their living.

As regards Sonia, considering the available country of origin information, one may conclude that the failure of the state to extend protection to women is not a problem limited to one specific area of the country, but rather a countrywide problem, as illustrated by the following excerpt from an Australian decision which also draw attention to the double discrimination women from marginalized group may face with regard to state protection:

The Tribunal is not satisfied by the evidence before it that the applicant has protection available to protect her from the serious harm which the Tribunal is satisfied the man intends to inflict on her. The Tribunal finds that the independent evidence before the Tribunal is sufficient for the Tribunal to find that there is a sustained and systematic absence of state protection for the lower caste women in abusive marriages attributable to a perception of them by the state as not deserving of equal protection under the law with higher caste and male members of the society. The Tribunal further finds that the applicant's caste and her being a woman, represent membership by her of these particular social groups, and that this membership is an essential and significant motivation for that lack of protection.

The Tribunal has also considered the option of relocation. However, the Tribunal finds that the fact that the husband knows the woman's daughter with whom she would have continued contact, as well as the relatively small size of Kathmandu and Nepalese urban society in general, would mean that she could not effectively hide from him. Moreover, the problem with unsympathetic authorities is a national rather than local problem, and so relocation is not reasonable in the circumstances of the applicant. This being so, the Tribunal has decided that the applicant has a well-founded fear of persecution in Nepal due to her caste and her membership of a particular social group.

Considering the absence of state protection all over the country, the prevailing discriminatory laws and social norms on gender-roles, (which would be likely to result in a precarious situation for a single woman, who also belongs to an ethnic minority) as well as her poor state of health, it would be unreasonable to request her to move to another part of the country. Conditions would be unduly harsh, i.e. she would face a difficult socio-economic situation because of gender discriminatory social norms and policies, and she would not have a possibility of durable and effective state protection, should her husband find her. The following excerpt from a UK decision is of relevance for reasonability assessments with regard to the availability of state protection and internal flight alternative for single women:

Decision regarding woman X from the Immigration Appeals Tribunal (IAT), December 30, 2004, UK:

The fact that the appellant is a single woman, without male protection, would expose her to considerable risks including a real risk of serious physical harm from which she would be unable to seek or obtain protection.

"The Appellant has shown that she had in the past and continues to have to day, a well-founded fear of persecution in Takhar and elsewhere in Afghanistan outside Kabul city, at the hands of warlords and their militia of the Jamiat-e-Islami, against whom the authorities of the ATIA did not and will not protect her."... The IAT relies on expert opinion ("According to Dr Lau, women avoid coming into contact with the police since the largely untrained and uneducated force is unlikely to protect a single woman against harassment") to conclude that "We find that the Appellant would effectively be prevented from even reporting any alleged crime."

"Whilst the security situation in Afghanistan is such that no reliable statistics on the position of women in society and incidents of harassment are available, he (the expert witness) is of the opinion that there is little doubt that the state is unable to protect women, and that the task of protection of women falls to the male members of her family, especially their husbands. Women who find themselves without the effective protection of their families are in a very vulnerable and dangerous position"... "Her compromised mental health is a further factor to be taken into consideration, which increases the difficulties faced by her, on return to Kabul, and which renders her less able than a woman who is not recovering from PTSD, to withstand the demands of daily life in Kabul city, in seeking to protect herself and her children."... "We find that the Appellant has not shown that her fear of that persecution for the reasons given, is well-founded to day, should she return to Kabul city... We do find, however, that the evidence before us, viewed in its totality, shows, for all the reasons given, that it would be unreasonable, and unduly harsh, to require this Appellant to go to Kabul city. It is not to be regarded as an alternative place of safety for her."⁶⁶

⁶⁶ Please contact the UNHCR Department for International Protection to get the full-text decision.

4) IS THE FEAR OF PERSECUTION LINKED TO A CONVENTION GROUND?

Concerning possible reasons for Sonia's fear of being subjected to violence and killing by her husband without getting due state protection, it should be highlighted that the following grounds may apply: particular social group, political opinion, nationality and race.

Particular social group

Does Sonia belong to a particular social group?

Sonia's particular social group can be defined by her sex, her marital status and her position in a society that condones discrimination against women. In the society, women are a social subset defined by innate and immutable characteristics (their sex) and they are treated differently than men. Their civil status (married) also identifies them as a group in society, subjecting them to different treatment and standards, both in the law and in practice. Their being married women make them subject to particularly discriminatory treatment according to the country's law, its implementation and societal norms. That Sonia protested against her husband's violence and sought the protection of state authorities also marks her as a person who has transgressed the social mores of her society, which condone and institutionalise discrimination against women. Women are expected to accept their fate without protest and without involving the authorities at all. This is another element identifying her as part of a particular social group.

Is the persecution Sonia suffered and fears because of her membership in a particular social group?

Sonia has clearly established a well-founded fear of being persecuted. This fear, however, must be related to one or more of the Convention grounds, i.e., there must be a causal link to fulfil the for-reasons-of requirement in the refugee definition.

Can Sonia's fear of persecution be linked to her membership in a PSG?

The Convention ground must be a relevant contributing factor, though it needs not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link (for reasons of) must be explicitly established (e.g. some Common Law states) while in other states causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of

the Convention ground to the claimant by the state or non-state agent of persecution is sufficient to establish the required causal connection.

In cases where there is a risk of being persecuted at the hands of a non-state agent (e.g. husband, partner or other non-state agent) for reasons which are related to one of the Convention grounds, the causal link is established whether or not the absence of state protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-state agent is unrelated to a Convention ground, but the inability or unwillingness of the state to offer protection is for reasons of a Convention ground, the causal link is also established.

Situations may arise where a claimant may be unable to show that the harm inflicted or threatened by the non-state agent is related to one of the five grounds. Nonetheless, if the state is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status.

In Sonia's case, according to the facts available, her husband abused her because she was a woman, his wife (over whom he thought he had the right to exercise full power and control), and he knew that he could do so with impunity. He also escalated his attacks against her when she protested his treatment. When she went outside the home to seek protection, she showed her opposition to domination by her husband and to the social mores of the society, which condones such domination. The Convention ground - her particular social group as defined above - was, therefore, a relevant contributing factor, sufficient to fulfil the causal link.

The persecution Sonia suffered at the hands of her husband (the non-state agent) and the fear of being persecuted by him in the future are for reasons of her social group, thus establishing the causal link regardless of the absence of state protection. The facts of the case indicate that the absence of state protection was for reasons of a Convention ground. There is ample evidence that the state discriminates against women and tolerates male dominance and abuse of married women by their husbands. Police and judicial inaction and criticism of Sonia for having transgressed social mores (that is, no longer tolerating abuse by her husband and trying to involve the authorities to protect her) are further evidence of this.

As for relevant case law, please see links to grant decisions under the heading Does the harm amount to persecution? Worldwide most grant decisions taken in gender related claims do identify the applicant as belonging to a particular social group, illustrated below by the following excerpt from a UK decision:

Decision regarding woman X from the Immigration Appeals Tribunal (IAT), December 30, 2004, UK:

For all the reasons that we have given, we find that the Appellant has shown that she is a member of a particular social group for the purposes of the Refugee Convention. She has shown that she has an immutable characteristic, namely that she is a woman. She has shown causal nexus of both political opinion and her status as an unprotected woman, and she has shown that women in Afghanistan are exposed to discrimination of the nature referred to by the House of Lords in the case of Islam and Shah. That social group is "women in Afghanistan."

Political Opinion

Did Sonia demonstrate a political opinion?

It may be concluded that while establishing the persecution ground it is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them, and often the applicant is not aware of the reasons for the persecution feared. It is not, however, the duty of the applicant to analyze his or her case to such an extent as to identify the reasons in detail.

Gender-related claims have often been analyzed within the parameters of membership of a particular social group. In some cases, however, the emphasis given to the membership of a particular social group ground has meant that the other applicable grounds, such as religion or political opinion, have been over-looked. In this case, the Convention ground of political opinion is also relevant.

Based on the information available, it may be concluded that Sonia has demonstrated a political opinion which is in opposition to the opinions of her two main persecutors identified above, e.g. her husband, whom she fears will subject her to further violence and even murder, and the state, which she fears will not extend its protection to her. Moreover, she has also demonstrated a political opinion in opposition to that of the majority society. The political opinion at issue is an opinion as to gender roles and thus an opinion as to the right to non-discrimination and to power relations in the state, society and family, i.e. that a woman should not have to be subjected to violence and discrimination. The country of origin information available supports Sonia's notion that her husband, the state and society have demonstrated a shared opinion that male domination through violence and discrimination is an acceptable phenomena and that women should conform to the prescribed gender roles (e.g. a wife shall rather endure violence than oppose her husband by divorcing, leaving him or reporting him to the police). The basis for this reasoning, where violence and discrimination against

women are interlinked with gender roles and thus power and control, can be traced back to the several UNHCR and other UN policy documents, *inter alia*:

[Violence against women]...is a manifestation of historically unequal power relations between women and men which have led to the domination over and the discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial mechanisms by which women are forced into a subordinate position compared to men.⁶⁷

Proponents of a broader interpretation of international law point out that virtually every society contains forms of brutality and violence directed at women. While assaults are committed throughout all sectors of society, gender-based violence, such as domestic violence, is directed primarily at women with the intention of depriving them of a range of rights and maintaining their subordination as a group. Because of the systematic and pervasive nature of this form of female subordination worldwide, it is argued that gender-based violence is a distinct form of discrimination which should constitute a violation of international human rights law in itself.⁶⁸

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. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature. A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods.⁶⁹

Sonia's verbal questioning of her husband, attempts to leave her husband and seek justice should thus be seen as a demonstration of her political opinion, mainly through her non-conformist behaviour but also through her verbal protests. The fact that she is seeking asylum is yet another action confirming her previously demonstrated opinion, and a definite sign that she wants to enjoy her right to a life free from violence, discrimination and death threats (and perhaps being killed) from her husband. Considering the overall link between violence and discrimination against women, laws, policies and social norms governing how a "proper" woman and a "proper" man should behave, and power relations in the

⁶⁷ UN Declaration on the Elimination of Violence against Women (1993).

⁶⁸ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85; E/CN.4/1996/53 para 53, February, 1996.

⁶⁹ UNHCR Gender Guidelines (2002) para. II.D.32.

state, society and family, women's resistance to male domination through violence and discrimination is to be regarded as political resistance. However, even if she had not, before her flight, overtly demonstrated her opposition to the abuse, by questioning her husband when he beat her or by trying to escape him and seek protection (in vain) from the authorities, it could nevertheless be concluded that she, at the time of her asylum application, holds a political opinion as to gender roles, contrary to that of her husband, the society and the state.

Can Sonia's fear of persecution be linked to political opinion?

There is a need to further analyze whether Sonia fears (future) persecution for reasons of her actual or imputed political opinion as to gender roles. One tool for finding that out is to first analyze whether her experiences of past persecution were for reasons of political opinion.

As a basis for discussion one may conclude, e.g. by reference to the above quoted UN policy documents, that violence and discrimination against women does not occur in a political vacuum, but in a political context of power relations. The political context in which Sonia was subjected to violence, is one characterised by gender discriminatory laws, policy and practice and social norms which tolerates domestic abuse. Sonia's husband and the state seem to share the opinion that women should be subordinate to men. The authorities' position is not the least manifested in the prevailing discriminatory laws and documented official practice regarding the (non) protection of women against gender-based violence, as well as in Sonia's experiences of being denied protection by the law enforcement authorities (the police ignored her claims for protection and a judge even explicitly told her that they do not interfere in private matters). It is clear that the state did not make any effort to act in accordance with the principle of due diligence and is not expected to do that for the moment either. Her husband's position is manifested in his statements that he regards himself as free to do whatever he wants, with impunity, and that she should do as he says as she is his wife, a position confirmed by his violent and controlling behaviour towards her.

Absence of state protection for reasons of the state's political opinion

Consequently, considering the country of origin information available and Sonia's personal experiences it is reasonable to believe that the absence of state protection is due to the state's political opinion, i.e. the opinion that domestic violence and male dominance in the family is acceptable. In other words, the state's failure to extend protection to her was because of her being a woman subject to domestic violence. The state's unwillingness or inability to offer her durable and effective protection could be labelled as a form of discrimination against women. Considering the country of origin information available regarding the issue of

state protection and that her testimony is considered credible, one may apply the principle of the benefit-of-the-doubt in the absence of documentary evidence supporting her claim that she was subject to double discrimination because of being a woman of an ethnic minority. As no substantial changes have occurred with regard to the availability of state protection, despite some positive legal changes, it can be concluded that the state would be unwilling or unable to provide effective and durable protection at a return, because of her being a woman. Her belonging to an ethnic minority would make authorities even more reluctant to give her protection. By concluding this it may be stated that the nexus criteria in the refugee definition is met and it may be appropriate to refer to the UNHCR Gender Guidelines (2002) which clearly states that where the risk of being persecuted at the hands of a non-state agent is unrelated to a Convention ground, but the inability or unwillingness of the state to offer protection is for reasons of a Convention ground, the causal link is established.

Persecution by her husband for reasons of her actual and imputed political opinion

There is a reason to proceed to the question of whether there exists a nexus between Sonia's experiences and fear of violence and discrimination at the hand of her husband, and her actual or imputed political opinion. Starting the discussion from her past experiences of persecution, it is possible to draw the conclusion that it is likely that her husband not only subjected her to domestic violence for reasons of his political opinion, but also subjected her to domestic violence for reasons of her actual and/or imputed adverse political opinion.

Underlying this conclusion is the well-established fact, reflected in various UN documents, that domestic violence generally involves a pattern of various abuses, ranging from verbal insults, criticism, isolation, control and threats of violence to actual rapes, beatings and death threats etc. In cases of domestic violence, an act of physical violence does generally not occur in isolation from for example psychological violence (why the whole pattern of possible abuses needs to be explored by the RSD worker). It is a continuum of violence.⁷⁰ Regardless of the woman's initial actual opinion regarding gender roles, the man may start to physically abuse his intimate partner. Generally, he may find a reason for why he believes that she is "provoking" him and inevitably "makes him" beat her; be it that she screams or opposes him when he forces her to have sex, or be it that he suspects her of being unfaithful or flirty or that she does not cook the dinner fast enough, wears the "wrong" dress, says the "wrong" thing, comes home too late,

⁷⁰ However, there may be cases of domestic violence where the beatings do not occur on a regular basis but where the psychological violence and the constant threat of violence have installed a state of fear and bad self-esteem in the victim's mind, who is under her husband's domination. Even under these circumstances, threats of violence and murder in case the woman leaves or report threats or any act of violence to the police, may be as real and life threatening as when a woman has been continuously and often exposed to physical, sexual and psychological violence.

openly challenges his judgement, expresses an opinion different to his, or irritates him in some way. The various reasons for why he, according to himself, may use violence against her do most probably have a common denominator, namely that he believes she does not behave the way he expects or wishes her to, which, according to him, is a reason for him to beat her, in order to correct her and make her behaviour in conformity with his expectations. This means that each time she does not behave according to his wishes, be it consciously or not, she transgresses the norms determined and interpreted by him, which prescribes how she should behave as a "proper" wife or partner. By transgressing the norms, she is perceived as challenging his political opinion as regards gender roles, i.e. he imputes her with the political opinion that she has the right to think and behave according to her own beliefs. At such a moment, she may risk punishment, as the punishment could be seen as a way of putting her in place and learning not to challenge his domination. Even when the husband may not be that articulate about his motives for beating her, it should be kept in mind that violence and explicit threats of violence (and sometimes of murder) perpetrated by an intimate partner would, together with a pattern of psychological violence, in most cases influence power relations. If the woman does not leave immediately, the mere fact that the husband has shown himself capable of beating her will probably influence her future behaviour and thoughts. Consequently, the violent husband exercises and/or asserts his power over her through violence.

Sonia has described how she endured psychological, physical and sexual violence at the hand of her husband. She may initially have been imputed with a political opinion as to gender roles in order for her husband to justify his first and subsequent acts of violence (the case does not reveal any details, but perhaps he accused her of not caring enough for him, being flirty, being adulterous or being in some way a "bad" wife and therefore needed to learn a lesson in how to behave). However, it should be kept in mind that according to Sonia's testimonies, she started to articulate her resistance to being abused, by questioning him and by trying to report him to the police and to leave him. Her verbal protests and non-conformist behaviour while protesting his abuse should be seen as demonstrations of political opinions contrary to those of her husband as well as the society and the state laws, policies and practices. It is clear that her husband subjected her to mental, physical and sexual violence as a means to exercise and reaffirm his power and control; he believed in his right to abuse her when he wanted to. Her increased political resistance was met by escalated violence and increased brutality, and he threatened to kill her, should she finally leave him (which is in fact a challenge of his right to dominate her). Based on the above, it is reasonable to conclude that Sonia's husband beat her for reasons of her imputed and actual political opinion as regards gender roles. Bearing in mind that she now has left him and thus definitely has challenged his power over her, there is reason to believe that she, on return, would risk being continuously persecuted by her husband, a non-state agent, for a Convention reason i.e. actual political opinion without being able to get state protection. As it is a prerequisite that "such opinions

have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant” it may be concluded that Sonia’s husband already knows about her political opinion. The causal link is established.

As a summary, it may be argued that Sonia has a well-founded fear of persecution by her husband for reasons of her political opinion and as well as it may be argued that she has a well-founded fear of state persecution, in the form of state failure to extend protection to her, for reasons of political opinion.

The following cases from the US may illustrate the how the link has been made in case law between a male perpetrator’s abuse and the convention ground political opinion:

Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir.) (1986), USA:

Olimpia has suffered persecution because of one specific political opinion Zuniga attributed to her. She is, she has been told by Zuniga, a subversive...

Here, when Zuniga manipulatively chooses to regard Olimpia as a subversive, he attributes to her the political opinion of a subversive, and she is being persecuted on account of a political opinion. The fact that Zuniga gave Olimpia the choice of being subjected to physical injury and rape or being killed as a subversive does not alter the significance of political opinion for Olimpia. Because of the status attributed to her by Zuniga and the political opinion that accompanied that status, Olimpia had to suffer the series of indignities that everyone sees as persecution...

w3.uchastings.edu/cgrs/law/fed/lazo.html

Matter of S C, (Boston, MA, Immigration Court, Feb. 19, 1998), USA:

The Ninth Circuit has recognized that flight from the clutches of the abuser can be an assertion of a political opinion...The Court in Lazo-Majano interpreted the persecutor’s actions, the beating, threatening, humiliating, and raping of the respondent, as asserting the political opinion that a man has a right to dominate. It follows that the respondent’s flight stood for her political opinion that a woman has a right not to be dominated by a man.

The applicant in the present case was forced into an abusive polygamous marriage as an attempt to gain additional control over her. The applicant had defied Malinke custom and asserted her own independence by having children out-of-wedlock and continuing a relationship that was against the wishes of the family patriarch. Her uncle specifically told her that she would be forced to marry the military officer. He also had Mr. S imprisoned

in order to separate him from the applicant. Much like the respondent in Lazo-Majano, the applicant asserted her opposition to being subjected to physical and mental abuse by attempting to flee from the forced-polygamous marriage. Both times she was brought back to her abuser by the authorities. Both times she was severely beaten for trying to escape. The second time she was even threatened with death. Despite the threats and the possibility of severe punishment, the applicant attempted to escape a third time.

The applicant has also voiced her opposition to gender-specific cultural norms by refusing to allow her daughter to be subjected to female genital mutilation. Although refusal to comply results in ostracization, the applicant has maintained her opposition by hiding her daughter from her family members.

The applicant has suffered harm and suffering on account of her political opinion at the hands of her husband in the form of beatings, threats to her life and freedom, and rape.

w3.uchastings.edu/cgrs/law/ij/58.html

The following case from New Zealand may illustrate how the failure of the state to extend protection to women can be linked to political opinion:

Refugee Appeal No 71427/99 (Refugee Status Appeal's Authority, 16 August, 2000), New Zealand:

...Our earlier findings at paras 74 to 79 were that the state in Iran condones, if not actively encourages, non-state actors such as husbands or former husbands to cause serious harm to women. In relation to this risk of non-state harm there will be an undoubted failure of state protection. Addressing now the issue of serious harm at the hands of the state itself and the failure of state protection in that regard, the evidence clearly establishes that the appellant is at risk of serious harm at the hands of the state and because the state is totalitarian in nature, no "state protection" will be available to her.

...As to the final question of nexus, we find that the 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. Given that Iran is a theocratic state, this means also that the persecution will be for reason of political opinion. But as we have stated before, the overarching reason why the appellant is at risk of persecution is because she is a woman. The social group category is therefore the primary Convention ground in relation to which a nexus has been established.

...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. The appellant is entitled to refugee status on this basis alone.

However, the further finding we make is that the serious harm which the state itself will inflict on the appellant and the reason for its failure to protect her from that harm will be for precisely the same Convention reasons. The appellant is entitled to refugee status on this basis as well.

[www.refugee.org.nz/Fulltext/71427-99.htm#IRAN:%20INEQUALITY%20OF%20MARRIAGE,](http://www.refugee.org.nz/Fulltext/71427-99.htm#IRAN:%20INEQUALITY%20OF%20MARRIAGE)

Gender discriminatory social norms and political opinion

Considering a possible fear of gender-discriminatory social mores resulting in a difficult socio-economic situation for a woman, with a possible risk of being forced into prostitution, the same type of argument as above applies. It may be argued that she has a well-founded fear of a difficult socio-economic situation with harassment, which has its base in gender discrimination and can amount to persecution on cumulative grounds. She fears this harsh situation as a woman, because she has transgressed the social norms dictating that wives should stay with their husbands, despite being subjected to violence, and not live alone. The harm could be seen as a punishment for transgressing the discriminatory social norms regarding gender roles and as her transgression of social norms as to gender roles equals political resistance, her fear of persecution should be understood as being for reasons of political opinion. Likewise, the state's inability and unwillingness to give protection against discriminatory social norms contributing to a difficult socio-economic situation and a vulnerability to sexual harassment and forced prostitution, could reasonably be argued to be, at least partly, for reasons of the state's political opinion that women should accept their "fate" and thus accept living in an abusive relationship rather than splitting up and living alone.

Nationality/Race

Sonia may also be considered having a well-founded fear of persecution because the state's unwillingness and inability to provide durable and effective protection to a woman belonging to the relevant ethnic minority group.

Concerning Sonia's fear of being subjected to gender discriminatory laws and social norms without receiving effective and durable state protection (e.g. resulting in a difficult socio-economic situation as a woman, with possible further vulnerability to harassments and risk of being forced into prostitution to earn a living), the applicable convention grounds would be a particular social group and political opinion. The same reasoning as above would apply.

COMPELLING REASONS...

It can be recalled that there might be situations where the applicant would be in need of international protection despite the fact that there is no longer a well-founded fear of (future) persecution. The basis of such reasoning could be found in article 1 C (5) of the 1951 Refugee Convention, which reads:

This Convention shall cease to apply to any person falling under the terms of section A if:
...(5) He can no longer, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

These provisions are explained further in the UNHCR Handbook (1992), para. 135-139, see for example para. 135 and 136:

135. 'Circumstances' refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory – change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of this sense of security, which international protection is intended to provide.

136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees.

It is frequently recognized that a person who –or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.

The principle is implicitly described in the following quote from a US decision:

Matter of S C, (A# redacted) (Boston, MA, Immigration Court, Feb. 19, 1998):

Once it is determined that the applicant: has established past persecution, the applicant shall be presumed also to have a well-founded fear of future persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. If this presumption is overcome and the applicant does not sustain his burden of establishing that he has a well-founded fear of persecution, the application for asylum shall be denied unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution. 8 C.F.R. § 209.13(b)(1); See also Matter of H-, Int. Dec. 3276 (BIA 1996).

W3.uchastings.edu/cgrs/law/ij/58.html

Matter of S- A-, 22 I. and N. Dec. 1328 (BIA 2000), USA:

We have recognized that past persecution can be a basis for granting asylum, even absent a showing of a well-founded fear of future persecution. See *Matter of H-*, 21 I and N Dec. 337, 339 (BIA 1996); see also *Matter of D-V-*, 21 I and N Dec. 77 (BIA 1995) (recognizing as persecution grievous harm suffered in Haiti in direct retaliation for activities on behalf of Jean-Bertrand Aristide); *Matter of B-*, *supra* (recognizing that the arrest, interrogation, and severe physical abuse of a Mujahidin supporter in Afghanistan constituted persecution); *Matter of Chen*, *supra* (recognizing that the severe repression of the applicant during China's "Cultural Revolution" constituted persecution).

www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3433.pdf

ANALYZING GENDER-RELATED CLAIMS: A NON-EXHAUSTIVE LIST OF POSSIBLE TRAPS

The following is a non-exhaustive list of examples of possible traps to fall into during RSD concerning gender-related claims. You may want to refer to it here, or while making a summary of the workshop (see next section) or not at all, depending of how much time you have left.

- The risk of not recognising various forms of gender-based violence and discrimination as harm amounting to persecution as well as other forms of state or non-state persecution which can be linked to gender, including sexual orientation. This could happen when there is a lack of knowledge of international human rights law, the concept of gender and the root causes and various aspects of gender-based violence and discrimination;
- The risk of requiring too much documentary evidence and require an unreasonably high level of proof, both as regards the applicant's personal details and past experiences, and as regards relevant country of origin information;
- The risk of requiring too many chronological details from the applicant regarding her experiences, not taking into account trauma and how it may influence memory, behaviour etc.;
- The risk of depoliticising experiences and fear of gender-based violence and discrimination as well as the state's unwillingness or inability to offer effective and durable protection to women and lesbian, gay, bisexual and transgender persons (lgbt-people);
- The risk of not recognising or of underestimating the risks connected with women's own organised political activity or their family members' political activities;
- The risk of expecting a heterosexual woman or lesbian, gay, bisexual or transgender person fearing persecution, including gender-based violence and discrimination to turn to the authorities or to relocate, without making an appropriate reasonability analysis based on the personal circumstances (e.g. disregarding experiences of trauma, class, caste or other belonging, sexual orientation, civil status or educational background etc.) and on relevant country of origin information concerning gender roles, e.g. the position of women and the availability of state protection against gender-based violence and discrimination;

- The risk of not reflecting upon the risk of forced marriages etc. in cases of lesbian asylum seekers fearing persecution because of their sexual orientation;
- The risk of expecting a woman to turn for protection to women NGOs, women shelters, churches/temples, or any other NGOs, without considering that the responsibility of the state for giving effective and durable protection, according to international law, can neither be reduced to temporary protection nor be transferred to NGOs.

ADDITIONAL REMARKS

Finally, if there is enough time, you could conclude the discussion on the case study exercise by pointing out that the judgement would not necessarily change if the country had good laws and policies on gender-based discrimination and violence e.g. if it would concern a Nordic, European or North American country.⁷¹ Nor would it necessarily change if Sonia had not turned to the police in vain before fleeing the country, if she had not belonged to an ethnic minority, if she had even voluntarily gone back to the husband once or twice hoping for a change, or if she had succeeded to divorce or if her husband had been convicted and imprisoned for a certain period of time.

If there is enough time, it may also be highlighted how discriminatory laws and social norms may influence negatively on law enforcement officials and thus on the possibilities for women to be treated as equal before the law and to get effective and durable protection.

⁷¹ There are for example cases where (Western) European women fleeing violence and death threats by their ex-partner have applied for and obtained asylum in North America.

CASE STUDY #2: SEXUAL ORIENTATION
DISCRIMINATORY LAWS, POLICIES,
PRACTICES AND SOCIAL NORMS

The case

The applicant, Farhad, is a 25 year old man from country X who left his home country and claimed asylum on false grounds, bringing false documentary evidence. His refugee claim has been declined on credibility grounds, cataloguing a number of inconsistencies and implausibilities in his account as well as suspected false documents handed in to support the claim.

In yet another claim Farhad has claimed that he fears persecution, in the form of death penalty and corporal punishment by the state or social ostracism and harassment by the society, for reasons of his homosexuality. He explains his earlier failure to advance his sexual orientation claim on two grounds. First, he did not know that a refugee claim could be based on sexual orientation and second, he felt too embarrassed to talk about sexual matters (particularly given that at the first instance hearing the refugee status officer and interpreter were both female) and did not know whether he would be treated fairly should he express his sexual feelings. However, after instructing his new solicitor (who speaks Farsi) following the first instance decline and after an attempted suicide in June 2003, he realised the necessity to disclose his homosexuality. He now claims that in his early teens he became aware of his homosexuality and from intermediate school he had emotional and sexual relationships with other boys. He had casual sexual relations with other men he would meet through his employers, other acquaintances or at a public park. He said that all his relationships were conducted furtively, the overriding imperative being to conceal everything from the parents of the other men, from his own mother and from the public at large. On two or three occasions the appellant attempted suicide because of his deep unhappiness. Addressing the point that subsequent to his expulsion from school in 1998, for reasons of his homosexuality, he had not been detained, arrested or otherwise ill-treated because of his homosexuality, Farhad spoke of the effect on him of the potential punishment of a hundred lashes and execution. He explains that if he returned he could not hide his sexual orientation. He further explains that for him homosexuality was not a matter only of sex, but of having loving relationships of the kind enjoyed by men and women. He can hardly endure thinking how life would be if he would have to return.

The Penal Code of Farhad's home country prescribes the severest of penalties for homosexuality (death). That penalty is not a historical footnote or relic on the state statute books. It is a very real penalty which is imposed from time to time, as is the lesser penalty of being flogged. There is strong theological and societal disapproval of homosexuality. To avoid criminal penalties (including lashings and potentially, the death penalty), extrajudicial beatings, societal disapproval, public

humiliation, discrimination and unequal treatment, homosexuals in his country must be discreet. They are denied a meaningful private life. For most, sexual orientation must be carefully hidden under the camouflage of feigned heterosexuality.

Questions to answer:

- Does the harm feared amount to persecution?
- Is the fear well-founded?
- If the persecutor is not an agent of the state, is the state able and willing to offer protection?
- Is the fear of persecution linked to a convention ground?

CASE ANALYSIS #2: SEXUAL ORIENTATION

GENDER DISCRIMINATORY LAWS, POLICIES, PRACTICES AND SOCIAL NORMS⁷²

Explanatory note

An analysis of the case is available below and could, together with the analysis of the previous case, assist you (the facilitator) as appropriate. You will also find some suggested additional remarks you may want to make, if you have time, in the end of the case study analysis. Please note that the analysis is *not* meant to be discussed in detail during the plenary review of the case, as there is no scope for that considering the limited amount of time available. The analysis is rather meant to serve as a guide to you as a facilitator in order to make you feel comfortable and well prepared to discuss the case study in plenary. The cases from different countries, which are referred to in the analysis, are not necessarily precedent cases and should only be treated as examples of how gender-related claims can be analyzed. Be sure to check the websites indicated in order to ensure that you are updated on relevant national and international case law and the most recent decisions.

1) DOES THE HARM FEARED AMOUNT TO PERSECUTION?

A gender-sensitive assessment of whether the harm feared amounts to persecution shall be assessed with reference to relevant international human rights instruments, e.g. both general human rights treaties and decisions by international and regional bodies and courts⁷³

Various breaches of human rights - because of sexual orientation

Farhad fears of being subjected to discriminatory laws, corporal punishment and the death penalty in the hands of the state, as well as discriminatory social norms resulting in harassment and social ostracism by individuals in the society, involve breaches of the several rights, *inter alia*:

⁷² For a more extensive analysis, please see the previous case study as the gender related concerns which are highlighted in that case, generally apply also to this kind of case, as persecution because of sexual orientation does form a gender-related asylum claim. The content of the framework of analysis is inspired by various UNHCR gender guidelines and documents, the UNHCR Handbook (1992), the book Refugees and Gender: Law and Process by Heaven Crawley, Jordan Publications, London (2001) and from gender guidelines produced by various countries or national NGOs (see relevant references in handouts-background information no. 6 and 21).

⁷³ E.g. International Covenant on Civil and Political Rights (ICCPR) and its supervisory committee; International Covenant on Economic, Social and Cultural Rights (ICESCR) and its supervisory committee; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its supervisory committee; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its supervisory committee; Convention on the Rights of the Child (CRC) and its supervisory committee; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its supervisory committee; Declaration on the Elimination of Violence against Women (DEVAW); Beijing Declaration and Platform for Action, Fourth World Conference on Women (PFA); Rome Statute of the International Criminal Court; and the European Convention on the Human Rights and Fundamental Freedoms as well as the European Court of Human Rights.

The right to freedom, equality and physical integrity:

- The right to life, liberty and security of person;
UDHR 2 • ICCPR 2:1 • ICESCR 2: 2 • CRC 2 • DEVAW 3a, c
- The right to live without suffering, torture or any form of cruel, inhuman or degrading treatment or punishment.
UDHR 5 • ICCPR 7 • CRC 37 • CAT 12 • DEVAW 3h
- The right to live without discrimination of any kind based on sex.
ICCPR 3 • ICESCR 3 • CEDAW 1, 2, 3 • PFA 214, 232 • DEVAW 3e
- The right not be treated differently, or have rights denied, because of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
UDHR 2 • ICCPR 2:1 • ICESCR 2:2 • CRC 2 • PFA 232
- The right to freedom of thought, conscience and religion.
UDHR18 • ICCPR18 • ICERD 5d, vii • CRC14
- The right to freely express an opinion without fear of punishment, both within the country of origin and to people in other countries.
UDHR 19 • ICCPR 19 • ICERD 5d, viii • CRC 12,13,17
- The right to the highest attainable level of physical and mental health and the right to equal access to health services, including family planning.
ICESCR 12 • CEDAW 12 • CRC 24 PFA 89,106b • DEVAW 3f
- The right to privacy.
ICCPR 17.

Various human rights violations - harm amounting to persecution

It may be concluded that Farhad fears violence, harassment and discriminatory laws and social norms, all human rights violations in the hands of state or non-state agents, which may constitute harm amounting to persecution by reference to the following paragraph in the UNHCR Guidelines (2002):

Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.⁷⁴

⁷⁴ UNHCR Gender Guidelines [2002] para. B.16.

Corporal punishment and the death penalty – harm amounting to persecution

Corporal punishment and the death penalty, violations constituting breaches of the right to life and the right to freedom from torture, are also to be considered harm amounting to persecution within the meaning of the 1951 UN Refugee Convention. To receive those punishments for reasons of sexual orientation would also mean receiving disproportionately severe punishments which clearly fall within the concept of persecution, as follows:

Where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution.⁷⁵ Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.⁷⁶

Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.⁷⁷

State failure to extend protection to homosexuals – harm amounting to persecution

Farhad fears discrimination by the state in failing to extend protection to homosexuals, resulting in discrimination and violence being inflicted with impunity by members of society. The rights at issue are:

The right to legal equality:

- The right to be treated by the law in the same way as everyone else, and to be protected by the law without discrimination.

**UDHR 7 • ICCPR 14:1,26 • CEDAW 2c, 15:1 • ICERD 5a • PFA
232 • DEVAW 3d.**

⁷⁵ Persons fleeing from prosecution or punishment for a common law offence are not normally refugees; however, the distinction may be obscured, particularly in circumstances of excessive punishment for breach of a legitimate law. See UNHCR's Handbook, paragraphs 56 and 57.

⁷⁶ UNHCR Gender Guidelines (2002) para. 1.12.

⁷⁷ UNHCR Gender Guidelines (2002) para.B.17.

A failure to extend protection to individuals, because of discrimination of any kind, could constitute harm amounting to persecution, as follows:

Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. 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. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analyzed in this context.⁷⁸

Discriminatory laws, policy and practices and social norms – harm amounting to persecution

As Farhad also fears discriminatory laws and social norms, resulting in for example social ostracism and harassment, it is worth recalling that discrimination based on sexual orientation (i.e. sex), as other forms of discrimination, may also alone or on cumulative grounds constitute harm amounting to persecution. While it depends on the specifics of the case, the following paragraphs in various UNHCR documents should be of relevance:

While it is agreed that “mere” discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or to access to available educational facilities.⁷⁹

Women may also flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution in some cases, the dividing line between discrimination and persecution is not a clear one.⁸⁰

It could also be emphasized that whether various measures may amount to persecution must be evaluated in light of all the particular circumstances of each case including the geographical, historical, ethnological context and the psychological make-up of the individual. Various discriminatory elements may for example, taken together, produce an effect on the mind of the applicant that can rea-

⁷⁸ UNHCR Gender Guidelines (2002) para. 15.

⁷⁹ The UNHCR Gender Guidelines (2002) para. II.B.14.

⁸⁰ The UNHCR Guidelines on the Protection of Refugee Women (1991), para. 55.

sonably justify a claim to well-founded fear of persecution. Consequently, interpretations of what amounts to persecution are bound to vary. These aspects may be specifically relevant to bear in mind in cases where women fear institutionalised discrimination as well as discriminatory norms as well as possible punishments for transgression of these laws and norms. Some general considerations are mentioned in the UNHCR Handbook, *inter alia*:

Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

...In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.

Where measures of discrimination are rare, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.⁸¹

⁸¹ UNHCR Handbook, para. 52-55.

It is also important to bear in mind that the UNHCR Gender Guidelines also states that discriminatory legislation can constitute persecution.

Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced..⁸²

The issue of discretion vs. enjoyment of human rights

In addition, the link between the principle of the right to privacy and to Farhad's fear of persecution for reasons of his sexual orientation should be clarified. To avoid severe criminal penalties, extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals must be "discreet". They are denied a meaningful "private" life. For most people, their sexual orientation must thus be carefully hidden which is not in conformity to fundamental human rights principles.

James Hathaway's framework for determining serious harm

It is also worthwhile mentioning that, although not part of UNHCR's doctrine, Professor James Hathaway's framework arguments found in his book *The Law of Refugee Status* (Batterworths, 1991) may be helpful in assessing whether a specific form of harm amounts to persecution.

Three levels of rights and the concept of serious harm

Hathaway refers to three levels of human rights and the situations in which their breach may constitute "serious harm" i.e. harm amounting to persecution.

The three levels of human rights are:

Level One Rights:

Rights stated in the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR) which countries may not derogate from even in times of compelling national emergency. They include:

- freedom from arbitrary deprivation of life (Art 6 ICCPR);
- freedom from torture, cruel, inhuman or degrading punishment or treatment (Art 7 ICCPR);
- freedom from slavery and servitude (Art 8 ICCPR);

⁸² UNHCR Gender Guidelines (2002), para. II.B.10.

- freedom from imprisonment for inability to fulfil a contractual obligation (Art 11 ICCPR);
- protection from retroactive criminal prosecution (Art 15 ICCPR);
- right to be recognized as a person in law (Art 16 ICCPR); and
- freedom of thought, conscience and religion (Art 18 ICCPR).

According to Hathaway failure of the state of origin to ensure these 'first level' rights will, under any circumstances be considered harm amounting to persecution.

Level Two Rights:

Rights stated in the UDHR and in the ICCPR from which states may derogate during a state of emergency which has been officially proclaimed. These rights include:

- freedom from arbitrary arrest and/or detention (Art 9 ICCPR);
- right to equal protection for all (Art 26 ICCPR);
- rights, in criminal hearings, to a fair and public hearing and a presumption of innocence (Art 14 ICCPR);
- protection of family and privacy (Art 17 ICCPR);
- right to freedom of movement inside a country and to choice of residence (Art 12 ICCPR);
- freedom to leave and return to one's country of origin (Art 12 ICCPR);
- liberty of opinion, expression, assembly and association (Arts 19, 21, 22 ICCPR);
- right to form and join trade unions (Art 22 ICCPR);
- right and opportunity to take part in the conduct of public affairs, and vote in periodic and genuine elections (Art. 25 ICCPR); and
- right to have access to public employment without discrimination (Art 25 ICCPR).

A failure to ensure these rights will generally be a violation of a state's basic duty of protection of its nationals unless 1) the government's derogation was strictly required by the problems of a real emergency situation, and 2) the derogations are not applied in a discriminatory way and 3) that the derogation was not inconsistent with other aspects of international law. 'Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted.'

Level Three Rights:

Rights in the UDHR and carried forward in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) 25. The state will be in breach if it secures the rights in a discriminatory manner or where it takes no steps to ensure the rights despite having adequate finances to do so. These rights include:

- right to work, including just and favourable conditions of employment, remuneration and rest (Arts 6 and 7 ICESCR);
- right to an adequate standard of living including: food, clothing, housing (Art 11 ICESCR);
- right to enjoyment of highest attainable standard of health (Art 12 ICESCR);
- right to education (Arts 13 and 14 ICESCR);
- protection of the family, especially children and mothers (Art 10 ICESCR); and
- right to engage in and benefit from cultural, scientific, literary and artistic expression (Art. 15 ICESCR).

According to Hathaway 'a state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond or where it excludes a minority of its population from their enjoyment. Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.'⁸³

Agent of persecution – state or non-state?

Finally, it may be recalled that agents of persecution can be both state and non-state, which is further outlined in several UNHCR policy documents, *inter alia*:

There is a scope within the refugee definition to recognize both state and non-state actors of persecution. While persecution is most often perpetrated by the authorities of a country, 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.⁸⁴

Promote acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish. Promote recognition that there may be a basis for granting refugee status where a government cannot or will not protect women who are subject to abuse for transgressing social standards. The government need not itself have been the instigator of the abuse.⁸⁵

⁸³ Hathaway as quoted from IAA Asylum Gender Guidelines para. 2A4, UK (2000).

⁸⁴ UNHCR Gender Guidelines (2002) para. II.B.19. See also UNHCR Handbook (1992) para.65.

⁸⁵ UNHCR Guidelines on the Protection of Refugee Women, para.71, Geneva (1991).

2) IS THE FEAR WELL-FOUNDED?

The subjective element of well-founded fear⁸⁶

Presupposing that Farhad is credible, it can be accepted that he has a genuine fear of persecution and thus fulfil the subjective element of well-founded fear. As for his credibility, it may be noted that he has given a reasonable explanation to why he initially did make a false asylum claim. Therefore his credibility should not be questioned.

Regarding the subjective fear, it may be noted that a possible questioning of the subjective element must be done with great sensitivity and from a holistic perspective.⁸⁷ To take an example, it sometimes happens that the subjective fear is questioned on the basis of the applicant's delay in presenting his/her asylum application to the authorities in the country-of-asylum. Thus the fear is perceived to be less genuine. In order to avoid an unnecessary questioning of the equity of the claim is relevant to stress the importance of looking at the claim holistically and also of whether the applicant has presented a reasonable explanation to her delay. Psychological effects of torture, including gender-based violence by state or non-state agent, may well be a reasonable explanation to delays in this regard.⁸⁸ However, it is also worth noting that the perception of fear will differ from person to person and that applicants may even not themselves be fully aware of the fact that they should be afraid. This could be the case of children or persons who are severely traumatized or mentally unfit.⁸⁹

The objective element – Personal circumstances

Farhad claims that he has experienced serious acts of violence and discrimination by non-state and state agents, without being able to get state protection as the state is a feared persecutor as well. He has thus experiences of past persecution, although not in recent years. However it should be taken into account that Farhad expresses fear concerning the very thought of having to live a life contrary to his beliefs and sexuality as well as his conviction that it would not be possible to suppress his homosexuality in the future. It should be recalled that the fact that he does not have any documentary evidence is not an indication of his fear being unfounded; lack of documentary evidence is very common in general, and in gender-related claims in particular, an applicant's credible and unrefuted testimony standing alone is sufficient to establish a well-founded fear of being persecuted.

⁸⁶ See for example the Michigan Guidelines on well-founded fear (2004), for a summary of the various ways of applying the subjective element of the criteria well-founded fear.

⁸⁷ See for example UNHCR Handbook para 40-41 and 201, UNHCR Gender Guidelines (2002) para II A.7.

⁸⁸ See for example UNHCR Gender Guidelines (2002) para III.35.

⁸⁹ Gorlick, Brian Common burdens and standards: legal elements in assessing claims to refugee status p.6 in New Issues in Refugee Research, Working paper No. 68 (October 2002), published by Evaluation and Policy Analysis Unit, UNHCR, Geneva. Available at: www.unhcr.org.

In the course of assessing his claim, the RSD worker would have explored, in more detail, Farhad's personal characteristics as well as his personal experiences, thoughts and feelings and that of other homosexual or lesbian men and women he may know about, regarding gender-relations and violence in the family, community and the state as from the time of flight to arrival in the country-of-asylum. This is particularly important as homosexuality is at the heart of the issue of gender. Homosexual men are often not considered to be "real" men, as "real" men are, according to social norms and laws, often assumed to be heterosexual men. However, the RSD worker would be aware of the fact that he/she may not be able to get the information he/she wished for as the person may feel very uneasy and ashamed of talking to other persons about sexual orientation in general and regarding himself in particular.

Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.⁹⁰

The objective element – Country of origin situation

In the course of assessing Farhad's claim, the RSD worker would have to collect information on the human rights situation in the country of origin in general, and specifically concerning the prevalence of discriminatory laws and practices and social norms regarding homosexuality including the state's failure to extend protection to homosexuals. It may be difficult to obtain evidence on the extent to which people are receiving the death penalty or corporal punishment by the state or violence and discrimination by non-state agents due to their sexual orientation. However, it may be emphasized that it should be kept in mind that all the required information may not be available in gender-related cases, that the principle of the-benefit-of-the-doubt is crucial for assessing an asylum claim, the asylum-seeker and the authorities share the responsibility for investigating relevant circumstances of the case and that the burden-of-proof may even, in some cases, be shifted from the asylum-seeker to the authorities.⁹¹

Taking into account the country of origin information available, Farhad may be considered fulfilling the subjective and objective element of well-founded fear as regards his fear of being subjected to corporal punishment and the death penalty by the state. Similarly, one could state that discriminatory laws and policy would amount to persecution on cumulative grounds (or alone). As regards state persecution, there exists a presumption on the absence of state protection, why there would not be a need to further explore the availability of state protection.

⁹⁰ UNHCR Gender Guidelines (2002) para III, 35.

⁹¹For references to UNHCR Gender Guidelines (2002), other policy documents and case law on the risk assessment, standards of proofs etc., please look at the first case study facilitators' notes below the heading Is the Fear Well-founded? and Objective Element, Country-of-origin Information. The same considerations should be made in a gender-related claim based on sexual orientation.

The need for further assessment

As for the fear of violence, threats, harassment and discriminatory social norms, the country of origin information available supports his notion that he risks being subject to human rights violations without getting effective state protection. However, as he fears a non-state agent, there is a need to look more deeply into the issue of whether a substantial change of the country of origin situation has occurred as regards the authorities' willingness or ability to offer him effective and durable protection.

3) IF THE PERSECUTOR IS NOT AN AGENT OF THE STATE, IS THE STATE ABLE AND WILLING TO OFFER PROTECTION?

As regards Farhad's fear of being subjected to violence, threats and discrimination by individuals in society, it would have been crucial for the RSD worker to determine the willingness or ability of the state to give effective and durable protection and consequently whether any substantial changes may have occurred in relevant areas. It would be desirable to collect information on the state's adherence to the principle of due diligence.

It would also be required to make a reasonability analysis in relation to whether Farhad could be expected to turn to the authorities for protection. As the state discriminates against homosexuals and even consider his lifestyle a crime, he would put himself at risk if he would approach the authorities. He could not expect to get any protection against human rights violations. The same situation would likely apply all over the country, i.e. there would not exist an effective internal flight alternative. Consequently, it may be concluded that given the country of origin information available as well as his personal circumstances (e.g. the fear he feels regarding the mere thought of potentially being punished for his homosexuality) it would be unreasonable to require him to ask for state protection against discriminatory social norms, which could result in harassment, threats, social ostracism and even violence by private individuals.

FURTHER ON THE ISSUE OF DISCRETION VERSUS ENJOYMENT OF HUMAN RIGHTS

It may be worthwhile giving extra attention to the risk assessment with regard to Farhad's experiences of past persecution as well as the issue of whether he could be requested to continue being discreet on his return and thus hide his homosexuality. As for his experiences of past persecution, and the fact that he, subsequent to his expulsion from school in 1998 because of his sexual orientation, had not been detained, arrested or otherwise ill-treated because of his homosexuality, it is important to note that the country of origin information supports his claim that it was impossible to openly live as a homosexual in country X and that the

situation does not seem to have changed significantly since he left. Consequently, the question arises of whether it would be reasonable to ask him to suppress his homosexuality and live a life without sexual relations or in a heterosexual relationship with a woman. Before discussing this issue, it is worthwhile noting that he has spoken of the effect on him of the potential punishment of a hundred lashes and execution. He has also said that if he returned he could not hide his sexual orientation. He can hardly endure thinking how life would be if he would have to return. The issue thus arises of whether it is reasonable to require of him to hide his homosexuality in order to avoid punishment or not. Based on the arguments shown in the decisions from Canada and New Zealand below, it is possible to conclude that such a position would not be in conformity with human rights law.

Canada

Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration), IMM-1595-03, 2004 FC 282, Ontario February 26, 2004:

The applicant has also argued that the Board erred in concluding that the applicant would not face a well-founded fear of persecution as she would only need to keep her relationship with another woman secret in order to avoid punishment, as the documentary evidence indicated that once a lesbian relationship became public, the state would no longer be passive and would deal harshly with those accused of being in such a relationship.

...The meaning of persecution, as set out in the seminal decisions of Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 and Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, is generally defined as the serious interference with a basic human right. Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution.

See for example, the decisions of Fosu v. Canada (Minister of Employment and Immigration) (1994), 90 F.T.R. 182, Hussein v. Canada, Minister of Citizenship and Immigration, (2002), 20 Imm. L.R. (3d) 92 (F.C.T.D.), dealing with the issue of claimants not being permitted to display their religious beliefs in public.

New Zealand

Refugee Appeal No. 74665/03 (Refugee Status Appeals Authority) July 7, 2004, New Zealand

On the country information presently available the finding made earlier in this decision was that the Penal Code of Iran prescribes severe penalties for homosexual conduct between consenting adults. In addition there is strong religious and societal disapproval of homosexuality in Iran. To avoid severe criminal penalties, extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals in Iran must be "discreet". They are denied a meaningful "private" life. For most their sexual orientation must be carefully hidden.

...The appellant wishes to escape this situation, particularly the denial of a private life, his unequal treatment and the potential judicial and extrajudicial consequences of exercising a fundamental human right. His claim to refugee status is based on well established principles of international human rights law, namely the right to privacy (Article 17 ICCPR) and the rights to equality and non-discrimination (Articles 2(1) and 26 of the ICCPR). There is no suggestion here of activity at "the margin". It is also clear that measured by international human rights norms the Iranian state has both threatened and inflicted serious harm on homosexuals who seek to do no more than exercise their fundamental human rights. It follows that the facts establish both serious harm and the failure of state protection. The appellant has proved that his return to Iran would lead to the predicament of "being persecuted".

... The appellant must establish that the risk of "being persecuted" is well-founded, or as that term is understood in New Zealand, that there is a real chance of being persecuted: *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [111] - [153], an approach not challenged in *Jiao v Refugee Status Appeals Authority* [2002] NZAR 845 (Potter J) or on appeal in *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

...If he returns to Iran the appellant will not be able to live openly as a homosexual and will have to choose between denying his sexual orientation or facing the risk of severe judicial or extra-judicial punishment. We are satisfied that one or the other of these circumstances could well occur and it follows that the real chance test is amply satisfied. [130] We turn now to the issue of the Convention ground and causation.

www.refugee.org.nz/Fulltext/74665-03.html

4) IS THE FEAR OF PERSECUTION LINKED TO A CONVENTION GROUND?

The applicable convention grounds could be: particular social group, political opinion and religion.

Particular social group

Sexual orientation can, in the appropriate situation, be accepted as a basis for finding a social group for the purposes of the Refugee Convention. Homosexuals in Farhad's country could be considered a cognisable social group united by a shared internal characteristic, namely their sexual orientation. It is sufficient for the appellant to establish that his membership of a particular social group is a contributing cause to the risk of being persecuted. It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. The only reason why Farhad claims that he is at risk of serious harm is because of his sexual orientation. It would also be possible to link the state's motive for persecution and its failure to extend protection to him, to his belonging of a social group united by their sexual orientation i.e. being homosexuals.

Political opinion

Farhad has stated that he believes that everyone should be able manifest his or her sexuality without fear of being subjected to severe punishment by the state or the society. Such a political opinion as to gender roles is in direct conflict with that of the authorities and the society. Expressing such a political opinion or acting in accordance with such, would mean that he transgresses the laws and social norms and therefore becomes at risk of persecution because of his actual and also possibly imputed political opinion.

In case he returns, he would not be able to live openly as a homosexual and would have to choose between denying his sexual orientation and facing the risk of severe judicial or extra-judicial punishment by the state and also discriminatory treatment and possible violence from non-state agents. To be forced to make such a choice would not be in accordance with basic human rights principles. Therefore it may be concluded that he may risk persecution on account of his actual and imputed political opinion.

Religion

The same reasoning as above under Political Opinion may apply as speaking and acting in accordance with Farhad's opinion as to gender roles, i.e. his belief about the rights of homosexuals, would put him at risk of persecution on account of his religion.

COMPELLING REASONS...

It may be recalled that there might be situations where the applicant would be in need of international protection despite the fact that there is no longer a well-founded fear of persecution. The basis of such reasoning could be found in article 1 C (5) of the 1951 Refugee Convention, which reads:

This Convention shall cease to apply to any person falling under the terms of section A if:

...(5) He can no longer, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

These provisions are explained further in the UNHCR Handbook (1992), para. 135-139, see for example para. 135 and 136:

135. 'Circumstances' refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory – change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of this sense of security, which international protection is intended to provide.

136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refu-

Module 1 - Analyzing gender-related asylum claims
Case study exercise on gender-related asylum claims
practices and social norms

gee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who –or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee".

The principle is implicitly described in the following quotation from the following US decisions:

Matter of S C, (A# redacted) (Boston, MA, Immigration Court, Feb. 19, 1998):

Once it is determined that the applicant: has established past persecution, the applicant shall be presumed also to have a well-founded fear of future persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. If this presumption is overcome and the applicant does not sustain his burden of establishing that he has a well-founded fear of persecution, the application for asylum shall be denied unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution. 8 C.F.R. § 209.13(b)(1); See also Matter of H-, Int. Dec. 3276 (BIA 1996).

w3.uchastings.edu/cgrs/law/ij/58.html

Matter of S- A-, 22 I. and N. Dec. 1328 (BIA 2000), USA:

We have recognized that past persecution can be a basis for granting asylum, even absent a showing of a well-founded fear of future persecution. See *Matter of H-*, 21 I and N Dec. 337, 339 (BIA 1996); see also *Matter of D-V-*, 21 I and N Dec. 77 (BIA 1995) (recognizing as persecution grievous harm suffered in Haiti in direct retaliation for activities on behalf of Jean-Bertrand Aristide); *Matter of B-*, *supra* (recognizing that the arrest, interrogation, and severe physical abuse of a Mujahidin supporter in Afghanistan constituted persecution); *Matter of Chen*, *supra* (recognizing that the severe repression of

the applicant during China's "Cultural Revolution" constituted persecution). Pursuant to federal regulations, an applicant who has established past persecution is presumed to have also demonstrated a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(i); see also *Matter of Chen, supra*, at 18 (stating that "a rebuttable presumption arises that an alien who has been persecuted in the past by his country's government has reason to fear similar persecution in the future"). The Immigration and Naturalization Service can rebut this presumption by showing that country conditions have changed to such an extent that the basis for the finding of past persecution no longer exists. See 8 C.F.R. § 208.13(b)(1)(i).

www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3433.pdf

ANALYZING GENDER-RELATED CLAIMS: A NON-EXHAUSTIVE LIST OF POSSIBLE TRAPS

The following is a non-exhaustive list of examples of possible traps to fall into during RSD concerning gender-related claims. You may want to refer to it here, or while making a summary of the workshop (see next section) or not at all, depending of how much time you have left.

- The risk of not recognising various forms of gender-based violence and discrimination as harm amounting to persecution as well as other forms of state or non-state persecution which can be linked to gender, including sexual orientation. This could happen when there is a lack of knowledge of international human rights law, the concept of gender and the root causes and various aspects of gender-based violence and discrimination;
- The risk of requiring too much documentary evidence and require an unreasonably high level of proof, both as regards the applicant's personal details and past experiences, and as regards relevant country of origin information;
- The risk of requiring too many chronological details from the applicant regarding her experiences, not taking into account trauma and how it may influence memory, behaviour etc.;
- The risk of depoliticising experiences and fear of gender-based violence and discrimination as well as the state's unwillingness or inability to offer effective and durable protection to women and lesbian, gay, bisexual and transgender persons (lgbt-people);

- The risk of not recognising or of underestimating the risks connected with women's own organised political activity or their family members' political activities;
- The risk of expecting a heterosexual woman or lesbian, gay, bisexual or transgender person fearing persecution, including gender-based violence and discrimination to turn to the authorities or to relocate, without making an appropriate reasonability analysis based on the personal circumstances (e.g. disregarding experiences of trauma, class, caste or other belonging, sexual orientation, civil status or educational background etc.) and on relevant country of origin information concerning gender roles, e.g. the position of women and the availability of state protection against gender-based violence and discrimination;
- The risk of not reflecting upon the risk of forced marriages etc. in cases of lesbian asylum seekers fearing persecution because of their sexual orientation;
- The risk of expecting a woman to turn for protection to women NGOs, women shelters, churches/temples, or any other NGOs, without considering that the responsibility of the state for giving effective and durable protection, according to international law, can neither be reduced to temporary protection nor be transferred to NGOs.

Relevant case law

Persecution – Sexual orientation

The following list contains examples of grant decisions concerning persecution for reasons of sexual orientation⁹²:

USA

- Anonymous, May 2003
w3.uchastings.edu/cgrs/summaries/summaries.html
- Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) , USA
w3.uchastings.edu/cgrs/law/fed/hern_montiel.html

Please see a number of summarized decisions of relevance from the USA concerning gender-related persecution at the website of Center for Gender and Refugees:

w3.uchastings.edu/cgrs/summaries/summaries.html

⁹² Please note that these grant cases may not always be cases of precedent character.

New Zealand

- Refugee Appeal No. 74665/03 (Refugee Status Appeals Authority)
July 7, 2004, New Zealand
www.refugee.org.nz/Fulltext/74665-03.html

Please see a number of other relevant decisions from New Zealand concerning gender-related persecution at the website of the Refugee Status Appeals Authority: www.refugee.org.nz

Canada

- Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration), IMM-1595 03, 2004 FC 282, Ontario February 26, 2004, Canada
decisions.fct-cf.gc.ca/fct/2004/2004fc282.shtml
- No. dossier SPR : MA3-01597, (Immigration and Refugee Board, August 4 2003), Canada
- RPD TA2-19317, Gibbs, January 8, 2004 (T.D.) Canada
www.irb.gc.ca/en/decisions/reflex/index_e.htm?action=article.viewandid=10950

Please see a number of other relevant decisions from Canada concerning gender-related persecution, at the website of the Canadian Immigration and Refugee Board (CIRB), www.irb-cisr.gc.ca/en/.

The CIRB has published a compendium of decisions concerning women refugee claimants fearing gender-related persecution, www.irb-cisr.gc.ca/en/about/tribunals/rpd/compendium/index_e.htm.

Australia

Please see a number of other relevant decisions from Australia concerning gender-related persecution.

The Refugee Review Tribunal: www.austlii.edu.au/au/cases/cth/rrt/

The High Court of Australia: www.austlii.edu.au/au/cases/cth/high_ct/

The Administrative Appeals Tribunal:
www.aat.gov.au/AATdecisions/AboutAATdecisions.htm

UK

Please see relevant decisions from UK concerning gender-related persecution.

The United Kingdom Immigration Appeals Tribunal:
www.bailii.org/recent-decisions-uk.html#uk/cases/UKIAT

Immigration Appellate Authority: www.iaa.gov.uk/

CONCLUDING REMARKS

If there is time, you may wish to discuss what additional problems lesbians may come across during the asylum process, including the RSD.

It may also be highlighted how discriminatory laws and social norms may influence negatively on law enforcement officials and thus on the possibilities for women to be treated as equal before the law and to get effective and durable protection.

CONCLUSIONS AND CLOSURE OF WORKSHOP

12.50-13.00 Conclusions and closure of workshop

CONCLUSIONS AND CLOSING OF WORKSHOP

Purpose - Why are you doing it?

The purpose of this section is to summarize the workshop.

Time – How long will it take?

It will take 10 minutes.

Method – How will you be doing it?

You will make a short presentation summarizing the workshop. Distribute handouts as appropriate.

Equipment and type of training material needed:

Handouts.

Handouts:

- No. 20 Gender sensitivity and procedural issues in the context of refugee status determination and durable solutions;
- No. 21 Suggested readings.

Facilitator's notes

Summarize the workshop by referring back to the agenda, expectations and objectives set forth in the beginning and again emphasize the need to mainstream a gender perspective in order to give all individuals, both men and women, an equal opportunity to get a fair refugee status determination and thus to receive international protection.

Distribute handout no. 20 in case the participants will not attend the following workshop, Module 2.

Distribute handout no. 21, which contains a list of suggested readings. Besides the documents previously mentioned, such as the UNHCR Handbook (1992) and the UNHCR gender guidelines (2002) as well as and other guidelines, you may advise them to pay specific attention to:

- Sexual and gender-based violence against refugees, returnees, internally displaced persons - Guidelines for prevention and response, UNHCR (2003);
- Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe, by Heaven Crawley and Trine Lester, UNHCR EPAU/2004/05, (2004);
- Refugees and Gender: Law and Process, Jordan Publications, by Heaven Crawley, London, (2001);

- Documents relating to UNHCR's global consultations.

N.B. If there is enough time you may also want to include in your summary of the workshop references to possible traps to fall in when analyzing gender-related claims and which one should thus be aware of in order to be able to avoid them. The list can be found at the end of the case study analyses exercises on pages 90 and 112.

APPENDIX - TRAINING MATERIALS

POWERPOINT SLIDES

HANDOUTS

EXERCISES

FURTHER READING

TRAINING MATERIALS NEEDED IN EACH WORKSHOP SECTION

INTRODUCTION TO WORKSHOP

WELCOME

PowerPoint slides nos. 1 and 2

INTRODUCTION OF THE PARTICIPANTS

Handout no. 1

SUMMARY OF EXPECTATIONS AND POSSIBLE RELEVANT PROBLEM AREAS

PowerPoint slide no. 3

INTRODUCTION OF THE AGENDA

PowerPoint slides nos. 4.1 and 4.2

Handout no. 2

GENDER AND SEX

PRESENTATION ON THE CONCEPT OF GENDER AND SEX

PowerPoint slide no. 5

Handout no. 3

EXERCISE ON SEX AND GENDER

PowerPoint slides nos. 6.1, 6.2, 7 and 8

Exercise no. 1

UNHCR GENDER GUIDELINES

INTRODUCTION TO THE BACKGROUND AND PURPOSE OF THE UNHCR GENDER GUIDELINES (2002) AS WELL AS TO AN EXERCISE ON THE GUIDELINES

PowerPoint slides nos. 9, 10, 11, 12 and 13

Handouts nos. 4 and 5

REVIEW OF THE EXERCISE

PowerPoint slide no. 14

ANALYZING GENDER RELATED ASYLUM CLAIMS

FRAMEWORK OF ANALYSIS FOR GENDER-RELATED ASYLUM CLAIMS

PowerPoint slide no. 15

DOES THE HARM FEARED AMOUNT TO PERSECUTION?

PowerPoint slides nos. 16, 17 and 18

Handouts nos. 6, 7, 8, 9 and 10

IS THE FEAR WELL-FOUNDED?

PowerPoint slides nos. 19, 20, 21 and 22

Handouts nos. 11 and 12

IF THE PERSECUTOR IS NOT AN AGENT OF THE STATE, IS THE STATE ABLE AND WILLING TO OFFER PROTECTION?

PowerPoint slides nos. 23, 24, 25 and 26

Handout no. 13

IS THE FEAR LINKED TO A CONVENTION GROUND?

PowerPoint slides nos. 27, 28, and 29

Handouts nos. 14, 15, 16, 17, 18 and 19

CASE STUDY EXERCISE ON HOW TO ANALYZE GENDER-RELATED ASYLUM CLAIMS

PowerPoint slide no. 30

Exercises nos. 2 and 3

REVIEW OF THE CASE STUDY EXERCISE IN PLENARY

PowerPoint slide no. 31

CONCLUSIONS AND CLOSURE OF THE WORKSHOP

CONCLUSIONS AND CLOSURE OF THE WORKSHOP

Handouts nos. 20 and 21

TRAINING MATERIALS CATEGORIZED BY TYPE OF MATERIAL AND NUMBER

PowerPoint slides:

- No. 1 Ensuring Gender Sensitivity in Refugee Status Determination;
- No. 2 Workshop objectives;
- No. 3 Expectations and possible problem areas;
- No. 4.1 Workshop agenda;
- No. 4.2 Agenda cont.;
- No. 5 Sex and Gender – Basic Definitions;
- No. 6.1 True or false – a quiz on gender and sex;
- No. 6.2 True or false..., cont.;
- No. 7 Gendered lives – wishing for a son or a daughter?
- No. 8 Gender roles...;
- No. 9 UNHCR Gender Guidelines (2002);
- No. 10 Convention Refugee Definition;
- No. 11 the engendering of international refugee law;
- No. 12 Gender-related claims could include (but not be limited to)...;
- No. 13 Gender Guidelines (2003) exercise – instructions to groups;
- No. 14 Review of the UNHCR Gender Guidelines (2002);
- No. 15 Gender-Sensitive Interpretation of the UN Refugee Definition;
- No. 16 Does the harm feared amount to persecution?
- No. 17 Serious harm – Persecution;
- No. 18 Agents of persecution;
- No. 19 Is the fear well-founded?
- No. 20 Subjective Element;
- No. 21 Objective Element – Personal Circumstances;
- No. 22 Objective Element – Country of origin Situation;
- No. 23 If the persecutor is not an agent of the state, is the state able and willing to offer protection?
- No. 24 State protection;
- No. 25 State protection – reasonability analysis;
- No. 26 State protection – IFA;
- No. 27 Is the fear linked to a convention ground?
- No. 28 Political opinion;
- No. 29 Particular Social Group;
- No. 30 Case study exercise – instructions;
- No. 31 Case study exercise – the analytical framework.

Handouts – background information:

- No. 1 List of participants and their contact details (already filled in) and/or Participant list;
- No. 2 Workshop agenda;
- No. 3 Sex and Gender – Basic Definitions;
- No. 4 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 (May 2002), e.g. UNHCR Gender Guidelines (2002);
- No. 5 Age and gender dimensions in international refugee law, by Alice Edwards, article appearing in Refugee Protection in International Law : UNHCR's global consultations on international protection"/ Feller, E. (ed.); Türk, V. (ed.); Nicholson, F. Cambridge (United Kingdom); New York (NY); Geneva: Cambridge University Press; UNHCR, 2003.
- No. 6 References to UN and other international and regional documents on human rights and the issue of gender-based violence and discrimination, paper compiled by Maria Bexelius, Consultant, UNHCR, 2005;
- No. 7 The International Human Rights Framework: the link with refugee protection and women's rights, (excerpts), by Rosa da Costa, legal consultant, UNHCR, 2002;
- No. 8 Discrimination against Women and Violence against Women in International Law, by Maria Bexelius, Consultant, UNHCR 2005;
- No. 9 Individuals' human rights and the laws that protect them, by Maria Bexelius, Consultant, UNHCR 2005;
- No. 10 Causes and consequences of sexual and gender-based violence, excerpts from Sexual and gender-based violence against refugees, returnees, internally displaced persons - Guidelines for prevention and response, UNHCR May 2003;
- No. 11 Common burdens and standards: legal elements in assessing claims to refugee status, by Brian Gorlick, New Issues in Refugee Research, UNHCR, Working Paper No. 68, October 2002;
- No. 12 The Michigan Guidelines on Well-Founded Fear, March 2004;
- No. 13 UNHCR Guidelines on International Protection n. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1 A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/03/04 23 July 2003;
- No. 14 Gender Sensitivity and the 1951 Refugee Definition -a checklist, by Maria Bexelius, Consultant, UNHCR 2005;
- No. 15 Framework of analysis – a guide to a gender sensitive RSD, by Maria Bexelius, Consultant, UNHCR, 2005.
- No. 16 The Michigan Guidelines on Nexus to a Convention Ground, October 2001;

Module 1: Appendix - training materials

- No. 17 UNHCR Guidelines on International Protection No 2: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002);
- No. 18 UNHCR Guidelines on International Protection no. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/04/06, 28 April 2004);
- No. 19 UK Immigration Appellate Authority Asylum Gender Guidelines (excerpts focusing on the convention ground political opinion), November 2000;
- No. 20 Gender sensitivity and procedural issues in the context of refugee status determination and durable solutions – a checklist, by Maria Bexelius, Consultant, UNHCR 2005;
- No. 21 Suggested readings.

Exercises

- No. 1 True or false – a quiz on gender and sex;
- No. 2 Case study #1: Domestic violence and Discriminatory laws, policies, practices and social norms;
- No. 3 Case study #2: Sexual orientation and Discriminatory laws, policies, practices and social norms.

BACKGROUND READINGS

UNHCR documents of special relevance for gender-sensitive RSD

Procedural Standards for Refugee Status Determination under UNHCR's Mandate – Available in various languages from the Department of International Protection, UNHCR, Geneva.

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/ IP/ 4/ Eng/ REV. 1 Reedited, Geneva, January 1992, UNHCR 1979. Available at: www.unhcr.ch

Sexual and gender-based violence against refugees, returnees, internally displaced persons - Guidelines for prevention and response, UNHCR May 2003. Available at: www.unhcr.ch

Global Consultations on International Protection/General: Agenda for Protection, UNHCR, June 2002. Available at: www.unhcr.ch

Summary Conclusions – Gender-Related Persecution, UNHCR Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, nos. 1 and 3. Available at: www.unhcr.ch

Global Consultation on International Protection/Third Track: Refugee Women (April 2002). Available at: www.unhcr.ch

Global Consultations on International Protection/Third Track: The Search for Protection-Based Solutions; Protection of Refugee Women and Children, Chairman's Summary (22-24 May 2002). Available at: www.unhcr.ch

Global Consultations on International Protection/Third Track: Refugee Children (April 2002.) Available at: www.unhcr.ch

Articles and summary conclusions from the UNHCR's global consultations, appearing in the book: Refugee Protection in International Law: UNHCR's global consultations on international protection"/ Feller, E. (ed.); Türk, V. (ed.); Nicholson, F. - Cambridge (United Kingdom); New York (NY); Geneva: Cambridge University Press; UNHCR, 2003. Available at: www.unhcr.ch

Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (April 2004) Available at: www.unhcr.ch

Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (September 2003) Available at: www.unhcr.ch

Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (July 2003) Available at: www.unhcr.ch

Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses) (October 2003) Available at: www.unhcr.ch

Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (May 2002) Available at: www.unhcr.ch

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 (May 2002) Available at: www.unhcr.ch

Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997) Available at: www.unhcr.ch

Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe, by Heaven Crawley and Trine Lester, UNHCR EPAU/2004/05, May 2004 Available at: www.unhcr.ch

UNHCR training materials of special relevance for gender-sensitive RSD

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 2: Gender Concepts and Strategies, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook – Chapter 3: Women’s Human rights, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 4: Sexual and Gender-Based Violence, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 5: Refugee Status Determination, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 6: Interviewing and Interpreting, December 2002.

Literature/academic research:

Crawley Heaven, Refugees and Gender: Law and Process, Jordan Publications, London 2001.
Available at: (to order): www.jordanpublishing.co.uk/Publications/catDetails.aspx?productID=289

Spijkerboer, Thomas. Gender and Refugee Status, Kluwer Academic Publishers, 2001.
Available at: (to order): www.powells.com/cgi-bin/biblio?inkey=17-0754620344-0

Gender Guidelines in various countries

Australia

Australian Department for Immigration and Multicultural Affairs (ADIMA) (1996) Guidelines on Gender Issues for Decision-Makers (Refugee and Humanitarian Visa applications),
Available at: sierra.uchastings.edu/cgrs/law/guidelines/aust.pdf

Report of the Australian Law Reform Commission, Part IV Section 11: Violence and Women's Refugee Status
www.austlii.edu.au/au/other/alrc/publications/reports/69/vol1/ALRC69Ch11.html#ALRC69Ch11

Canada

Immigration and Refugee Board of Canada (1996), Women Refugee Claimants Fearing Gender-Related Persecution Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act.
Available at: www.cisr.gc.ca/en/about/guidelines/index_e.htm

Ireland

Suggested guidelines by the Irish Council for Civil Liberties Women's Committee, Gender Guidelines for Female Refugees and Asylum Seekers (2000) Available at: www.iccl.ie/women/refasyl/guidelines00.html

South Africa

Suggested guidelines by an NGO, the National Consortium on Refugee Affairs, Gender Guidelines for Asylum Determination (1999). Available at: www.web.net/~ccr/safr.PDF

Sweden

Swedish Migration Board (2001) Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection. Available at: www.migrationsverket.se/english.html

Swedish Migration Board (2002) Guidelines for the Investigation and Evaluation of Asylum Cases in which Persecution based on Given Sexual Orientation is cited as Ground.
Available at: www.migrationsverket.se/english.html

United Kingdom

Home Office (2004) Asylum Policy Instructions (APIs) 'Gender Issues in the Asylum Claim'
Available at: www.ind.homeoffice.gov.uk/default.asp?PageId=4790 ,

Immigration Appellate Authority, Asylum Gender Guidelines, London 2000
Available at: www.asylumsupport.info/publications/iaa/gender.pdf

Refugee Women’s Legal Group (1998) Gender Guidelines for the Determination of Asylum Claims in the UK
London: RWLG. Available at: www.rwlg.org.uk,

United States (US)

US Immigration and Nationality Service (1995) Considerations for Asylum Officers Adjudicating Asylum Claims from Women. Available at: sierra.uchastings.edu/cgrs/law/guidelines/us.pdf US Department of State, Gender Guidelines for Overseas Refugee Processing (2000).

Module 1: Appendix - training materials
Background readings

ALL TRAINING MATERIALS INCLUDED IN
CHRONOLOGICAL ORDER

INTRODUCTION TO WORKSHOP

All resource materials needed

PowerPoint slides:

No. 1 Ensuring Gender Sensitivity in Refugee Status Determination;

No. 2 Workshop objectives;

No. 3 Expectations and possible problem areas;

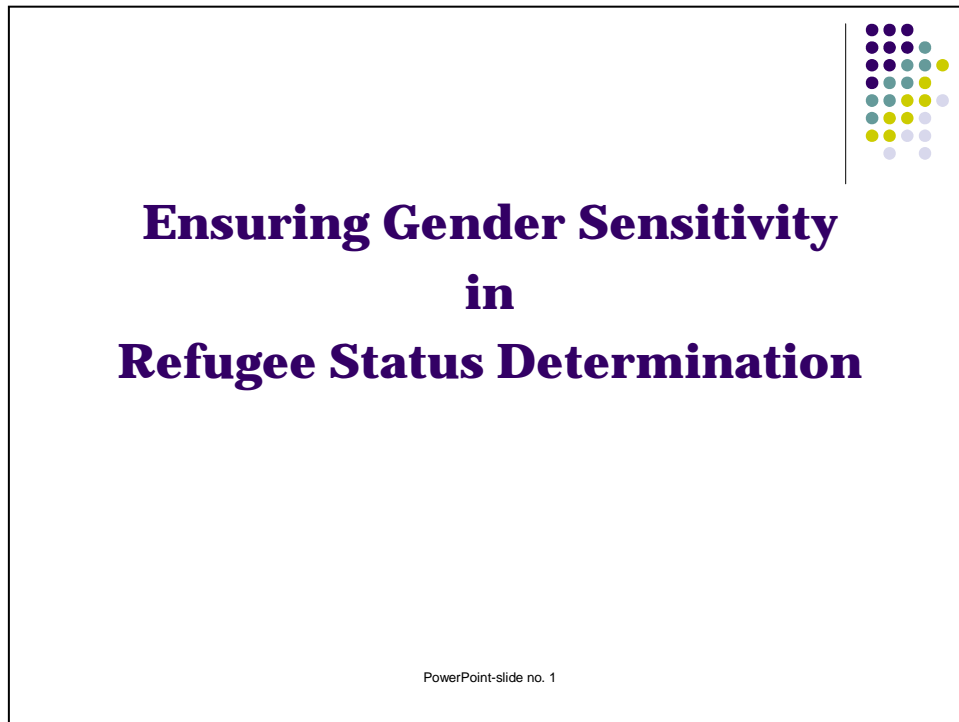
No. 4.1 Workshop agenda;

No. 4.2 Agenda cont.

Handouts:

No. 1 List of participants and their contact details (already filled in) and/or Participant list;

No. 2 Workshop agenda.



Workshop objectives



- To raise awareness of the link between international human rights and refugee protection
 - To review major guidelines relevant to gender-related asylum claims
 - To raise awareness of the more complex legal and procedural issues which may arise in relation to gender-related asylum claims, and to provide some tools to handle these issues
 - To increase knowledge and applied analytical skills in relation to gender-related asylum claims;
- ⇒ To assist the participants with tools to avoid common traps and to ensure a refugee status determination that corresponds to international standards.

PowerPoint-slide no. 2

Expectations and possible problem areas – instructions



Write down answers to the following questions
(individually and anonymously):

- 1) What expectations do you have of this training workshop?
- 2) What problematic issues could create obstacles for good training results?

PowerPoint-slide no. 3

Workshop agenda

- Ensuring Gender Sensitivity in Refugee Status Determination



Introduction to Workshop

- | | |
|-----------|--|
| 9.00-9.05 | Welcome |
| 9.05-9.15 | Introduction of participants |
| 9.15-9.30 | Summary of expectations and possible relevant problem areas, including two exercises highlighting these issues |
| 9.30-9.35 | Introduction to the agenda |
| 9.35-9.40 | Establishment of workshop rules |

Gender and Sex

- | | |
|------------|---|
| 9.40-9.50 | Presentation on the concept of gender and sex |
| 9.50-10.00 | Exercise on sex and gender |

PowerPoint-slide no. 4.1

Agenda cont.



UNHCR Gender Guidelines

- | | |
|-------------|--|
| 10.00-10.20 | Introduction to the background and purpose of the UNHCR Gender Guidelines (2002) as well as to an exercise on the guidelines |
| 10.20-10.40 | Coffee break including work on the exercise |
| 10.40-10.50 | Continuing work on the exercise |
| 10.50-11.20 | Review of the exercise |

Analysing Gender Related Asylum Claims

- | | |
|-------------|--|
| 11.20-12.00 | Framework of analysis for gender-related asylum claims |
| 12.00-12.30 | Case study exercise on how to analyse gender-related asylum claims |
| 12.30-12.50 | Review of the case study exercise |

Closure of workshop

- | | |
|-------------|-------------------------------------|
| 12.50-13.00 | Conclusions and closing of workshop |
|-------------|-------------------------------------|

PowerPoint-slide no. 4.2

Handout no. 1

PARTICIPANTS LIST

NAME	ORGANIZATION/TITLE	CONTACTS (email)
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AGENDA

ENSURING GENDER SENSITIVITY IN REFUGEE STATUS DETERMINATION

Introduction to Workshop

- | | |
|-----------|--|
| 9.00-9.05 | Welcome. |
| 9.05-9.15 | Introduction of participants. |
| 9.15-9.30 | Summary of expectations and possible relevant problem areas, including two exercises highlighting these issues |
| 9.30-9.35 | Introduction to the agenda. |
| 9.35-9.40 | Establishment of workshop rules. |

Gender and Sex

- | | |
|------------|--|
| 9.40-9.50 | Presentation on the concept of gender and sex. |
| 9.50-10.00 | Exercise on sex and gender. |

UNHCR Gender Guidelines

- | | |
|-------------|---|
| 10.00-10.20 | Introduction to the background and purpose of the UNHCR Gender Guidelines (2002) as well as to an exercise on the guidelines. |
| 10.20-10.40 | Coffee break including work on the exercise. |
| 10.40-10.50 | Continuing work on the exercise. |
| 10.50-11.20 | Review of the exercise. |

Analyzing Gender Related Asylum Claims

- | | |
|-------------|---|
| 11.20-12.00 | Framework of analysis for gender-related asylum claims. |
| 12.00-12.30 | Case study exercise on how to analyze gender-related asylum claims. |
| 12.30-12.50 | Review of the case study exercise. |

Closure of Workshop

- | | |
|-------------|--------------------------------------|
| 12.50-13.00 | Conclusions and closing of workshop. |
|-------------|--------------------------------------|

GENDER AND SEX

All resource materials needed:

PowerPoint slides:

- No. 5** Sex and Gender – Basic Definitions;
- No. 6.1** True or false – a quiz on gender and sex;
- No. 6.2** True or false..., cont.;
- No. 7** Gendered lives – wishing for a son or a daughter?
- No. 8** Gender roles...

Handout:

- No. 3** Sex and Gender – Basic Definitions.

Exercise:

- No. 1** True or false – a quiz on gender and sex.

Sex and gender: - basic definitions



Sex

- Biologically determined
- Innate
- Unchangeable
- Universal

Gender

- Socially constructed
- Learnt
- Dynamic and changeable over time and differs depending on social and political context
- Define identities, status, roles, responsibilities and power relations among the members of any society or entity

PowerPoint-slide no. 5

True or false – a quiz on gender and sex



- 1) Women give birth to babies, men don't. (S/G)
- 2) Girls and women are polite, caring, listening and smooth in behaviour and attitude. (G)
- 3) In ancient Egypt men stayed home and did weaving. Women handled family business. Women inherited property and men did not. (G)
- 4) Men's voices often break more obvious than women's in puberty. (S)
- 5) More men than women have seats and also powerful positions in political parties, governments, parliaments, universities, international organisations, NGOs, companies, municipality- or village councils and other decision-making bodies. (G)

PowerPoint-slide no. 6.1

True or false..., cont.



- 6) Women and men do compulsory military service (G)
- 7) According to UN statistics, women do 67% of the world's work, yet their earnings for it amount to only 10% of the world's income. (G)
- 8) Men are using make-up and hair products. (G)
- 9) Men have more sexual needs and lust than women. (G)
- 10) Women can breast feed babies; men can bottle feed babies. (S/G)

PowerPoint-slide no. 6.2

Gendered lives – wishing for a son or a daughter



- Choose a sex for your child
- Think about the reasons lying behind your choice

PowerPoint-slide no. 7

Gender roles...



Are learned behaviours in a given society/community or other social group, that condition which activities, tasks and responsibilities are perceived as male and female.

Are affected by:

- Age
- Class
- Ethnicity
- Religion or other ideologies
- Geographical, economic and political environment

PowerPoint-slide no. 8

SEX AND GENDER: BASIC DEFINITIONS

Sex

The term sex refers to the biological characteristics of males and females. These characteristics are congenital and their differences are limited to physiological reproductive functions.

Gender

Gender is the term used to denote the social characteristics assigned to men and women. These social characteristics are constructed on the basis of different factors, such as age, religion, national, ethnic and social origin. They differ both within and between cultures and define identities, status, roles, responsibilities and power relations among the members of any society or culture. Gender is learned through socialisation. It is not static or innate, but evolves to respond to changes in the social, political and cultural environment.

(Source: UNHCR Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, p.19)

Gender roles are learned behaviours in a given society/community or other social group, that condition which activities, tasks and responsibilities are perceived as male and female. Gender roles are affected by age, class, ethnicity, religion or other ideologies, and by the geographical, economic and political environment.

TRUE OR FALSE - A QUIZ ON GENDER AND SEX⁹³

- 1) Women give birth to babies, men don't. (S/G)
- 2) Girls and women are polite, caring, listening and smooth in behaviour and attitude. (G)
- 3) In ancient Egypt men stayed home and did weaving. Women handled family business. Women inherited property and men did not. (G)
- 4) Men's voices often crack more obvious than women's in puberty. (S)
- 5) More men than women have seats and powerful positions in political parties, governments, parliaments, universities, international organisations, NGOs, companies, municipality- or village councils and other decision-making bodies. (G)
- 6) Women and men do compulsory military service. (G)
- 7) According to UN statistics, women do 67% of the world's work, yet their earnings for it amount to only 10% of the world's income. (G)
- 8) Men use make-up and hair products. (G)
- 9) Men have more sexual needs and lust than women. (G)
- 10) Women can breast feed babies; men can bottle feed babies. (S/G)

Questions to reflect on:

1. Is the statement true or false, and could it be referred to gender or sex?
2. What is the reasoning behind categorising a statement as sex- or gender-based?
3. What norms and values may influence a statement?
4. What may be the consequences of transgressing norms underlying a statement?

⁹³ Some of the statements are to be found in Class, Gender and Race Equality and the Media in an International Context. Focus for Change, 1992.

UNHCR GENDER GUIDELINES (2002)

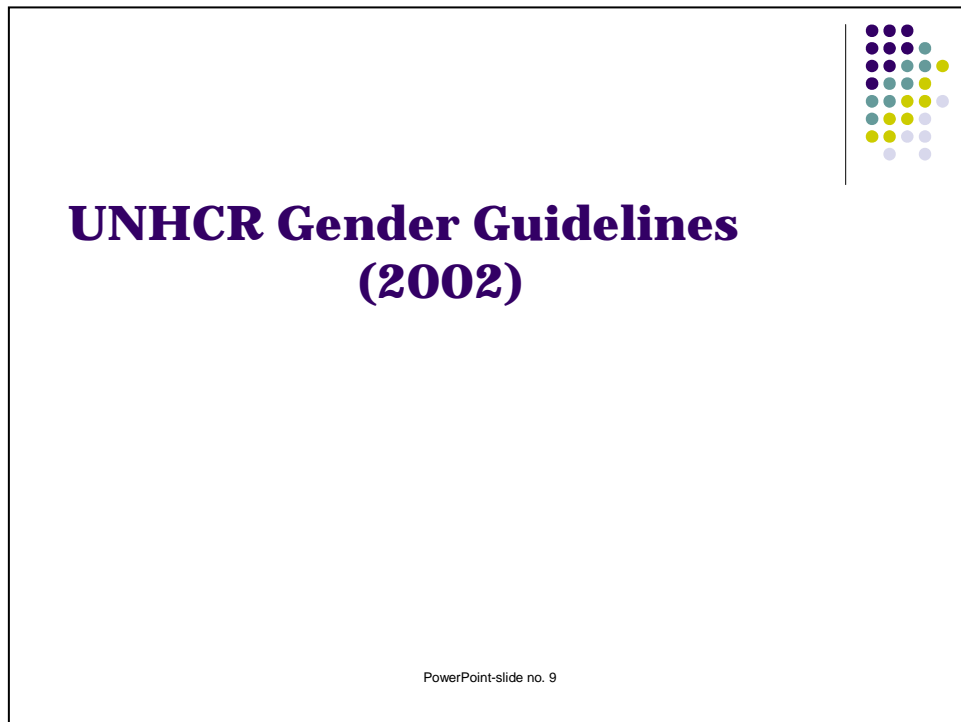
All resource materials needed:

PowerPoint slides:

- No. 9** UNHCR Gender Guidelines (2002);
- No. 10** Convention Refugee Definition;
- No. 11** The engendering of international refugee law;
- No. 12**, Gender-related claims could include (but not be limited to)...
- No. 13** Gender Guidelines (2003) exercise – instructions to groups;
- No. 14** Review of the UNHCR Gender Guidelines (2002)

Handouts:

- No. 4** UNHCR Gender Guidelines (2002),
- No. 5** Age and gender dimensions in international refugee law, by Alice Edwards.



Convention Refugee Definition



A refugee is a person who:

- “owing to a **well-founded fear** of being
- **persecuted**
- for reasons of **race, religion, nationality, membership of a particular social group or political opinion**, is
- **outside the country of his nationality** and
- **is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”**

PowerPoint-slide no. 10

The engendering of international refugee law



Despite no specific reference to gender in the refugee definition of the 1951 Convention,

it is an established principle that it should be interpreted with an awareness of possible gender dimensions

PowerPoint-slide no. 11

Gender-related claims could include (but not be limited to)



...cases of gender-based violence and gender discrimination such as:

- rape, domestic violence, forced prostitution and trafficking, female genital mutilation, forced abortion, social ostracism etc.;
- gender discriminatory laws, policies and practice as well as discriminatory social norms and punishments for not complying with certain norms and laws etc.

PowerPoint-slide no. 12

Gender guidelines (2002) exercise – instructions to groups



Prepare a summary of the content in a specific part of the UNHCR Gender Guidelines (2002):

- Group 1 covers the paragraphs under “Introduction” and “Substantive analysis”
- Group 2 covers the paragraphs under “Well-founded fear of persecution”
- Group 3 covers the paragraphs under “The casual link”
- Group 4 covers the paragraphs under “Procedural issues”

Select a group rapporteur

PowerPoint-slide no. 13

Review of the UNHCR Gender Guidelines (2002)



- Group 1 and the paragraphs under “Introduction” and “Substantive analysis”
- Group 2 and the paragraphs under “Well-founded fear of persecution”
- Group 3 and the paragraphs under “The casual link”
- Group 4 and the paragraphs under “Procedural issues”

PowerPoint-slide no. 14



Distr.
GENERAL

HCR/GIP/02/01
7 May 2002

Original: ENGLISH

**GUIDELINES ON INTERNATIONAL PROTECTION:
Gender-Related Persecution within the context of Article 1A (2)
of the 1951 Convention and/or its 1967 Protocol
Relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992). They further replace UNHCR's Position Paper on Gender-Related Persecution (Geneva, January 2000) and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

I. INTRODUCTION

1. “*Gender-related persecution*” is a term that has no legal meaning *per se*. Rather, it is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status. These Guidelines specifically focus on the interpretation of the refugee definition contained in Article 1A (2) of the 1951 Convention relating to the Status of Refugees (hereinafter “1951 Convention”) from a gender perspective, as well as propose some procedural practices in order to ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognized as such.
2. It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR’s Programme.⁹⁴
3. In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms “gender” and “sex”. Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant’s sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex. Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.
4. Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

II. SUBSTANTIVE ANALYSIS

A. BACKGROUND

5. Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals have gone unrecognized. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice generally and in academic writing. These developments have run parallel to, and have

⁹⁴ In its Conclusions of October 1999, No. 87 (n), the Executive Committee “not[ed] with appreciation special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices; encourage[d] States, UNHCR and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence; further encourage[d] UNHCR and other concerned actors to develop, promote and implement guidelines, codes of conduct and training programmes on gender-related refugee issues, in order to support the mainstreaming of a gender perspective and enhance accountability for the implementation of gender policies.” See also Executive Committee Conclusions: No.39, Refugee Women and International Protection, 1985; No.73, Refugee Protection and Sexual Violence, 1993; No.77(g), General Conclusion on International Protection, 1995; No.79(o), General Conclusion on International Protection, 1996; and No.81(t), General Conclusion on International Protection, 1997.

been assisted by, developments in international human rights law and standards,⁹⁵ as well as in related areas of international law, including through jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court. In this regard, for instance, it should be noted that harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.

6. Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition.⁹⁶
7. In attempting to apply the criteria of the refugee definition in the course of refugee status determination procedures, it is important to approach the assessment holistically, and have regard to all the relevant circumstances of the case. It is essential to have a full picture of the asylum-seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin. Making generalisations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked.
8. The elements of the definition discussed below are those that require a gender-sensitive interpretation. Other criteria (e.g. being outside the country of origin) remain, of course, also directly relevant to the holistic assessment of any claim. Throughout this document, the use of the term "women" includes the girl-child.

B. WELL-FOUNDED FEAR OF PERSECUTION

9. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution.⁹⁷ In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking,⁹⁸ 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.
10. Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of

⁹⁵ Useful texts include the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Political Rights of Women 1953, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, and in particular, the Convention on the Elimination of All Forms of Discrimination against Women 1979 and the Declaration on the Elimination of Violence against Women 1993. Relevant regional instruments include the European Convention on Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969, and the African Charter on Human and Peoples' Rights 1981.

⁹⁶ See Summary Conclusions – Gender-Related Persecution, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, nos.1 and 3 (Summary Conclusions – Gender-Related Persecution).

⁹⁷ See UNHCR's Handbook, paragraph 51.

⁹⁸ See below at paragraph 18.

that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.

11. Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid.
12. Where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution.⁹⁹ Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.
13. Even where laws or policies have justifiable objectives, methods of implementation that lead to consequences of a substantially prejudicial nature for the persons concerned, would amount to persecution. For example, it is widely accepted that family planning constitutes an appropriate response to population pressures. However, implementation of such policies, through the use of forced abortions and sterilisations, would breach fundamental human rights law. Such practices, despite the fact that they may be implemented in the context of a legitimate law, are recognized as serious abuses and considered persecution.

Discrimination amounting to persecution

14. While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or access to available educational facilities.¹⁰⁰
15. Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. 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. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analyzed in this context.

Persecution on account of one's sexual orientation

16. Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to

⁹⁹ Persons fleeing from prosecution or punishment for a common law offence are not normally refugees, however, the distinction may be obscured, in particular, in circumstances of excessive punishment for breach of a legitimate law. See UNHCR's Handbook, paragraphs 56 and 57.

¹⁰⁰ See UNHCR's Handbook, paragraph 54.

socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.

17. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.

Trafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution¹⁰¹

18. Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.¹⁰²

Agents of Persecution

19. There is scope within the refugee definition to recognize both State and non-state actors of persecution. While persecution is most often perpetrated by the authorities of a country, 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.¹⁰³

C. THE CAUSAL LINK (“for reasons of”)

20. The well-founded fear of being persecuted must be related to one or more of the Convention grounds. That is, it must be “for reasons of” race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link (“for reasons of”) must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee defini-

¹⁰¹ For the purposes of these Guidelines, “trafficking” is defined as per article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000. Article 3(1) provides that trafficking in persons means “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

¹⁰² Trafficking for other purposes could also amount to persecution in a particular case, depending on the circumstances.

¹⁰³ See UNHCR's *Handbook*, paragraph 65.

tion. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-state actor of persecution is sufficient to establish the required causal connection.

21. In cases where there is a risk of being persecuted at the hands of a non-state actor (e.g. husband, partner or other non-state actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.¹⁰⁴

D. CONVENTION GROUNDS

22. Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition. In many cases, claimants may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion or social affiliations, for example, are often seen as aligned with relatives or associates or with those of her community.
23. It is also important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analyzed in terms of religion, political opinion or membership of a particular social group. The claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted.

Race

24. Race for the purposes of the refugee definition has been defined to include all kinds of ethnic groups that are referred to as "races" in common usage.¹⁰⁵ Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction.

Religion

25. In certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where 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. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religions regardless of what she actually believes. 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

¹⁰⁴ See Summary Conclusions – Gender-Related Persecution, no.6.

¹⁰⁵ See UNHCR's *Handbook*, paragraph 68.

a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion.

26. There is some overlap between the grounds of religion and political opinion in gender-related claims, especially in the realm of imputed political opinion. While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion. For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.

Nationality

27. Nationality is not to be understood only as “citizenship”. It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term “race”.¹⁰⁶ Although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls.

Membership of a Particular Social Group¹⁰⁷

28. Gender-related claims have often been analyzed within the parameters of this ground, making a proper understanding of this term of paramount importance. However, in some cases, the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-looked. Therefore, the interpretation given to this ground cannot render the other four Convention grounds superfluous.
29. Thus, a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.
30. It follows that 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.¹⁰⁸ Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.¹⁰⁹ Equally, this definition would encompass homosexuals, transsexuals, or transvestites.

¹⁰⁶ See UNHCR’s *Handbook*, paragraph 74.

¹⁰⁷ For more information, see UNHCR’s *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002).

¹⁰⁸ See Summary Conclusions – Gender-Related Persecution, no.5.

¹⁰⁹ See also Executive Committee Conclusion No.39, Refugee Women and International Protection, 1985: “States ... are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as ‘a particular social group’ within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention”.

31. The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate,¹¹⁰ or that every member of the group is at risk of persecution.¹¹¹ It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.¹¹²

Political Opinion

32. Under this ground, a claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to him or her. 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. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature. A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.

33. The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. 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. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets. Women are also frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives. While this may be analyzed in the context of an imputed political opinion, it may also be analyzed as being persecution for reasons of her membership of a particular social group, being her "family". These factors need to be taken into account in gender-related claims.

34. Equally important for gender-related claims is to recognize that a woman may not wish to engage in certain activities, such as providing meals to government soldiers, which may be interpreted by the persecutor(s) as holding a contrary political opinion.

¹¹⁰ See Summary Conclusions - Membership of a Particular Social Group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no.4 (Summary Conclusions – Membership of a Particular Social Group).

¹¹¹ See Summary Conclusions – Membership of a Particular Social Group, *ibid.*, no.7.

¹¹² See Summary Conclusions - Membership of a Particular Social Group, *ibid.*, no.6.

III. PROCEDURAL ISSUES¹¹³

35. Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.¹¹⁴
36. Against this background, in order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, the following measures should be borne in mind:
- i. Women asylum seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.
 - ii. It is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands.
 - iii. Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves,¹¹⁵ and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.
 - iv. An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.
 - v. The interviewer should take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview. The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family. Importantly, the interviewer should explain that he/she is not a trauma counsellor.
 - vi. The interviewer should remain neutral, compassionate and objective during the interview, and should avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate. The interviewer should allow the claimant to present his/her claim with minimal interruption.

¹¹³ This Part has benefited from the valuable guidance provided by various States and other actors, including the following guidelines: *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (Immigration and Naturalization Service, United States, 26 May 1995); *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (Department of Immigration and Humanitarian Affairs, Australia, July 1996); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada, 13 November 1996); *Position on Asylum Seeking and Refugee Women*, (European Council on Refugees and Exiles, December 1997); *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women's Legal Group, July 1998); *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs, South Africa, 1999); *Asylum Gender Guidelines* (Immigration Appellate Authority, United Kingdom, November 2000); and *Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection* (Migration Board, Legal Practice Division, Sweden, 28 March 2001).

¹¹⁴ See also *Sexual Violence against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995) and *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, 27-29 March 2001, Geneva).

¹¹⁵ See also Executive Committee Conclusion No.64, *Refugee Women and International Protection*, 1990, (a) (iii): Provide, wherever necessary, skilled female interviewers in procedures for the determination of refugee status and ensure appropriate access by women asylum seekers to such procedures, even when accompanied by male family members.

- vii. Both 'open-ended' and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews. Women who have been involved in indirect political activity or to whom political opinion has been attributed, for example, often do not provide relevant information in interviews due to the male-oriented nature of the questioning. Female claimants may also fail to relate questions that are about 'torture' to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, 'honour killings', forced marriage, etc.).
- viii. Particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. In this regard, interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed.
- ix. Where it is envisaged that a particular case may give rise to a gender-related claim, adequate preparation is needed, which will also allow a relationship of confidence and trust with the claimant to be developed, as well as allowing the interviewer to ask the right questions and deal with any problems that may arise during an interview.
- x. Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.
- xi. The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as, use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers, civilians) etc.) as well as the motivation of the perpetrator may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.
- xii. Mechanisms for referral to psycho-social counselling and other support services should be made available where necessary. Best practice recommends that trained psycho-social counsellors be available to assist the claimant before and after the interview.

Evidentiary Matters

- 37. No documentary proof as such is required in order for the authorities to recognize a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognize that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might

assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.

IV. METHODS OF IMPLEMENTATION

38. Depending on the respective legal traditions, there have been two general approaches taken by States to ensure a gender-sensitive application of refugee law and in particular of the refugee definition. Some States have incorporated legal interpretative guidance and/or procedural safeguards within legislation itself, while others have preferred to develop policy and legal guidelines on the same for decision-makers. UNHCR encourages States who have not already done so to ensure a gender-sensitive application of refugee law and procedures, and stands ready to assist States in this regard.

AGE AND GENDER DIMENSIONS IN INTERNATIONAL REFUGEE LAW
by Alice Edwards

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The article is available on the UNHCR website: www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&id=419c74784

Age and Gender Dimensions in International Refugee law Alice Edwards*

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I. Context

International refugee law has evolved in significant ways over the last fifty years, as it has been required to adapt to new and changing refugee situations and humanitarian challenges. The removal of dateline and geographical limitations by virtue of the 1967 Protocol, and developments in other bodies of international law have 'fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses'.¹¹⁶ The Preamble to the 1951 Convention calls on States 'to assure refugees the widest possible exercise of [their] fundamental rights and freedoms', necessitating an analysis of refugee law within the wider humanitarian and human rights context. International human rights law and international humanitarian law instruments complement the safeguards for refugees enumerated in the 1951 Convention. Importantly, these bodies of law reinforce the non-discriminatory basis of international law in general, which impacts on international refugee law in particular. The text, object and purpose of the 1951 Convention require that it be interpreted and applied in a non-discriminatory way. The codification of women's and children's rights has also substantially advanced understandings of equal treatment and equal rights within the international refugee protection framework. Age and gender perspectives have thus become important features of international refugee law over the last decade.

¹¹⁶ *The views expressed are the personal views of the author, and are not necessarily shared by the UN or UNHCR.

See the paper by R. Haines on gender-related persecution in Part 5.1 of this book. For the 1951 Convention Relating to the Status of Refugees, see 189 UNTS 150 and for the 1967 Protocol There to, see 606 UNTS 267.

This paper will consider, in particular, Articles 1A(2), 1F and 1C, from these perspectives, thus complementing the other papers in this book. It presents a snapshot of some of the key aspects of refugee status determination which could benefit from age- and gender-sensitive approaches. In so doing, it sets out the evolution of the understanding of the refugee definition to include child-specific forms of persecution, persecution by non-state agents, and claims based on sexual orientation or as a result of being trafficked. It challenges certain preconceptions that have had the effect of denying protection under the 1951 Convention to claims not conforming to the 'adult male' standard. These legal issues, which nevertheless fall within the framework of the 'second track' of the Global Consultations with its focus on clearer interpretation of the 1951 Convention¹¹⁷, are not drawn together elsewhere in the book in this way. Their inclusion here gives them their proper prominence in international refugee law, while also recognizing that such approaches are still under development.

The logical first step to achieving a non-discriminatory application of refugee law is to ensure that age- and gender-sensitive and -inclusive asylum procedures are in place. The importance of equal access to asylum procedures cannot be overstated. This includes the implementation of a myriad of simple measures in order to foster an open and receptive environment. The second step is to adopt age and gender sensitive interpretations of international refugee law. This includes a full understanding of the differential impact of law and its interpretation on women vis-`a-vis men, on children¹¹⁸ vis-`a-vis adults, and on the elderly vis-`a-vis able-bodied adults. It further requires an understanding of the double impact of age and gender dimensions on some claims, particularly those of young girls. This necessarily entails a clear understanding of the differences between sex and gender. Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles, and responsibilities that are assigned to one sex or another, while sex is a biological determination.¹¹⁹

While there has been an overall trend towards recognition of gender-related claims (and less in relation to age-related claims), some States and judiciaries continue to fail to apply a full interpretation of the refugee definition. Not only are age and gender relevant to the identification of types of persecution feared, it is equally important that the entire refugee definition be age and gender inclusive. Notwithstanding the crucial importance of such a focus, the real challenge to refugee status determination is to give true effect to the individualized nature of the inquiry, characterized not only by age and sex, but also by cultural, religious, political, physical, mental, and other factors.

A. The human rights narrative

At the outset, it is important to reflect on how normative international law, while intending to protect all individuals, may exclude certain persons from the realization of its protective scope on account of its lack of differentiation between the impact of various provisions on different groups or individuals. Some commentators have argued that '[t]he normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined'.¹²⁰ The writer, however, finds that it is not the normative structure of international law that has marginalized the rights of women, nor the fact that laws tend to be written in gender-neutral language.¹²¹ The real issue is the gulf between the global purpose of international law to benefit all persons, and the marginalization of women from its ambit.

¹¹⁷ For further information on UNHCR's Global Consultations see the Preface and Part 1.1 of this book.

¹¹⁸ 'Children' for the purposes of this paper are persons under the age of eighteen years, unless otherwise specified.

¹¹⁹ See among others, UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol on the Status of Refugees', UN doc. HCR/GIP/02/01, Geneva, 7 May 2002 (hereinafter UNHCR, 'Guidelines on Gender-related Persecution', (2002), para. 3.

¹²⁰ H. Charlesworth, C. Chinkin, and S. Wright, 'Feminist Approaches to International Law', in *International Rules: Approaches from International Law and International Relations* (ed. R. J. Beck, A. C. Arend, and R. D. Vander Lugt, Oxford University Press, 1996), p. 265.

¹²¹ Except for specific international treaties directly related to women, such as the Convention on the Elimination of Discrimination against Women 1979.

This is mirrored in society at large, with women often finding themselves on the sidelines of society. The application of international law in general and international refugee law in particular has been rooted in the public/private dichotomy, which has often been translated into a male/female and political/apolitical divide.¹²² This has not been caused by the law itself, but by social perceptions of the roles and responsibilities of women vis-à-vis men.

It was not until differences in the forms of persecution facing women were identified, and a holistic gender-sensitive and gender-inclusive approach to refugee law was promoted, that specific claims of women and other gender claims were recognized as falling within the purview of the 1951 Convention. As Spijkerboer has pointed out, 'derivative persecution' of female asylum seekers on the basis of their family membership is more readily accepted by decision makers than that of direct persecution where the claimant has to establish that she has suffered or fears persecution on a particular Convention ground.¹²³ The assortment of asylum claims of women in particular rests in gender stereotypes of accepted and 'believed' roles. It is these stereotypes which need to be deconstructed, rather than there being a need to recreate international norms. Anyone who does not conform to the adult male standard is affected by narrow understandings of international law. These stereotypes also affect the claims of children or the elderly or other age groupings, which do not correspond to that standard. For example, children are not readily seen as full members of society, benefiting from rights equal to those of adults. It is an individual right to seek and to enjoy asylum from persecution, which is implicit in the 1951 Convention. Thus, in order to ensure that international refugee law is applied in a non-discriminatory way to all individuals, age and gender approaches are vital components of any analysis.

Developments in refugee protection (outlined below) must be seen within a broader framework of advancements in international human rights law, including, in particular, the Convention on the Elimination of All Forms of Discrimination against Women 1979 and its Optional Protocol¹²⁴, the Declaration on the Elimination of Violence against Women 1993¹²⁵, the Convention on the Rights of the Child 1989¹²⁶ and its Optional Protocols on the Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography,¹²⁷ the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995¹²⁸ and the follow-up 'Beijing Plus 5' Special Session of the General Assembly,¹²⁹ and jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda,¹³⁰ as well as the Statute of the International Criminal Court.¹³¹

¹²² H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001), p. 18.

¹²³ T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Dartmouth, 2000), as restated in Crawley, above n. 7, p. 19.

¹²⁴ 1249 UNTS 13 and UNGA resolution A/RES/54/4, 6 Oct. 1999.

¹²⁵ UNGA resolution 48/104, 20 Dec. 1993.

¹²⁶ UNGA resolution 44/25, 20 Nov. 1989 (hereinafter 'CRC').

¹²⁷ Both UNGA resolutions 54/263, 25 May 2000; entered into force on 12 Feb. 2002 and 18 Jan. 2002 respectively.

¹²⁸ 'Report of the Fourth World Conference on Women, Platform for Action', UN doc. A/CONF.177/20, 17 Oct. 1995.

¹²⁹ 'Women 2000: Gender Equality, Development and Peace in the Twenty-First Century', 23rd Session of the General Assembly, UN doc. A/55/341, 5–9 June 2000.

¹³⁰ International Criminal Tribunal for the former Yugoslavia (ICTY), judgment in the case of *Kunarac, Kovac and Vukovic*, Case No. IT-96-23 and IT-96-23/1, 22 Feb. 2001, found rape to be a crime against humanity as well as a violation of the laws or customs of war. This judgment was upheld by the ICTY Appeals Chamber on 12 June 2002. See also paper by R. Haines, Part 5.1 of this book.

¹³¹ Arts. 7(1)(g) and 8(2)(b)(xxii) of the Statute of the International Criminal Court (ICC) specifically define a 'crime against humanity' and a 'war crime' as including 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. Art. 8(2)(b)(xxii), concerning international armed conflicts, differs slightly from Art. 7(1)(g) in defining other forms of sexual violence as being those 'also constituting a grave breach of the Geneva Conventions'. Art. 8(2)(e)(vi), concerning internal armed conflicts, gives the same list of war crimes except that 'any other form of sexual violence' is defined as one 'constituting a serious violation of article 3 common to the four Geneva Conventions'. Arts. 7(1)(c) and 7(2)(c) further include 'enslavement' as a crime against humanity, with specific reference to trafficking in women and children; Art. 6(d) identifies the imposition of measures intended to destroy, in whole or in part, a national, ethnic, racial, or religious group, by preventing births within the group, as 'genocide', as well as the forcible transfer of children of the group to another group, per Art. 6(e).

These measures have advanced global trends towards gender inclusion and equal treatment between the sexes, and have given special attention to children.¹³² Human rights law has had the effect of moving predominantly private harm to an act that infringes international human rights law as a result of State tolerance or condonation. As UNHCR's 'Guidelines on Gender-Related Persecution' state:

International 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. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act.¹³³

This does not suggest, however, that it is necessary to identify a violation of human rights law in each and every case in order to establish persecution, although persecution will usually involve breaches of human rights law. Prior to the enumeration of women's human rights in international instruments, it cannot be said that rape did not amount to persecution for the purposes of the 1951 Convention. It still existed as a form of persecution. Rather, the international legal framework has helped to move away from male-dominated perspectives and to conceptualize the nature of such violence as a serious human rights violation. Many gender related claims to refugee status draw on international law or pronouncements of the United Nations in order to support the persecutory nature of the violence in question.¹³⁴ As there is no internationally accepted definition of what constitutes 'persecution', it would be unwise to limit its application to serious human rights abuses. It is possible that all forms of persecution have not yet been identified or codified in international human rights law. International human rights law does, however, have a role to play in clarifying some forms of persecution as serious human rights violations. As Jacqueline Bhabha and Wendy Young suggest in relation to children's rights, the 'best interests of the child' principle, as derived from Article 3 of the Convention on the Rights of the Child (CRC), 'operates as an interpretative aid [to international refugee law], broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms'.¹³⁵ Prior to the adoption and entry into force of the CRC, however, children were still entitled to the enjoyment of rights as individuals under other international instruments.

B. Recent developments

1. Gender

There has been significant progress in relation to the recognition of gender-related claims to refugee status over the last decade. In 1985, the Executive Committee of the High Commissioner's Programme first referred to the fact that 'women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A(2)', although it was left to States' discretion 'in the exercise of their sovereignty' whether or not to do so.¹³⁶ In 1990, there was the first mention of providing skilled female interviewers in refugee status determination procedures as well as ensuring access by women asylum seekers to such procedures, 'even when accompanied by male family mem-

¹³²There is still a large void in relation to the rights of some other groups, such as the elderly and persons with disabilities.

¹³³ UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 9.

¹³⁴ See, also, P. Goldbert and B. Passade Cissé, 'Gender Issues in Asylum Law after Matter of R.A.', *Immigration Briefings*, Feb. 2000, p. 1.

¹³⁵ J. Bhabha and W. Young, 'Not Adults in Miniature: Child Asylum Seekers and the New US Guidelines', *11 International Journal of Refugee Law*, 1999, p. 84, at p. 98.

¹³⁶ Executive Committee, Conclusion No. 39 (XXXVI), 1985, on refugee women and international protection, para. k.

bers'.¹³⁷ UNHCR's 1991 'Guidelines on the Protection of Refugee Women' created the impetus for subsequent resolutions, advising that 'special efforts may be needed to resolve problems faced specifically by refugee women',¹³⁸ and urging that refugee status determination officials be given training regarding the claims of women asylum seekers.¹³⁹ Consequently, in 1993, there was encouragement to States to develop 'appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men'¹⁴⁰. In October 1995, and again in 1996, 1997, and 1999,¹⁴¹ the Executive Committee went further and

call[ed] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women . . . In accordance with the principle that women's rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.¹⁴²

Throughout this period, States began responding to the call for the introduction of safeguards, including the development of guidelines, in order to ensure equitable access to asylum procedures. The United States, Australia, Canada, and the Netherlands were the first States to accept the challenge¹⁴³.

UNHCR held a symposium on gender-based persecution in 1996 to examine comparative practices with a view to improving protection for women who fear persecution on gender-related grounds.¹⁴⁴ As a culmination of these developments, judicial reasoning took on new approaches, moving away from paradigms dominated by the experiences of male refugees, and towards a gender-sensitive and gender-inclusive interpretation and application of refugee law that gave equal significance to the sometimes different, although no less serious, forms of persecution feared by women. Case law has recognized 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 outlined briefly in the paragraphs which follow.

Rape and sexual violence inflicted by members of the armed forces have been recognized as a ground for refugee status.¹⁴⁵ These decisions have paralleled developments in

¹³⁷ Executive Committee, Conclusion No. 64 (XLI), 1990, on refugee women and international protection, para. a(iii).

¹³⁸ UNHCR, 'Guidelines on the Protection of Refugee Women', Geneva, 1991, para. 4.

¹³⁹ *Ibid.*, para. 75.

¹⁴⁰ Executive Committee, Conclusion No. 73 (XLIV), 1993.

¹⁴¹ See Executive Committee, Conclusions No. 79 (XLVII), 1996, para. o; No. 81 (XLVIII), 1997, para. t; and No. 87 (L), 1999, para. n, respectively.

¹⁴² Executive Committee, Conclusion No. 77 (XLVI), 1995, para. g.

¹⁴³ US Immigration and Naturalization Service, 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women', 26 May 1995; Department of Immigration and Humanitarian Affairs, Australia, 'Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers', July 1996; Immigration and Refugee Board, Canada, 'Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update', 13 Nov. 1996; and Netherlands Immigration and Naturalization Service, 'Working Instruction No. 148: Women in Asylum Procedures', subsequently superseded by guidelines in the Aliens Circular 2000.

¹⁴⁴ 'UNHCR Symposium on Gender-Based Persecution, Geneva, 22–23 Feb. 1996', 9 *International Journal of Refugee Law*, special issue, Autumn 1997.

¹⁴⁵ See e.g., *Olympia Lazo-Majano v. Immigration and Naturalization Service*, USCourt of Appeals (9th Circuit), 813 F.2d 1432, 9 June 1987 (El Salvadorean woman raped by sergeant of Salvadorean armed forces, political opinion); *Matter of D.V.*, USBoard of Immigration Appeals, Interim Decision No. 3252, 25 May 1993 (Haitian woman gang-raped by soldiers after fall of Aristide government because of her active membership in a church group supporting that government); *Grajo v. Immigration and Naturalization Service*, 124 F.3d 203 (7th Circuit), 1997; *Fuentes v. Immigration and Naturalization Service*, 127 F.3d 1105 (9th Circuit), 1997; Decision of 7 Sept. 2001, Administrative Court Frankfurt am Main, Ref. No. 1 E 31666/97.A(1); *Raquel Mart*

international human rights law confirming, for instance, that the rape of a 17-year-old female detainee by an official of the State was an especially grave and abhorrent form of ill-treatment and that the accumulation of acts of violence, especially the act of rape, amounted to torture.¹⁴⁶ Similarly, judgments of the international tribunals for the former Yugoslavia and Rwanda confirming enslavement, rape, and torture as crimes against humanity¹⁴⁷ and genocide¹⁴⁸ have further clarified the international legal position regarding such acts. Victims of domestic violence where the State is unable or unwilling to intervene to provide protection have in recent years increasingly also been recognized as refugees, not least as a result of evolving jurisprudence on 'membership of a particular social group'.¹⁴⁹

The position adopted by the Executive Committee that 'women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group"'¹⁵⁰ has been accepted in numerous jurisdictions.¹⁵¹ Again, human rights developments have buttressed such interpretations. The European Court of Human Rights has found, for instance, that there was a real risk of the applicant, an Iranian refugee accused of adultery,¹⁵² being subjected to treatment contrary to Article 3 of the European Convention on Human Rights,¹⁵³ including potentially death by stoning, if she were returned to Iran.

Other claims of gender-related persecution have included those concerning the practice of female genital mutilation, and refugee status has now been recognized in such cases

n de Mejía v. Peru,

Inter-American Commission on Human Rights, Case No. 10.970, Report No. 5/96, 1 March 1996 (Peruvian woman raped by armed forces for alleged membership of guerrilla group, later granted asylum in Sweden). The Center for Gender and Refugee Studies at Hastings College of the Law, University of California, USA, maintains a useful database of decisions on gender-related asylum claims and other relevant material at www.uchastings.edu/cgrs/.

¹⁴⁶ *Aydin v. Turkey*, European Court of Human Rights, Case No. 57/1996/676/866, 25 Sept. 1997.

¹⁴⁷ *Kunarac, Kovac and Vukovic*, above n. 15. See also, *Prosecutor v. Anto Furundzija*, ICTY, Case No. IT-95-17/1-T, 10 Dec. 1998, upheld on appeal 21 July 2000.

¹⁴⁸ *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-96-4-T, 2 Sept. 1998.

¹⁴⁹ See e.g., *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary of State for the Home Department*, UK House of Lords, [1999] 2AC629, [1999] 2 AllER545 (hereinafter *Shah and Islam*) (two Pakistani women falsely charged with indecent violence by their husbands and severe sanctions under Pakistani law, membership of a particular social group, social mores); *Minister of Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, [2002] HCA 14, 11 April 2002 (Pakistani woman subject to severe domestic violence); *Matter of R.A.*, Interim Decision No. 3403, Board of Immigration Appeals, 11 June 1999 (Guatemalan citizen subject to brutal violence by her husband, membership of a particular social group, political opinion); *Aguirre-Cervantes v. Immigration and Naturalization Service*, USCourt of Appeals (9th Circuit), 242 F.3d 1169, 21 March 2001 (19-year-old Mexican girl abused by her father granted status on the basis of 'family membership'); Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority (RSAA), 16 Aug. 2000 (Iranian woman and son subject to custody battle, cumulative discrimination).

¹⁵⁰ Executive Committee, Conclusion No. 39, above n. 21.

¹⁵¹ See e.g., *Shah and Islam*, above n. 34; *Fatin v. Immigration and Naturalization Service*, Court of Appeals (3rd Circuit), 12 F.3d 1233, 1993 (18-year-old Iranian woman, wearing the *chador* and freedom of expression and equality of the sexes); *Matter of S.A.*, Board of Immigration Appeals, Interim Decision No. 3433, 27 June 2000 (21-year-old Moroccan woman subject to severe physical abuse by her father on account of her differing religious beliefs about the role of women in Moroccan society), cf. *Fisher v. Immigration and Naturalization Service*, 79 F. 3d 955 (9th Circuit), 1996; *Matter of D.*, US Immigration Court, San Francisco, California, 3 July 1996, available at www.uchastings.edu/cgrs/law/ij/9.pdf (Afghan woman with well-founded fear of persecution on grounds of political opinion and religion); Refugee Appeal No. 71427/99, above n. 34; Refugee Appeal No. 2039/93 *Re M.N.*, New Zealand RSAA, 12 Feb. 1996 (Iranian woman subject to cumulative discrimination amounting to a real chance of persecution on grounds of race, religion, and political opinion at hands of State and male family members); Refugee Appeal No. 2223/94, New Zealand RSAA, 30 July 1996; Refugee Appeal No. 915/92 *Re S.Y.*, New Zealand RSAA, 29 Aug. 1994 (imputed political opinion); *Elkebir*, French *Commission des recours des réfugiés* (CRR, Refugee Appeal Commission), 22 July 1994 (Westernized Algerian woman threatened by Islamic militants, lack of State protection); *Sahraoui*, French CRR, 8 Feb. 1995 (being too Westernized); *Haj Ahmed*, French CRR, 30 Nov. 2000 (divorced woman, raising children on her own in Algeria). These issues are also addressed by the Australian High Court in *Khawar*, above n. 34, paras. 52, 123, 134, and 150.

¹⁵² *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000.

¹⁵³ European Convention on the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

in a number of jurisdictions.¹⁵⁴ For its part, the European Parliament has expressed the hope that member States of the European Union will recognize the right to asylum of women and girls at risk of being subjected to such treatment.¹⁵⁵ A further recent example of gender-related persecution concerns victims of trafficking, who have in some cases also been granted refugee status.¹⁵⁶

Initiatives promoting the inclusion of women asylum seekers within refugee status determination processes and gender-sensitive interpretations of refugee law have also had the positive corollary effect of accepting the non-traditional claims of some men who breach social roles attributed to their sex.¹⁵⁷ Just as women who refuse to wear the veil in some societies are seen as transgressing accepted social mores, male homosexuals, for example, in some societies also find themselves in breach of both gender roles and social rules and are persecuted as a result. The rapidity with which such cases have been seen as falling within the parameters of Article 1A(2) of the 1951 Convention demonstrates dynamic progression towards a correct understanding of the gendered nature of particular claims.

By 2000, there was widespread acceptance that gender can 'influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment',¹⁵⁸ although the Executive Committee continued to express its concern about the 'less than full application of international refugee instruments by some States Parties'.¹⁵⁹ In 1998, Norway introduced guidelines on determining refugee status¹⁶⁰ and, two years later, the United Kingdom introduced guidelines on gender-sensitive approaches to refugee law and procedures.¹⁶¹ Sweden has introduced two sets of guidelines, one on women and the other on sexual orientation, with a focus on procedural aspects of asylum determination.¹⁶² At the time of writing this pa-

¹⁵⁴See e.g. *In re Fauziya Kasinga*, US Board of Immigration Appeals, File No. A73 476 695, 13 June 1996 (19-year-old Togolese woman, FGM and forced marriage); *Annan v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), [1995] 3 FC 25, 6 July 1995; *Soumah*, French CRR, 7 Dec. 2001; *A.*, French CRR, 18 Sept. 1991; *Soumahoro*, French CRR, 17 July 1995, cited in M. Laurain, 'Membership of a Particular Social Group in Recent French Case Law' (paper submitted to the Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), Council of Europe, Strasbourg, doc. CAHARPSG (2002) 4 fre, 14 March 2002); Decision No. IFAS 220.268/0-XI/33/00, Austrian Independent Federal Asylum Senate (IFAS/UBAS, second instance asylum authority), Vienna, 21 March 2002 (refugee status granted on basis of membership of the group of Cameroonian women who are to be circumcised).

¹⁵⁵E. V. Martinez-Orozco, 'Report on Female Genital Mutilation', A5-0285/2001, European Parliament, 17 July 2001, p. 13/32.

¹⁵⁶See e.g., Decision No. T98-06186, CRDD No. 298, 2 Nov. 1999 (Thai woman in sex trade debt bondage, refugee status as member of social group of women and/or former sex trade workers); *Dzhygun*, UK Immigration Appeal Tribunal, Appeal No. CC-50627-99 (00TH00728), 17 May 2000 (refugee status of trafficked Ukrainian woman upheld on appeal); Decision No. 99/20/0497-6, Austrian Administrative Court (*Verwaltungsgerichtshof*, 3rd instance), 31 Jan. 2002 (denial of asylum to Nigerian woman trafficked into prostitution overruled and returned for reconsideration).

¹⁵⁷See section II.A.3 below. Cases include *Ourbih*, French CRR (sections r 'eunis (SR)), Decision No. 269875, 15 May 1998 (Algerian transsexuals a particular social group); *Djellal*, French CRR (SR), Decision No. 328310, 12 May 1999; *Aourai*, French CRR, Decision No. 343157, 22 Feb. 2000; *Meguenine*, French CRR, 12 July 2001 (all three cases involving Algerians openly proclaiming their homosexuality), cited in Laurain, 'Membership of a Particular Social Group in Recent French Case Law', above n.39. See, also, *ReG.J.*, Refugee Appeal No. 1312/93, New Zealand RSAA, 1 NLR 387, 30 Aug. 1995 (Iranian homosexual recognized as member of particular social group, analysis of other jurisprudence on sexual orientation); *Hernandez-Montiel v. Immigration and Naturalization Service*, USCourt of Appeals (9th Circuit), No. A72-994-278, 225 F.3d 1084, 24 Aug. 2000 (Mexican 'gaymen with female sexual identities' a particular social group); *Matter of Marcelo Tenorio*, US Board of Immigration Appeals (BIA), File No. A72-093-558, 1999; *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, [2000] FCA 211, 6 March 2000. For an overview of cases in Europe, North America, South Africa, Australia, and New Zealand, see European Legal Network on Asylum (ELENA), 'Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status' (European Council on Refugees and Exiles (ECRE), June 1997).

¹⁵⁸UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 6. See also, paper by R. Haines, Part 5.1 of this book.

¹⁵⁹Executive Committee, Conclusion No. 89 (LI), 2000.

¹⁶⁰Royal Ministry of Justice and the Police, 'Guidelines for Determining Refugee Status in Norway', 15 Jan. 1998.

¹⁶¹UK Immigration Appellate Authority, 'Asylum Gender Guidelines', Nov. 2000.

¹⁶²Migration Board, Legal Practice Division, Sweden, 'Gender-Based Persecution: Guidelines for the Investigation and Evaluation of the Needs of Women for Protection', 28 March 2001, and Migration Board, Sweden, 'Guidelines for the Investigation and Evaluation of Asylum Cases in

per, however, Sweden has yet to accept that the claims of women or those based on sexual orientation fit within the 'particular social group' ground of the refugee definition, although Sweden has said publicly that legislative changes are in train to correct this.¹⁶³ The current Swedish 'Guidelines on Women' do emphasize, however, that 'women's expressions of protest and their refusal to submit are often directed towards social, cultural and religious norms' that are supported by political and religious arms of society. The Swedish 'Guidelines on Sexual Orientation' also refer to contravention of strict religious practices. This hints that such activities can be appropriately classified as political or religious in character for the purposes of the 1951 Convention refugee definition. Several non-governmental organizations have also produced valuable guidance in the absence of State action.¹⁶⁴

In comparison, Ireland, Panama, South Africa, and Venezuela have opted specifically to identify 'sex', 'gender', and/or 'sexual orientation' as grounds for claiming refugee status.¹⁶⁵ Still other countries have included references to specific forms of gender-related persecution, rather than adding an additional ground. Switzerland, for instance, expressly provides in legislation that the 'motives of flight specific to Women shall be taken into account'.¹⁶⁶ Guatemala refers to sexual violence and other gender-based persecution.¹⁶⁷ Germany prohibits *refoulement* of aliens facing persecution because of their gender, in addition to *refoulement* of those facing persecution on one or more of the Convention grounds.¹⁶⁸ In 1995, the Austrian Ministry of the Interior issued an order specifying that 'on the basis of the [1951] Geneva Convention and the 1991 Asylum Law, rape, just like any other violation of a person's integrity, is a ground for asylum, provided that it was motivated by one of the reasons enumerated in the [1951] Geneva Convention'.¹⁶⁹ A correct interpretation of the refugee definition does not, however, require that another ground be added.¹⁷⁰ Nonetheless, it is clear that specific reference to 'sex' or 'sexual orientation' within the law has the effect of removing any remaining doubt that persons facing gender-related persecution are protected by the 1951 Convention.

UNHCR, throughout its Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention, adopted a gender and age-inclusive approach. In addition, States Parties urged that separate agenda items on refugee women and on refugee children be included in relation to the 'third track' of the Consultations.¹⁷¹ Within the documentation on refugee women, a section was dedicated to the continuing need for gender-sensitive interpretation and -application of refugee law. A section on trafficking also highlighted the particular vulnerabilities of refugee women as targets of trafficking rings, in addition to finding that some trafficked persons may be able to mount valid claims to refugee status, where the State has been unable or unwilling to protect them against such forms or

which Persecution Based on Given Sexual Orientation is Cited as a Ground', 28 Jan. 2002.

¹⁶³ Statement by the Swedish delegate to the .nal 'third track' meeting of the Global Consultations on International Protection on refugee women, Geneva, 24 May 2002. Currently, such claimants are granted subsidiary or complementary forms of protection.

¹⁶⁴ See, e.g., ECRE, 'Position on Asylum Seeking and Refugee Women', Dec. 1997; Refugee Women's Legal Group, 'Gender Guidelines for the Determination of Asylum Claims in the UK', July 1998; National Consortium on Refugee Affairs, South Africa, 'Gender Guidelines for Asylum Determination', 1999; Irish Refugee Council, 'Guiding Principles on Asylum-Seeking and Refugee Women', June 2001.

¹⁶⁵ The 1996 Irish Refugee Act, section 1, defines membership of a particular social group as including 'persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation'; Panamanian Executive Decree No. 23, 10 Feb. 1998, Art. 5, includes 'gender'; the 1998 South African Refugee Act specifies that members of a particular social group can include persons persecuted because of their 'gender, sexual orientation, class or caste'; the National Assembly of Venezuela, Decree of 3 Oct. 2001, Art. 5, adds the ground of 'sex' to the refugee definition.

¹⁶⁶ 1998 Asylum Act, Art. 3(2).

¹⁶⁷ Government Accord No. 383-2001, Guatemala, 14 Sept. 2001, Art. 11(d).

¹⁶⁸ Immigration Law, section 60, signed into law by Federal President, June 2002.

¹⁶⁹ Order of the Austrian Ministry of Interior, No. 97.101/10/SL III/95.

¹⁷⁰ See UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 6; and Global Consultations, 'Summary Conclusions – Gender-Related Persecution', San Remo expert roundtable, 6–8 Sept. 2001, para. 1.

¹⁷¹ UNHCR, 'Refugee Women', Global Consultations on International Protection, UN doc. EC/GC/02/8, 25 April 2002, Parts V and VI; and UNHCR, 'Refugee Children', UN doc. EC/GC/02/9, 25 April 2002.

threats of harm.¹⁷² As indicated in the Introduction in Part 1.1 of this book, the second track specifically included gender-related persecution as a separate discussion at the expert roundtable in San Remo, 6–8 September 2001.

2. Age

Less has been said in relation to the age dimension in the interpretation and application of international refugee law. Like sex and sexual orientation, age is not included in the refugee definition in Article 1A(2) of the 1951 Convention as a specific ground for seeking asylum. Nonetheless, the range of potential claims with an age dimension is broad, including forcible or under-age recruitment into military service,¹⁷³ family or domestic violence,¹⁷⁴ infanticide, forced or under-age marriage,¹⁷⁵ female genital mutilation,¹⁷⁶ forced labour, forced prostitution, child pornography, trafficking,¹⁷⁷ and children born outside of strict family planning rules.¹⁷⁸ Although refugee children are entitled to access the same protection as refugee adults, their special vulnerabilities require that an age-sensitive approach be adopted in relation to substantive aspects of refugee law as well as procedures. If not, the risk of failing to recognize child-specific forms of persecution or underestimating the particular fears of children is high. Age-sensitive approaches are particularly relevant to children, although they are also important for the elderly, who may, for example, suffer severe discrimination (including exclusion) amounting to persecution.

The claims of many children often incorporate a gender element. For example, young girls, as opposed to adult women, are most likely to be threatened with female genital mutilation. Thus, such cases necessarily import both an age and a gender dimension which are often overlooked. Is the girl at risk of persecution based on her sex, as a girl, or her age, as a young girl, or both? Are young boys who flee forcible recruitment being persecuted by reason of their sex, or because of their age, or both? In both these examples, their vulnerability to particular forms of persecution is compounded by these two factors: age and gender. Cases of young girls frequently see the convergence of age and gender dynamics. In other cases, the question of age is of overriding significance, such as in child prostitution and child pornography, which affect boys and girls, albeit to different degrees in different contexts. Their shared characteristic is their young age. Even in cases involving politically or religiously motivated persecution, age-sensitive approaches are needed in order to ensure an accurate refugee status determination.

While international human rights law, including especially Article 22 of the CRC and its Optional Protocols, has significantly advanced the rights of the child, refugee law has not progressed to the same degree. Although many States recognize the right of children to seek asylum, there is often a complete absence of analysis in judicial decisions as to how their age may affect their claim. Similarly, the Executive Committee Conclusions are all but devoid of references to child asylum seekers and their special needs in relation to access to asylum systems, although they are reasonably comprehensive in so far as they promote the 'best interests' of the child¹⁷⁹ and identify specific forms of protection issues facing children, including 'physical violence, sexual abuse, trade in children, acts of piracy, military or armed at-

¹⁷² UNHCR, 'Refugee Women', above n. 56, Parts V and VI.

¹⁷³ See, *Minister for Immigration and Multicultural Affairs v. Applicant Z.*, Federal Court of Australia, [2001] FCA 1823, 19 Dec. 2001, in which an appeal was dismissed, finding that 'able-bodied Afghan men' do not constitute a 'particular social group'.

¹⁷⁴ Decisions Nos. U95-00646, U95-00647, U95-00648, CRDD, 15 Jan. 1997, 67 *Re.ex.*, 26 May 1997 (principal claimant a 12-year-old citizen of both USA and UK, persecution based on sexual abuse by British father), see below n. 93 for appeal to the Federal Court of Canada (Trial Division). Decision No. TA0-05472, CRDD, 30 May 2001 (teenage unaccompanied minor subject to physical abuse by his father and verbal abuse by both parents in Poland).

¹⁷⁵ See *Re W. (Z.D.)*, CRDD No. 3, No. U92-06668, 19 Feb. 1993.

¹⁷⁶ See, by way of comparison, the cases mentioned above n. 39.

¹⁷⁷ See, by way of comparison, the cases mentioned above n. 41.

¹⁷⁸ See *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, [2000] HCA 19, (2000) 170 ALR 553, 13 April 2000.

¹⁷⁹ See CRC, Art. 3(1).

tacks, forced recruitment, political exploitation or arbitrary detention'.¹⁸⁰ The link between these forms of harm and claims to refugee status is, however, missing. In 1987, the Executive Committee underlined the special situation of unaccompanied and separated children, including 'their needs as regards determination of their status',¹⁸¹ although no more was said.

Few countries have adopted guidelines to assist decision makers in handling the special circumstances of asylum-seeking children. Canada adopted guidelines on procedural and evidentiary aspects of children's claims in 1996, followed by the United States in 1998.¹⁸² More recently, Finland has adopted guidelines for interviewing (separated) minors.¹⁸³ UNHCR has also developed guidelines on unaccompanied children.¹⁸⁴ At the time of writing, UNHCR, together with other humanitarian agencies, was in the process of finalizing the 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children', which include a short section on children in refugee status determination.¹⁸⁵

II. Age and gender in the refugee definition

A. Inclusion

1. Non-State agents of persecution

Whether persecution, within the context of the 1951 Convention definition, can be derived from non-state actors or agents, as opposed to State agents, has been at the forefront of debate on international refugee law. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*¹⁸⁶ clarifies that, while persecution is normally related to action by the authorities of a country, it may also emanate from sections of the population, if the acts are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.¹⁸⁷ This conforms with the 1951 Convention refugee definition itself which does not prescribe from whom the persecution must originate. Similarly, neither the 1969 Organization of African Unity (OAU) Refugee Convention,¹⁸⁸ nor the 1984 Cartagena Declaration on Refugees,¹⁸⁹ contains a requirement that the persecutor be the State. In most common law countries, persecution at the hands of non-state actors has now been accepted, in situations where the State is unable or unwilling to offer effective protection against such

¹⁸⁰ Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. e; as repeated in part in Executive Committee, Conclusion No. 59 (XL), 1989, on refugee children, paras. h and i; No. 72 (XLIV), 1993; No. 74 (XLV), 1994; No. 79 (XLVII), 1996; and Executive Committee, Conclusion No. 84 (XLVIII), 1997, on refugee children and adolescents (in its entirety); No. 85 (XLIX), 1998, paras. k and dd; No. 87 (L), 1999, para. o; and No. 89 (LI) of 2000.

¹⁸¹ Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. i.

¹⁸² Immigration and Refugee Board, Canada, 'Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues', 30 Sept. 1996; US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims', 10 Dec. 1998.

¹⁸³ Directorate of Immigration Finland, 'Guidelines for Interviewing (Separated) Minors', March 2002.

¹⁸⁴ UNHCR, Community Service Guidelines, 'Working with Unaccompanied Children: A Community-based Approach,' revised May 1996, pp. 39–52; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', Feb. 1997 (hereinafter UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997). See, also, ECRE, 'Position Paper on Refugee Children', Nov. 1996; UNHCR and International Save the Children Alliance in Europe, 'Separated Children in Europe Programme: Statement of Good Practice', Dec. 1999.

¹⁸⁵ UNHCR, UN Children's Fund (UNICEF), International Committee of the Red Cross, International Rescue Committee, Save the Children (UK), and World Vision International, 'Inter-Agency Guiding Principles on Unaccompanied and Separated Minors', forthcoming 2002.

¹⁸⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992).

¹⁸⁷ *Ibid.*, para. 65.

¹⁸⁸ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 Sept. 1969, 1001 UNTS 45.

¹⁸⁹ Adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico, and Panama, in Cartagena, 19–22 Nov. 1984.

harm (the so-called protection view).¹⁹⁰ The European Commission's Draft Directive on standards for qualification as a refugee, supports this view and has proposed that persecution may originate from non-state actors, thus advancing the cause of gender-related claims.¹⁹¹ In contrast, civil law jurisdictions are more divided and tend to require some level of accountability of the State.¹⁹² While some discrepancy remains between the case law in different jurisdictions, a trend is emerging towards a general acceptance that persecution can be at the hands of non-state actors, at least where the State refuses to offer protection, and, increasingly, where the State proves unable to do so.

For many gender-related claims, the view adopted can be a determining factor in the grant of refugee protection. It can also be a key factor in many non-gender-related cases today, given the specific nature of armed conflicts and civil wars, where the State is often unable to exercise effective control or offer satisfactory protection. In fact, acceptance of non-state agents of persecution was first advanced in cases with no gender component.¹⁹³

Claims to refugee status on the basis of domestic violence are the ultimate test of the durability of the so-called protection-based approach. Substantial positive case law now exists on this question.¹⁹⁴ Most recently, the High Court of Australia in *Khawar* reconformed the approach adopted by the House of Lords in *Horvath*, in which the failure of the State to provide protection was seen as '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'.¹⁹⁵ By so doing, the High Court reaffirmed the decision of the Federal Court of Australia to grant refugee status to Mrs Khawar, who claimed she was the victim of serious and prolonged domestic violence on the part of her husband and members of his family, and that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection. Such refusal was considered not only to be a mere inability to provide protection, but also 'alleged tolerance and condonation'.¹⁹⁶

Although still largely untested, claims to refugee status on the basis of being trafficked for the purposes of sexual slavery or enforced prostitution are as plausible as other claims of gender-related persecution and invoke the non-state actor issue. As UNHCR states, '[t]he forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death'.¹⁹⁷ Although such practices are most often characterized as a form of persecution perpetrated by non-state actors, the direct complicity of the police or other State officials in such activities is not uncommon.

There is no reason why a victim of trafficking,¹⁹⁸ who fears returning home due to the real possibility of being re-trafficked, targeted for reprisals, or threatened with death, should

¹⁹⁰ See, for instance, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, High Court of Australia, [2000] HCA 55, 26 Oct. 2000; *Zalzali v. Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, [1991] 3 FC 605; *Canada (Attorney General) v. Ward*, Supreme Court of Canada, [1993] 2 SCR 689; *Adan v. Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293; *Horvath v. Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577.

¹⁹¹ European Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM(2001), 510 final, 12 Sept. 2001, Art. 9(1).

¹⁹² See, V. Turk, 'Non-State Agents of Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002), pp. 95–109, for State practice in Germany, Switzerland, France, and Italy. See also, W. K. Aalin, 'Non-State Agents of Persecution and the Inability of the State to Protect', 15(3) *Georgetown Immigration Law Journal*, Spring 2001, pp. 415–31.

¹⁹³ See the *Adan*, *Horvath* and *Ward* cases, above n. 75.

¹⁹⁴ See the cases listed above n. 34.

¹⁹⁵ *Horvath* case, above n. 75, [2001] 1 AC 489 at pp. 497–8, restated by Gleeson CJ in *Khawar*, above n. 34, at para. 19.

¹⁹⁶ *Khawar*, above n. 34, at para. 30.

¹⁹⁷ UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', 2002, above n. 4, para. 18; UNHCR, 'Refugee Women', above n. 56, paras. 18–19. See also, A. Edwards, 'Resettlement: A Valuable Tool in Protecting Refugee, Internally Displaced and Trafficked Women and Girls', 11 *Forced Migration Review*, Oct. 2001, p. 31, at p. 34.

¹⁹⁸ A distinction is drawn here between smuggling and trafficking. Art. 3 of the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the 2000 UN Convention against Transnational Organized Crime, UN doc. A/55/383,

not be granted refugee status where the State of origin is unable or unwilling to protect that person against such harm. Severe community ostracism or discrimination may also rise to the level of persecution in an individual case. Of course, many forms of persecution, such as rape, sexual violence, physical assault, and other forms of violence, amount to criminal acts. The trafficking experience can also render some victims stateless and eligible to apply for refugee status as stateless persons under Article 1A(2) of the 1951 Convention.¹⁹⁹

Two recent cases illustrate some of these issues. An Austrian High Administrative Court decision, involving a citizen of Nigeria who was sold by her adoptive parents into forced prostitution and trafficked to Italy, suffering severe ill-treatment, annulled a preceding negative decision on the grounds of illegality of substance. The earlier decision was found to have wrongly reasoned that 'the risk she claimed was clearly not attributable to the reasons set forth in the [1951] Geneva Convention'.²⁰⁰

The United Kingdom Immigration Appeal Tribunal's decision in *Lyudmyla Dzhygun* accepted that trafficking could amount to persecution in the absence of State protection, but struggled with the issue of whether victims of crime could constitute a 'particular social group'. The Tribunal finally decided that it could not see how being a victim of a crime precluded an individual from being a member of a 'particular social group'.²⁰¹ The group was defined as 'women in the Ukraine who are forced into prostitution against their will', stating that this group exists independently of the persecution it fears.²⁰²

Such cases raise not only the issue of the correct interpretation of 'persecution' for the purposes of the 1951 Convention definition and the identification of the appropriate ground, but also the causal link between the persecution and the ground – the question of whether the persecution was 'for reasons of' one of the Convention grounds. There have been mixed results in this regard. In the now famous case of *Shah and Islam*,²⁰³ it was well accepted that the two Pakistani women satisfied the element of persecution, having been found to be at risk of false accusations of adultery, an act punishable in Pakistan by flogging or stoning to death.

The decision rested on whether the claimants were at risk of being persecuted 'for reasons of' their membership in a particular social group, which in this case was considered to be 'Pakistani women'. Lord Hoffmann found that two elements were needed in cases involving non-state agents of persecution:

First, there is the threat of violence to the claimant by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the

defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

¹⁹⁹ UNHCR, 'Activities in the Field of Statelessness: Progress Report', UN doc. EC/51/SC/CRP.13, 30 May 2001, para. 18:

Trafficked women may have their documents stolen or destroyed either on arrival in a third country or prior to transfer, often making it impossible to prove their status when they try to re-enter their country. They may be placed in detention in the country to which they have been transported illegally, and may linger there for years because of the refusal of the country of citizenship to readmit them in the absence of evidence of their nationality, and refusal of the country of detention to release them without proper documentation.

²⁰⁰ Decision No. 99/20/0497-6, above n. 41 (author's translation).

²⁰¹ See, *Dzhygun*, above, n. 41, para. 34.

²⁰² *Ibid.*, para. 29. See also, Decision No. T98-06186, CRDD, above n. 41; Decision No. V95-02904, CRDD, 26 Nov. 1997; *An Li v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), IMM-1023-95, 30 March 2001; *Matter of J.M.*, US Immigration Court, San Pedro, California, 3 Dec. 1996, available on www.uchastings.edu/cgrs/law/ij/364.pdf.

²⁰³ *Shah and Islam*, above n. 34.

inability or unwillingness of the State to do anything to protect them. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. The combination of these two elements was held to constitute persecution within the meaning of the Convention.²⁰⁴

This approach has been further clarified by subsequent decisions and has found voice in UNHCR's 'Guidelines on Gender-Related Persecution':

In cases where there is a risk of being persecuted at the hands of a non-state actor (e.g. husband, partner, or other non-state actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is established.²⁰⁵

This approach is adopted to ensure the equitable treatment of men and women before the law. Traditionally, claims to asylum by men involved a *direct* link between the action of the State to suppress, intimidate, or imprison the claimant and one or more of the Convention grounds. To accept only direct links between persecution and the State would be to 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. It may also exclude the non-traditional claims of some men. This is to apply a gender analysis to the application of the law. Similarly, an age-sensitive analysis needs to be promoted.

Children are often subjected to persecution by non-state actors, including parents, other family members, guerrilla groups, or their community. In some cases of persecution at the hands of government officials, parents or guardians can be implicated in the persecution. As has been noted, '[t]heymay participate directly, aswhen a child is sold, married, forced into hazardous work or subjected to child abuse or female genital mutilation', or they may 'acquire in the abuse, whether through voluntary consent or fear'.²⁰⁶ The same standard applied to gender-related claims should equally apply to age-related claims. Thus, where a child has been subjected to abuse at the hands of a non-state actor, it will amount to persecution where the State has been unable or unwilling to provide protection to the child against such harm.

What amounts to 'protection' in this sense has not been fully tested. Absent a complete breakdown of State apparatus, it has been presumed that the State is capable of protecting its citizens. Clear and convincing confirmation of its inability to do so seems to be the standard in order to rebut this presumption.²⁰⁷ A Canadian case, with age and gender dimensions, demonstrates the difficulties in this regard.²⁰⁸

²⁰⁴ Ibid., per Lord Hoffmann. Formore on the causal link or nexus, see papers by T. A. Aleinikoff on membership of a particular social group, in Part 4.1, and by R. Haines on gender-related persecution, in Part 5.1, of this book. See, in contrast, *Matter of R.A.*, Interim Decision No. 3403, above n. 34.

²⁰⁵ UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 21. See also, 'Summary Conclusions on Gender-Related Persecution', San Remo, above n. 55, para. 6.

²⁰⁶ Bhabha and Young, above n. 20, pp. 107–8.

²⁰⁷ See e.g., *Attorney General of Canada v. Ward*, above n. 75.

²⁰⁸ *Canada (Minister of Citizenship and Immigration) v. Smith*, Federal Court of Canada (Trial Division), [1999] 1 FC 310, [1998] FCJ No. 1613, 29 Oct. 1998 (see above n. 59 for earlier CRDD decision of 15 Jan. 1997 in this case). For a negative decision, see *R.O.I. (Re)*, CRDD No. 235, 1996 (UK and Iran), and for positive decisions, see *U.C.R. (Re)*, CRDDNo. 94, 2001 (France); *D.I.P. (Re)*, CRDDNo. 288, 1996 (USA); *G. (B.B.) (Re)*, CRDDNo. 397, 1994 (Beirut). In several of these cases, the issue of child abduction was raised, including in relation to persecution and possible exclusion. In

The principal applicant in this case was a 12-year-old boy who was a citizen of both the United States and the United Kingdom. The Convention Refugee Determination Division (CRDD) initially granted him asylum, finding that he belonged to a group of 'young boys who are victims of incest'. The Division found that both the United States and the United Kingdom had deprived him of some of the basic rights enumerated in Articles 19–37 of the CRC and that such a violation amounted to persecution. On appeal, however, the Federal Court overturned the earlier decision, finding that a claimant:

must advance 'clear and convincing' evidence of a State's inability to afford protection. Several visits to the police were not considered sufficient to rebut the presumption. When the State in question is a democratic State, the claimant must do more than simply show that he went to see some members of the police force and that his or her efforts were unsuccessful.

In contrast, in a similar case the CRDD held that the claimant was successful in rebutting the presumption. It was held that the claimant had no choice but to flee France from the threat of abduction by the children's Syrian father, as all the witnesses and written testimony were consistent in saying that the claimant had no choice but to flee and, further, all available judicial remedies had been exhausted.²⁰⁹ In a further case, the CRDD found that there was no State protection (by the United States) against the forcible abduction or recourse against the forcible separation from the mother. In stating this, the CRDD in the latter case specifically clarified that the reasoning did not reflect on the United States' ability to provide protection to its citizens in general, but was rather a reflection of the ability of the United States to provide adequate protection to these particular children in their particular circumstances.

By analogy to the above cases asserting a higher burden on persons originating from democratic countries, cases involving 'non-democratic societies' therefore seem to require less action on the part of the claimant in order to prove a lack of State protection. There is no doubt that objective information about the country of origin must be produced to support the claim that there is an absence of State protection. This evidence should indeed be clear and convincing, although independent reports and data may be challenged where an individual is refused protection by the State of origin on several occasions. There should not, however, be a higher standard imposed upon claimants originating from democratic societies. States should be held to the same standards of accountability and protection.²¹⁰ A State may have instituted a plethora of systems to protect individuals. Whether these systems work in reality is the ultimate issue; that is, are these protections accessible, effective, and durable? An individual should not be required to exhaust all available remedies in order to establish that protection is unavailable in cases where the fear of persecution is particularly serious or imminent. To put it differently, the responsiveness of the State in providing protection should increase in direct proportion to the vulnerability of the particular individual. If the State would take concrete action in the case of a child or a woman beaten in the street by a stranger, but does not do so in relation to a child or woman subjected to violence at home, it could be determined that the State has withheld protection from those citizens. The public/private dichotomy is never more pronounced than in these types of cases and is often reflected in the level of protection available to such individuals.

U.C.R., the panel found that the threat of 'international kidnapping of children to a country that is not a signatory to the Hague Convention [on the Civil Aspects of International Abduction], by its very nature, [is] a serious and continuing breach of fundamental rights, both of the children and the mother, [and] thus amounts to persecution within the meaning of the definition'. In relation to the application of the exclusion clauses, it found that the mother had not committed an act contrary to the purposes and principles of the UN in bringing her children to Canada, as her intention was to protect them from a real and imminent danger.

²⁰⁹ *U.C.R. (Re)*, CRDDNo. 94, 2001.

²¹⁰ It is arguable that there should even be a higher standard on democratic States to ensure needed protection.

2. Assessing the well-founded nature of the fear

The understanding of the term 'persecution' is fundamental to an accurate determination of a particular case, especially in relation to age and gender-specific claims. One issue that can become an obstacle to a child's claim to refugee status is how to make an accurate assessment of the well-foundedness of the fear of persecution. Where certain forms of persecution are explicitly identified, such as sexual abuse, female genital mutilation, or forcible marriage, an assessment of the nature of the persecution will be less controversial. In these cases, it is possible to indicate particular human rights provisions in support of the claim. It becomes more difficult when an asserted form of persecution by a child would not amount to persecution in the eyes of an adult. As Bhabha and Young note: 'Actions which when directed at adults might be considered mere harassment or interference, could amount to persecution when applied to children.'²¹¹ They illustrate this as follows:

Aggressive police questioning, handcuffing, slapping or rough handling that may not constitute 'serious harm' for an adult, for example, may produce lasting damage, physical or psychological trauma in a child that amounts to persecution, particularly if the child is young or physically frail.²¹²

For the elderly, their frailty or lack of mobility could also make threats rise to the level of persecution compared to more active persons, as they would be less able to avoid them or to escape. Certain legitimate forms of punishment for adults might amount to persecution for either children or elderly persons. Cumulative forms of discrimination against the elderly, including exclusion from social and economic life, could rise to the level of persecution in particular cases.²¹³

3. Avoiding persecution

Some gender-related cases, particularly those based on sexual orientation, have raised the issue of the degree to which one could be required to suppress one's opinions or activities in order to avoid persecution. This has been directly related to establishing the well-founded nature of the persecution, and also has implications for possible internal relocation alternatives (see section II.A.5 below). In cases based on political opinion or religion, it has been consistently held that one cannot be expected to suppress one's political opinion or religious beliefs in order to avoid persecution.²¹⁴ To suggest otherwise would be contrary to the true essence of international refugee protection. Nonetheless, a few cases concerning 'sexual orientation' have given rise to lengthy discussions on the extent to which a homosexual can be expected to 'discreetly' or 'safely practice his homosexuality'.²¹⁵

²¹¹ Bhabha and Young, above n. 20, p. 104.

²¹² Ibid.

²¹³ These considerations could also apply to the disabled.

²¹⁴ See, UNHCR, 'Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', forthcoming, 2003 (hereinafter UNHCR, 'Guidelines on Internal Flight or Relocation Alternative', forthcoming, 2003).

²¹⁵ See Decision No. V95/03188, Refugee Review Tribunal, 12 Oct. 1995, appealed to Federal Court of Australia as *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, above n.42, and²¹⁵ Bhabha and Young, above n. 20, p. 104.

²¹⁵ Ibid.

²¹⁵ These considerations could also apply to the disabled.

²¹⁵ See, UNHCR, 'Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', forthcoming, 2003 (hereinafter UNHCR, 'Guidelines on Internal Flight or Relocation Alternative', forthcoming, 2003).

²¹⁵ See Decision No. V95/03188, Refugee Review Tribunal, 12 Oct. 1995, appealed to Federal Court *R. v. Secretary of State for the Home Department, ex parte Binbasi*, [1989] ImmAR 595, High Court (Queen's Bench Division), 20 July 1989; cf. Decision No. IV/IE06244/81, Administrative Court (*Verwaltungsgericht*) Wiesbaden, 26 April 1983 (refugee status on the basis of membership of a particular social group of homosexuals in Iran).

Although the Refugee Review Tribunal in the Australian case of *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs* recognized that it might be an infringement of a fundamental human right to be forced to suppress or conceal one's sexuality,²¹⁶ it found that it is not as freely accepted that it would be an infringement if one were required, for safety's sake, simply not to proclaim that sexuality openly.²¹⁷ The appeal to the Federal Court did not fully decide this question, confining its decision to whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in Sri Lanka, disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationships established as a result.²¹⁸ Should a member of a social group be required to be discreet about that membership in order to avoid persecution, while another individual is not expected to repress their political or religious beliefs? Is this not applying a different standard to cases argued on the grounds of political opinion or religion to those argued under 'particular social group'? A German judgment, in contrast, ruled that the applicant should not have to refrain from homosexual activity and live inconspicuously.²¹⁹ It found it to be as unacceptable to expect someone to avoid persecution by living a hidden homosexual life, as to suggest someone deny and hide their religious beliefs or try to change their skin colour.

As stated earlier, human rights law can assist in the identification of forms of persecution, although it is not necessary in each and every case to identify a human rights violation in order to establish a well-founded fear of persecution. International refugee law operates to assist persons in need of protection because of a well-founded fear of being persecuted on one or more of the five grounds, and is thus not limited to fear of a breach of one's individual human rights. Whether or not it is a universal right publicly to display one's sexuality is not the critical issue, as suggested by the Australian case discussed above. Rather, international refugee law is premised on the protection of individuals in fear of being persecuted for reasons of their race, religion, nationality, membership of a particular social group, or political opinion. Human rights law in the sense of the Australian case discussed above has been used to narrow the protections available under the 1951 Convention and highlights the danger of having to link a fear of being persecuted with a human rights violation.

4. 'Particular social group' versus the other grounds

A stumbling block to earlier decisions by domestic courts has, to some extent, been the failure of the refugee definition in Article 1A(2) of the 1951 Convention specifically to identify 'sex' or 'age' as individual grounds of persecution. As has been noted:

The drafters of the Convention failed singularly to reflect in words what has long been a reality – that crimes with a basis in gender are as persecutory in Convention terms as any other crimes when the harm inflicted is sufficiently serious and when they are part of a carefully calculated effort to achieve a political end.²²⁰

In applying the refugee definition to claims of gender-related persecution, creative judicial reasoning has, therefore, necessarily been invoked. This is not to suggest that the refugee

²¹⁶ *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, above n. 42. See also, *Toonen v. Australia*, Human Rights Committee, Communication No. 488/1992, UN doc. CCPR/C/50/D/488/1992, 4 April 1994, which held that laws prohibiting consensual homosexual acts in private violate the right to private life under Art. 17 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

²¹⁷ *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, FCA, above n. 42, paras. 18–35.

²¹⁸ *Ibid.*, para. 24.

²¹⁹ Case No. IV/IE06244/81, above n. 100.

²²⁰ E. Feller, Director, Department of International Protection, UNHCR, 'Rape is a War Crime: How to Support the Survivors: Lessons from Bosnia – Strategies for Kosovo', presentation, Vienna, 18–20 June 1999.

definition has been distorted to 'fit' particular claims based on gender within it. Rather, a proper interpretation of the definition was until recently neither advanced nor accepted. Cases raising an age component have yet to benefit fully from an age-sensitive analysis.

Early decisions tended to view the gender-specific claims of women within the 'particular social group' ground, due, in large part, to the failure of decision-makers to recognize actions by women as political. Yet Heaven Crawley notes that 'nowhere are the effects of the public/private dichotomy on the understanding of women's experiences more evident . . . than with regard to the concept of "politics"'.²²¹

Subsequent judgments have found that gender-related persecution can be characterized as racial, ethnic, religious, or political in nature, or a combination of one or more of these grounds, although decision makers more consistently rely on the 'social group' ground. Claimants often raise 'political opinion' or 'religion' as a valid ground, yet decisions rarely analyze them in depth. As important as the 'fifth' ground is to age- and gender-related claims, a full application of the refugee definition requires a full and equal utilization of the other Convention grounds.

Why is it so difficult to recognize the acts of a woman in transgressing social customs as political?²²² Why are certain acts (for instance, acts contravening religious dress codes) considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict been seen as only criminal and not also racial in character?²²³

The meaning of 'political opinion' has largely been defined to include 'opinions contrary to or critical of the policies of the government or ruling party'.²²⁴ In comparison, Goodwin-Gill supports a broader definition of 'any opinion on any matter in which the machinery of State, government, and policy may be engaged'.²²⁵

Based on these definitions, young girls who refuse to be subjected to harmful traditional practices, imposed on them by family, community, or village leaders, would struggle to demonstrate that they were expressing a 'political opinion' of dissent or opposition to the machinery of the State, government, and policy. Even Goodwin-Gill's broader definition requires that the 'State, government, or policy' be 'engaged' in order to see a particular opinion as 'political'. Surely, the failure of the State to engage to prevent harmful practices or to punish those engaging in it should also be considered 'political', especially in the face of harmful practices that violate fundamental human rights? Should not political opinion apply to any thought, opinion, action, or inaction that can be seen as questioning or opposing the views of authority or society at large, whatever the type of authority in place?

The latter would include any form of authority that has the power to impose laws or social rules, or to punish or to discriminate against those refusing to participate in accepted social or cultural practices or rites, including tribal leaders, traditional healers, and village chiefs. Jurisprudence in industrialized States often fails to see such activities as political in nature due to its inherent bias towards Western political structures, and has ignored the political apparatus in non-Western countries.

Rather, it would seem more correct when interpreting the term 'political' to look to the context in which the human rights abuse or persecution took place. The definition given to 'political opinion', as with the refugee definition as a whole, needs to be individualized to take account

²²¹ Crawley, *Refugees and Gender*, above n. 7, p. 21.

²²² See, e.g., statements made in *Re M.N.*, Refugee Appeal No. 2039/93, above n. 36, in relation to the first instance decision: 'The Refugee Status Section did not even remotely come to grips with this aspect [the political opinion and religion aspect] of the appellant's case.'

²²³ UNHCR Vienna Regional Of.ce, 'Asylum-Seekers in Austria: An Analysis and Case Study of the Legal Situation and Administrative Practice', Feb. 1995, pp. 207–12. Reference is made to several cases in which rape of civilian women by soldiers in armed conflict were not considered as 'persecution' within the meaning of the refugee definition, but criminal behaviour.

²²⁴ A. Grahl Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff, Leyden, 1972), p. 220.

²²⁵ G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), p. 49. See also *Ward*, above n. 75, which endorsed this definition.

of the situation in different countries of origin. This is especially important in countries where authority devolves to regional or village levels.

Interestingly, some applications for refugee status on the grounds of sexual orientation have been considered under 'political opinion', despite the fact that many homosexuals do not consider their sexual orientation to be a political matter.²²⁶ Is it political to engage in homosexual acts or to adopt an overtly homosexual lifestyle?

The answer to this question will depend on whether the decision maker considers sexual orientation to be, on the one hand, an innate or immutable characteristic or one so fundamental to a person's identity that a claimant ought not be compelled to change it,²²⁷ or, on the other hand, a choice. Relying on the latter, it may well be 'political' to actively pursue a homosexual lifestyle. Conversely, relying on the former analysis, it would not be necessarily seen as a political gesture to engage in sexual activity, but rather a natural aspect of being a human being. Of course, a political opinion subversive to the laws and/or policies of the State may be attributed to a homosexual on the basis of that person's sexual orientation or lifestyle.

There has been some recognition that refusing to wear the veil in some Islamic societies where there is disproportionate punishment as a consequence amounts to persecution for reasons of 'religion'.²²⁸ Similarly, laws that impose serious penalties on homosexuality could be considered under the 'religion' ground, where these laws are rooted in religious doctrine. Even in cases involving strict religious codes to justify discriminatory and persecutory laws and action against certain groups, courts and tribunals have not always readily categorized such policies or action as religious in nature, but have preferred to rely on the 'particular social group' ground.

The social group ground has been the least developed of the five grounds, with gender-related claims finally attempting to settle its true scope. There continue to be, however, two different schools of thought as to how specifically defined the particular social group must be. For example, several jurisdictions have rejected that women per se constitute a 'particular social group', largely out of fear of a flood of such claims, yet overlooking the requirement that simply being a woman would not suffice to meet each element of the definition. Other supporters of this view have argued that the 'particular social group' ground is not a 'safety net' for all forms of persecution that do not fall within the other four grounds.²²⁹ The expansion of the refugee definition from the one contained in UNHCR's Statute,²³⁰ which omits the social group ground altogether, to its later inclusion in the 1951 Convention definition, could nevertheless be viewed as further evidence that at least part of the intention of adding an additional ground was to secure protection for persons outside the four other grounds.

UNHCR, in its recent 'Guidelines on International Protection' on membership of a particular social group, has stated that women can be a 'particular social group' for the purposes of the refugee definition. Using the large size of the group as a means for refusing to recognize 'women' as a social group is rejected by UNHCR as having 'no basis in fact or reason, as the other grounds are not bound by this question of size'.²³¹ The Summary Conclusions from the San Remo expert roundtable also reflect this analysis, stating: 'It follows that sex can properly be within the ambit of the social group cate-

²²⁶ See *Dykonv. Canada (Minister for Employment and Immigration)*, Canadian Federal Court (Trial Division), (1994) 87 FTR 98, Sept. 1994, quoted in ELENA, 'Research Paper on Sexual Orientation', above n. 42, pp. 1–2.

²²⁷ See, Decision No. T-91-04459, *Jorge Alberto Inaudi*, CRDD, 4 April 1992.

²²⁸ See above n. 36.

²²⁹ For an overview, see the paper by Aleinikoff, Part 4.1 of this book.

²³⁰ Statute of the Office of the High Commissioner for Refugees 1950, A/RES/428 (V), 14 Dec. 1950, para. 6(ii).

²³¹ See UNHCR's 'Guidelines on International Protection: Membership of a Particular Social Group within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', UNdoc. HCR/GIP/02/02, 7 May 2002 (hereinafter UNHCR, 'Guidelines on Membership of a Particular Social Group', 2002), paras. 18 and 19; as well as UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 31.

gory, with women being a clear subset defined by innate and immutable characteristics, and who are frequently treated differently to men.²³²

The same can be said in relation to age-related claims. It follows that 'children' or 'the elderly' as a whole could form a social group. Normally, given the factual circumstances of a given case, the group will be narrower than this, such as 'young boys in Y society'. Unlike gender-related cases, theoretically, age-related cases could challenge the 'protected characteristics' test,²³³ in so far as one's age is neither 'innate nor immutable' due to continuous change over time. However, the fact that a particular individual is unable to change his or her own age, except with the passage of time, should surely identify 'age' as, at least, an immutable characteristic.

The 'social perception' approach²³⁴ would seem to avoid such dilemmas, as in most situations children are seen as a particular social group by the society in which they live. In contrast, 'sexual orientation' cases relying on the 'particular social group' ground could face difficulty under the 'social perception' approach where the individual's sexuality is hidden from public view or where he or she has not acted to alert the authorities or others to it, even where discriminatory laws carry harsh or excessive penalties. Many jurisdictions accept that an individual's sexuality is immutable, or at least so fundamental to identity that he or she ought not to be compelled to forsake it, for the purposes of the 'protected characteristics' approach.²³⁵

The paper in this book by T. Alexander Aleinikoff further concludes that 'an applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists'.²³⁶ This is the only correct interpretation and has been accepted in many jurisdictions, including recent statements by Gleeson CJ of the Australian High Court in *Khawar*.²³⁷

Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely.²³⁸

5. Internal flight possibilities

When a State is directly involved in acts of persecution, through its officials, the question of a possible internal flight or relocation alternative to the claimant is 'presumed' not to be relevant.²³⁹ This is a correct presumption. It is not required that the asylum seeker prove that he or she will be persecuted throughout the country.²⁴⁰ However, this

²³² 'Summary Conclusions on Gender-Related Persecution', above n. 55, para. 5.

²³³ This is one legal interpretative approach used to define 'particular social group' by examining whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. Sex would be considered as an immutable characteristic. See, UNHCR, 'Guidelines on Membership of a Particular Social Group', 2002, above n. 116, para. 6. See also, *Ward*, above n. 75; and the paper by Aleinikoff, Part 4.1 of this book.

²³⁴ This is an approach which considers whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.

²³⁵ See ELENA, 'Research Paper on Sexual Orientation', above n. 42.

²³⁶ See the paper by Aleinikoff, Part 4.1 of this book.

²³⁷ *Khawar* case, above n. 34, para. 33.

²³⁸ *Ibid.*, para. 35.

²³⁹ Global Consultations, 'Summary Conclusions on Internal Protection/Relocation/Flight Alternative', San Remo expert roundtable, 6–8 Sept. 2001, para. 2. See also, the paper by J. C. Hathaway and M. Foster in Part 6.1 of this book; UNHCR, 'Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called "Internal Flight Alternative" or "Relocation Principle"', Geneva, Feb. 1999, see Annex, paras. 1–3; cf. UNHCR, 'Guidelines on Internal Flight or Relocation Alternative' (forthcoming, 2003), above n. 99.

standard has not yet been extended to non-state actor cases. The Summary Conclusions from the expert roundtable in San Remo state that '[w]here the risk of being persecuted emanates from a non-state actor, IPA/IRA/IFA [internal protection/relocation/flight alternative] may more often be a relevant consideration',²⁴¹ even though an individual may have suffered persecution and may already have proved as part of the claim that the State is unable or unwilling to provide effective protection against further harm. Thus, if we accept that, in cases where the State is the direct agent of persecution, it is in control of its agents, can we not also assume that, if the State is unable or unwilling to protect the claimant in the place of the original persecution, it would also be unable or unwilling to protect the claimant in another part of the territory? The fact that we judge non-state actor cases, which are most often raised in age- and gender-related claims, against a different standard from those cases of persecution by the State, is to discriminate indirectly against women and children. Thus, the presumption should work in favour of all types of case, rebuttable by evidence of the fact that the claimant could have relocated, and could in the future relocate, elsewhere.

Where an assessment of a possible internal alternative is considered relevant to a particular case, the next step is to consider whether it would be 'reasonable' to require the claimant to return there, according to UNHCR and a large number of jurisdictions.²⁴² J. C. Hathaway and M. Foster in their paper in this book analyze the availability of a place of internal relocation in the context of the extent to which an individual would be protected in that place. Protection in this sense is predicated on respect for human rights. The 'reasonableness' approach similarly analyzes respect for international human rights law, but in addition places specific emphasis on the particular situation of the individual. Both these approaches require an analysis of the potentially differential impact of return on different groups (women vis-à-vis men, as well as children vis-à-vis adults, and elderly vis-à-vis able-bodied adults), although the 'reasonableness' approach more readily points to age and gender inclusiveness. As has been stated elsewhere in the text, international human rights law is an important guiding tenet of international refugee law, although refugee law is not restricted to such an analysis.

Unaccompanied or single women may face particular hardships in areas of potential return, including perhaps community ostracism, isolation, or severe discrimination. It may not even be possible in some countries for unmarried women to live alone.²⁴³ Hathaway and Foster note that 'cases involving child applicants have stressed the importance of access to education and basic economic subsistence'.²⁴⁴ The Canadian case of *Elmi* helpfully stated:

What is merely inconvenient for an adult might constitute 'undue hardship' for a child, particularly the absence of any friend or relation. Moreover, in the case of a child whose education has already been disrupted by war, and who would arrive in [the internal relocation area] without any money, there arises the question not simply of 'suitable employment' but of a livelihood at all.²⁴⁵

The impact of internal relocation on unaccompanied or separated children should only ever be considered in exceptional circumstances. For accompanied children, it may be a legitimate issue depending on the full circumstances of the case, although a detailed analysis of the impact of return on persecuted children would need to be carefully weighed. A child may believe that he or she has reached safety in the country of asylum. To return a child to the

²⁴⁰ UNHCR, *Handbook*, above n. 71, para. 91.

²⁴¹ Summary Conclusions on IPA/IRA/IFA, above n. 124, para. 2.

²⁴² E.g. Australia, Austria, Canada, Germany (in some cases), Sweden, the UK, and the USA.

²⁴³ See, *Haj Ahmed*, French CRR, above n. 36; *Gonzales-Cambana v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-933-96, 1997, also cited in the paper by Hathaway and Foster, Part 6.1 of this book.

²⁴⁴ Hathaway and M. Foster, Part 6.1 of this book, referring to the German Federal Constitutional Court, Decision of 24 March 1997, 2 BvR 1024/95, NVwZ 97, 65.

²⁴⁵ *Elmi v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-580-98, 12 March 1999, para. 13. See also Hathaway and Foster, Part 6.1 of this book.

country of origin may induce devastating psychological effects. Depending on the age of a child, he or she may not understand the concept of distance and may believe that 'anywhere' within the country is dangerous.

The particular vulnerabilities of older persons have also been considered in a number of cases, albeit with mixed results.²⁴⁶ The cases have taken into account level of education and literacy, family links, language abilities, and disability in assessing 'reasonableness' or 'undue hardship'. As with children, what might be difficult or cumbersome for an able-bodied adult might amount to undue hardship for an older person.

B. Exclusion

As stated above, there has been progress in relation to recognizing rape, sexual slavery, and other forms of sexual violence as war crimes or crimes against humanity under the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Statute of the International Criminal Court. Such violations should, therefore, be considered similarly in terms of excludable crimes. In the context of armed conflict, they would fall under Article 1F(a), or in other situations as serious, non-political crimes under Article 1F(b).

The exclusion clauses raise, in particular, age-related questions. The case of child soldiers is a typical example where complex factual and legal issues come into play. The Graca Machel study on the *Impact of Armed Conflict on Children*²⁴⁷ brought to light the situation facing child soldiers in many armed conflict situations throughout the world. Its sequel, released in 2001, dedicates a chapter to child soldiers.²⁴⁸ Moreover, international human rights safeguards have been put in place to protect children from being involved in hostilities or forcibly conscripted into armed forces. Articles 1 and 2 of the CRC Optional Protocol on the Involvement of Children in Armed Conflict 2000 provide that persons under eighteen years should not take part in direct hostilities and that States should take all feasible measures to ensure that children under eighteen are not compulsorily recruited. Article 8 of the Statute of the International Criminal Court lists 'conscripting children under the age of fifteen years' as a war crime. These are important defining parameters, which indicate that in most cases, children who have committed serious crimes during the course of armed conflict are not only perpetrators of those crimes, but are equally the victims of abuse. Geoff Gilbert warns in his paper in this book that 'States should not contribute to the traumatization of the child by washing their hands of them through the process of exclusion from refugee status'.²⁴⁹

Article 40 of the CRC provides that States shall establish a minimum age for criminal responsibility. This can vary from ten to fifteen years, and can result in unequal treatment of children seeking asylum in different jurisdictions. Where there are discrepancies in age limits, it is not clear whether the applicable age of criminal responsibility is that in the child's home State, or that in the country of asylum.

Caution would indicate that the higher age of the two should be applied, although this would also lead to inconsistent decision-making within and between jurisdictions.

Where a child otherwise fulfilling the refugee definition is below the age of criminal responsibility, they cannot be excluded from refugee status. For those children who have reached that age, one must determine if they possessed the mental capacity at the time of the commission of the crime.

In determining *mens rea*, consideration ought to be given to a wide range of factors. These include the age of the claimant at the time of becoming involved with

²⁴⁶ See Hathaway and Foster, *ibid.*

²⁴⁷ Report of G. Machel, Expert of the Secretary-General of the United Nations, *Impact of Armed Conflict on Children*, United Nations and UNICEF, 1996, available on www.unicef.org/graca/.

²⁴⁸ G. Machel, *The Impact of War on Children* (Hurst & Co., London, 2001).

²⁴⁹ See the paper by G. Gilbert, 'Current issues in the application of the exclusion clauses', in Part 7.1 of this book.

the armed group (the younger the age, the lesser the responsibility), his or her reasons for joining the armed group (was it voluntary or coerced or in defence of oneself or others?), the consequences of a refusal to join, the length of time as a member, the forced use of drugs, alcohol, or medication, promotion within the ranks due to actions undertaken, the level of education and understanding of the events in question, and the trauma, abuse, or ill-treatment suffered by the child as a result

of his or her participation. Children become soldiers in a variety of ways, through conscription, pressure, kidnapping, as away to protect their families,²⁵⁰ or as away to support their families economically. Child soldiers are used for forced sexual services, as combatants, messengers, porters, or cooks.²⁵¹ The application of the exclusion clauses to children is a complex and sensitive process. Michael S. Gallagher argues that, as child soldiers can be seen as victims of war crimes, Article 39 of the CRC comes into play, requiring 'recovery and reintegration' to be the 'only permissible governmental goal for such children'.²⁵² UNHCR states that, where a child is below the minimum age, he or she cannot be considered by the State concerned as having committed an excludable offence.²⁵³ Children should be given the benefit of the doubt in all cases, and clear and convincing evidence is needed to show why a particular child should be excluded. The principle of the 'best interests' of the child should be taken into account, in relation to both exclusion and post-exclusion action.

Increasingly, women are becoming publicly active in politics and may be directly involved in excludable acts. Depending on the position of women (including their rights and status) in the society concerned, however, it may be particularly necessary to take into account issues of duress and intimidation. As has been outlined above in relation to children, women may not only participate in a violent action for instance, they may also be the victim, being subjected to rape and other forms of sexual slavery and forced labour. Men may also be forced into participating in excludable acts, by threats to their family members or by threats of death to themselves. Most importantly, decision makers should not make assumptions about culpability on the basis of the individual's ethnic origin, race, religion, political opinion, social group, age, or sex. Clear and credible evidence must be forthcoming in all cases.

C. Cessation

While much has been written about the application and interpretation of Article 1A(2) of the 1951 Convention in a gender sensitive manner (and less about age), little has been written in relation to the cessation clauses, Article 1C. The compelling reasons' exception to Article 1C(5) and(6), in particular, needs to import age and gender sensitive analyzes. As the UNHCR *Handbook* notes, the exception subclauses 'deal with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in the country of origin'.²⁵⁴ Given the potentially serious consequences of return, the general cessation clauses are necessarily personalized. To import age and gender considerations into the cessation exception, it is important to understand the nature of the persecution suffered and the gravity of its effects on each individual. The psychological effects of rape and sexual violence on women assume, in many cases, that return may never be possible, particularly if the family or society of origin is likely to ostracize or otherwise victimize the refugee. In such cases, 'return involves much more than physical aspects of return'.²⁵⁵

²⁵⁰ Machel, above n. 133, pp. 8–9.

²⁵¹ *Ibid.*, p. 7.

²⁵² M. S. Gallagher, 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum', 13 *International Journal of Refugee Law*, 2001, p. 310, at p. 333.

²⁵³ UNHCR's 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', forthcoming, 2003.

²⁵⁴ UNHCR, *Handbook*, above n. 71, para. 136.

²⁵⁵ See, UNHCR and UNHCHR, 'Daunting Prospects – Minority Women: Obstacles to their Return and Integration', Sarajevo, Bosnia and Herzegovina, April 2000, p. 16.

A UNHCR study in Bosnia and Herzegovina offers an analysis of return prospects of minority women, including victims of sexual violence and torture. While the study does not deal specifically with the cessation clauses, many of its ideas can be imported into such an analysis. The study concluded that:

ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons, should be offered protection and alternative durable solutions [to return home]. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return.²⁵⁶

For victims of sexual violence, 'fundamental change' in the country of origin would necessarily include police and judicial measures to ensure the swift arrest and prosecution of alleged perpetrators of such violence. It should also necessarily require appropriate medical and psychosocial help. The effect on the principal victim is not the only consideration in relation to the 'compelling reasons' exception.

The impact of return on other family members, including spouses and children, needs to be carefully weighed. A child or spouse may have been a witness to the violence, and return could invoke serious psychological damage. Fear of community ostracism or victimization, including physical abuse and attacks, can be very real, especially for victims of sexual violence returning to very traditional communities. This level of social ostracism also affects other members of the family. For recognized child refugees who have suffered severe persecution, there would be very few situations where cessation would apply. It could be said that a traumatized child will always fall under the 'compelling reasons' exception. Sometimes children appear to survive trauma better than adults. This is not always true, and close medical and psychological advice should be sought. The ability of children to suppress violent memories is in many cases the direct result of the trauma they have suffered. The fact that a child has spent a long time in a host country must work in the child's favour.

Uprooting children can be very disruptive, even under the most peaceful and voluntary conditions. Returning children to the scenes of violent crimes can have untold psychological damage on them.

III. Age and gender in asylum procedures

The age and gender sensitive implementation of asylum procedures should not only address questions of access to the determination procedure. It ought to provide separate interviews for female asylum seekers, as well as an 'open and reassuring environment' so as to establish trust between the interviewer and the claimant and to 'help the full disclosure of sometimes sensitive and personal information'.²⁵⁷ The often male-oriented nature of questioning can mean that women who have been involved in indirect political activity or to whom political opinion has been attributed do not always disclose their full story. As UNHCR's 'Guidelines on Gender-Related Persecution' have noted, '[f]emale claimants may also fail to relate questions about "torture" to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, "honour killings", forced marriage, etc.)'.²⁵⁸ These are among the range of procedural safeguards that need to be put in place to ensure that all claimants have equal access to a determination procedure. Failing to provide all adult members of a family with separate interviews can later place the refugee family in a precarious situation.

Provision of separate interviews can affect not only initial inclusion decisions but also subsequent decisions on cessation of refugee status due to fundamental change in the coun-

²⁵⁶ Ibid.

²⁵⁷ UNHCR, 'Guidelines on Gender-Related Persecution', above n. 4, para. 36(iv).

²⁵⁸ Ibid., para. 36(vii).

try of origin. For example, a husband establishes that he was actively involved in political activities and risked persecution in his country of origin. As a result, he is granted refugee status. After a declaration of general cessation has been made on the basis of ceased circumstances under Article 1C(5), he may have no right to remain in the country of asylum. His wife in contrast who was sexually assaulted and persecuted on the basis of her ethnicity never applied for asylum. Had she applied for asylum initially, she might have been able to establish 'compelling reasons' arising out of past persecution in order to be exempted from the application of general cessation.²⁵⁹ The fact that her claim was not detected at the time and can now not be invoked successfully in its own right in relation to cessation shows a fundamental error in the asylum system. Where such errors occur, the appropriate solution would be to allow a full hearing of the asylum application of the individual who was initially not heard, although this is not ideal. The victim may no longer be able to establish that she is at risk of future persecution, even though she may have compelling reasons arising out of past persecution to avoid cessation of status had it been so granted in the first place. Therefore, any subsequent hearings ought to take into account her status at the time of flight in order to give effect to the intention of international refugee law and to compensate for the serious administrative error.

Similarly, the claims of children and the elderly necessitate special care and attention. There is an extra burden on States to take all appropriate measures to ensure that a child seeking asylum receives appropriate protection and humanitarian assistance.²⁶⁰ This would include at a minimum:

- Unaccompanied and separated children seeking asylum should not be refused access to the territory.²⁶¹
- Due to their vulnerability, applications by children for refugee status should be given priority and every effort should be made to reach a decision promptly and fairly. Appeals should be processed fairly and expeditiously.
- Unaccompanied asylum-seeking children should be represented by an adult familiar with the child's background and have access to legal representation.²⁶²
- Interviews should be conducted by specially qualified and trained personnel.

As UNHCR has noted:

Particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults.²⁶³

The manner in which a child's rights may be violated may be different from those of adults.²⁶⁴ In particular, the claims of children have suffered from:

scepticism about the reliability of child testimony, deference to local traditions implemented by non-state actors and considered oppressive by the

²⁵⁹ *Mehmet Brahimi v. Immigration Appeal Tribunal and Secretary of State for the Home Department*, High Court of Justice (Queen's Bench Division), Case No. CO/2238/2001.

²⁶⁰ CRC, Art. 22.

²⁶¹ UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, Executive Summary.

²⁶² *Ibid.*, Part 8: Procedures. See also, UNHCR, 'Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems', UN doc. EC/GC/01/12, 4 Sept. 2001, Annex.

²⁶³ UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, para. 8.6.

²⁶⁴ *Ibid.*, para. 8.7.

asylum seeker, [and] narrow construal of the 'membership of a particular social group' to exclude broad demographic characteristics such as age.²⁶⁵

Instead, an awareness of cultural differences in children's behaviour is sometimes critical to an accurate assessment of the case. Children from different backgrounds interact differently with persons in positions of authority. For instance, in some cultures it is normal for children not to look adults in the eye, but in other cultures this can be interpreted as lying.²⁶⁶

Older persons may be acutely traumatized by the refugee flight experience, especially where they are without family members, or where they have never been outside their country of origin. They may not be able to articulate their claims due to a lack of education, disorientation, or memory loss. As with other asylum seekers, they should be given advice in a manner and language they understand.

IV. Conclusion

The application of normative rules to individual circumstances in a non-discriminatory way is an essential ingredient of full and inclusive refugee status determination. This requires an assessment of the intentions of the law (in the case of Article 1A(2), to protect persons from persecution) and the differential impact a particular approach can have on different individuals. Taking the 'adult male' as the standard distorts the nature, not only of the claims of some women and children, but also of those of men who do not conform to male stereotypes. It is important to recognize that our different backgrounds colour our understandings and interpretations of law. Applying age- and gender-sensitive analyzes to law means identifying the individual nature of the inquiry.

Focusing on the individuality of claims should lead to a non-discriminatory approach, and ensure that individuals are not discriminated against on the basis of race, colour, sex, language, religion, national or social origin, property or birth, or other status. Making generalizations about different groups is not always helpful and can overlook important differences. Although international law is intended to govern relations between States, human rights law (and refugee law) have at their centre the rights of individuals. Thus, the failure of a State to fulfil its obligations can result in a breach of an individual's rights, as well as a breach of human rights (and refugee) law. A State's failure in this regard includes unwillingness or inability to protect. Thus a State not only has an obligation under international human rights (and refugee) law to refrain from directly breaching its provisions, it must equally take measures to protect individuals from breaches by other individuals.

Forms of persecution perpetrated by State and non-state actors are, therefore, valid.

On this basis, it is conceivable that the failure of a State to protect an individual from persecution by a non-state actor could amount to a human rights violation by that State. Human rights law in this respect contributes in some cases to a clearer identification of particular forms of persecution, although the 1951 Convention does not require that a human rights violation be acknowledged in order to establish 'persecution'. Importantly, the protections available under international refugee law should not be narrowed by strict alignment with international human rights law, especially in light of existing preconceptions and interpretations of law that do not always recognize age and gender dimensions, as well as the fact that not all forms of persecution have yet been codified in international human rights law.

To adopt and implement age- and gender-sensitive interpretations of the 1951 Convention is also to recognize the inherent bias in legal formulation – the fact that 'sex', 'sexual orientation', or 'age' were omitted from the refugee definition resulted from the lack of understanding of the fact that individuals may suffer different forms of persecution, for different

²⁶⁵ Bhabha and Young, above n. 20, p. 98.

²⁶⁶ Directorate of Immigration, Finland, 'Guidelines for Interviewing (Separated) Minors', above n. 68.

reasons, including age- and gender-related ones. It is also a reflection of inequalities in society at the time of drafting the 1951 Convention, which continue to influence its interpretation and application. Age and gender-inclusive approaches are not only critical for an accurate interpretation and application of Article 1A(2). The exclusion and cessation clauses and all other aspects of the 1951 Convention should equally benefit from such analyzes. As stated above, the underlying objective of applying age- and gender-sensitive approaches is to give true effect to the individualized nature of refugee status determination.

ANALYZING GENDER RELATED ASYLUM CLAIMS

All training materials needed:

PowerPoint slides:

- No. 15** Gender-Sensitive Interpretation of the UN Refugee Definition;
- No. 16** Does the harm feared amount to persecution?;
- No. 17** Harm and persecution;
- No. 18** Agents of persecution;
- No. 19** Is the fear well-founded?;
- No. 20** Subjective Element;
- No. 21** Objective Element – Personal Circumstances;
- No. 22** Objective Element – Country of origin Situation;
- No. 23** If the persecutor is not an agent of the state, is the state able and willing to offer protection?;
- No. 24** State protection;
- No. 25** State protection – reasonability analysis;
- No. 26** State protection – IFA;
- No. 27** Is the fear linked to a convention ground?;
- No. 28** Political opinion;
- No. 29** Particular Social Group;
- No. 30** Case study exercise – instructions;
- No. 31** Case study exercise – the analytical framework.

Handouts:

- No. 6** References to UN and other international and regional documents on human rights and the issue of gender-based violence and discrimination;
- No. 7** The International Human Rights Framework: the link with refugee protection and women's rights, (Excerpts);
- No. 8** Discrimination against Women and Violence against Women in International Law;
- No. 9** Individuals' human rights and the laws that protect them;
- No. 10** Causes and consequences of sexual and gender-based violence, excerpts from Sexual and gender-based violence against refugees, returnees, internally displaced persons - Guidelines for prevention and response;
- No. 11** Common burdens and standards: legal elements in assessing claims to refugee status;
- No. 12** The Michigan Guidelines on Well-Founded Fear;
- No. 13** UNHCR Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1 A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees;
- No. 14** Gender Sensitivity and the 1951 Refugee Definition - a checklist;
- No. 15** Framework of analysis – a guide to a gender sensitive RSD;
- No. 16** The Michigan Guidelines on Nexus to a Convention Ground;
- No. 17** UNHCR Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees;
- No. 18** Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees;
- No. 19** UK Immigration Appellate Authority Asylum Gender Guidelines (excerpts focusing on the convention ground political opinion);
- No. 20** Gender sensitivity and procedural issues in the context of refugee status determination and durable solutions – a checklist;
- No. 21** Suggested readings.

Exercises:

- No. 2** Case study #1 – Domestic violence/discriminatory laws, polices, practices and social norms;
- No. 3** Case study #2 – Sexual orientation/discriminatory laws, policies, practices and social norms.

Gender-sensitive interpretation of the UN Refugee Definition



- Does the harm feared amount to persecution?
- Is the fear well-founded?
- If the persecutor is not an agent of the state, is the state able and willing to offer protection?
- Is the fear of persecution linked to a convention ground?

PowerPoint-slide no. 15

Does the harm feared amount to persecution?



PowerPoint-slide no. 16

Harm & persecution



- Gender-based violence and discrimination may constitute harm amounting to persecution, irrespective of the agent of persecution
- Gender-based violence and discrimination may even amount to torture
- Persecution should be assessed with reference to relevant international human rights instruments.

PowerPoint slide no. 17

Agents of persecution



- “There is a scope within the refugee definition to recognise both State and non-State actors of persecution.” as

international law declares state responsibility for human rights abuses committed by the state, non-state entities or individuals

PowerPoint slide no. 18

Is the fear well-founded?



- **Subjective element**
 - The existence of a genuine fear
- **Objective element**
 - The existence of an objective fear on the basis of personal circumstances and of the country-of-origin situation

PowerPoint slide no. 19

Subjective element



- Need for a holistic assessment taking into account the lack of a stereotyped behaviour and expression of fear as well as possible psychological effects of torture, including gender-based violence by state and non-state agents.

PowerPoint slide no. 20

Objective element - personal circumstances



- Personal characteristics such as age, class, cast, ethnicity, education, health status, political- and religious opinions etc.
- Personal experiences of past persecution in the form of gender-based violence and discrimination and/or those of female relatives or other similarly situated women
- The principle of the-benefit-of-the-doubt as survivors of gender-based violence all over the world, including in European countries, often lack documentary evidence of threats, sexual and physical violence etc...
- Thorough knowledge of the issue of gender-based violence and discrimination in order to limit the risks of unreasonably questioning a woman's experiences and fear of persecution
- Past persecution is neither a requirement for the granting of refugee status, nor a criteria automatically leading to refugee status, but...

...a factor which would create an assumption that there is a well-founded fear of [future] persecution

PowerPoint slide no. 21

Objective element – country-of-origin situation



- Relevant country-of-origin information is collected, including on gender discriminatory laws, policies, practices and norms as well as the prevalence of various forms of gender-based violence
- The required information may not be readily available and the lack of information does not have to be an obstacle for the grant of refugee status
- Where a woman's fear relates to personal-status laws or where her human rights are being violated by private individuals, an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution
- By concluding there is a well-founded fear of state persecution, it would generally exist a presumption of state protection being absent in all parts of the country
- Knowledge exists on different forms of gender-based violence and discrimination, its causes as well as possible psychological, physical, social and legal consequences

PowerPoint slide no. 22



If the persecutor is not an agent of the state, is the state able and willing to offer protection?

PowerPoint slide no. 23



State protection

- Collect relevant country-of origin information, focusing on state laws, policy and practice relating to the protection of women and/or lgbt-persons against different forms of gender-based violence and discrimination committed by state and non-state actors (ref. to international human rights law instruments).
- The required information may not be readily available; there may be no documentary evidence presented with regard to the inadequacy of state protection as concerns gender-related persecution. This should not unreasonably contribute to a rejection of refugee status.
- The claimant needs not to have approached non- state organizations for protection.
- A reasonability analysis should be made on the basis of the applicant's personal circumstances and of relevant country-of-origin information.

PowerPoint slide no. 24

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(Crawley

State protection – reasonability test



Need to establish whether it would be reasonable or not to expect the applicant to seek state protection. One tool to assess the reasonability would be to take into account:

- “whether the applicant sought and was denied protection by the government;
- whether the governing institutions and/or government agents were aware of the harm to the applicant and did nothing to protect her or were unable to;
- whether the applicant has reasons to believe that it was or would be futile to seek the protection of the government (e.g. if the government has denied protection to similarly situated women, or if the government has systematically failed to apply existing laws).”

(Crawley H., “Refugees and Gender – Law and Process”, Jordan 2001)

PowerPoint slide no. 25

State protection – IFA



International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort.

Need to make:

- A relevance analysis
- A reasonableness analysis

...on the basis of personal circumstances and relevant country-origin information

PowerPoint slide no. 26

Is the fear of persecution linked to a convention ground?



- Political opinion
- Religious opinion
- Particular social group
- Race
- Nationality

PowerPoint slide no. 27

Political opinion



- The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies.
- Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the 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.

- Women are less likely than their male counterparts to engage in high profile political activity

PowerPoint slide no. 28

A Particular Social Group



UNHCR –definition:

A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.

The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

PowerPoint slide no. 29

Case study exercise – instructions



- Analyse the case, answer the four questions, and prepare to argue for the granting/denial of refugee status
- Choose a group rapporteur

Use the handouts previously distributed, as appropriate

PowerPoint slide no. 30

Case study exercise – the analytical framework



- Does the harm feared amount to persecution?
- Is the fear well-founded?
- If the persecutor is not an agent of the state, is the state able and willing to offer protection?
- Is the fear of persecution linked to a convention ground?

PowerPoint slide no. 31

REFERENCES TO UN AND OTHER INTERNATIONAL AND REGIONAL DOCUMENTS ON HUMAN RIGHTS AND THE ISSUE OF GENDER-BASED VIOLENCE AND DISCRIMINATION²⁶⁷

UNITED NATIONS AND REGIONAL DOCUMENTS – An overview²⁶⁸

UN General Assembly – International conventions, declarations, resolutions and other documents

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- Optional Protocol to the International Covenant on Civil and Political Rights (1966)
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (2002)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1999)
- The Slavery Convention (1926) and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)

- Declaration of the Rights of the Child (1959)
- Convention on the Rights of the Child (1989).
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)

- Convention relating to the Status of Refugees (1951)
- Protocol relating to the Status of Refugees (1967)
- Convention Relating to the Status of Stateless Persons (1954)
- Convention on the Reduction of Statelessness 30 08 1961
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)

- Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflict - Protocol I (1977)
- Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts - Protocol II, (1977)
- Declaration on the Protection of Women and Children in Emergency and Armed Conflict' (1974)

- The UN Convention against Transnational Organised Crime (the Palermo Convention) (2000) and specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Air and Sea
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)
- Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)

²⁶⁷ This list has been compiled by Maria Bexelius, Consultant, UNHCR, 2005

²⁶⁸ Please note that this is not an exhaustive list. More relevant documents may be found at www.un.org

- Convention on the Elimination of all Forms of Discrimination against Women (1979)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).
- Declaration on the Elimination of Discrimination against Women (1967)
- Declaration on the Elimination of Violence against Women (1994).
- Convention on the Nationality of Married Women (1957)
- Convention on the Political Rights of Women (1952)
- Convention on the Nationality of Women (1933)(1998, as corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 8 May 2000, 17 January 2001 and 16 January 2002).
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)
- Convention against Discrimination in Education (1960)
- Resolution 58/190 on Protection of Migrants (2004)
- Resolution 58/143 on Violence against Women Migrant Workers (2004)
- Resolution 58/150 on Assistance to Unaccompanied Refugee Minors (2004)

- Gender Mainstreaming in Peacekeeping Activities, Report of the Secretary General, U.N. Doc. A/57/731, 13 February 2003.
- Mainstreaming the Gender Perspective into All Policies and Programmes in the United Nations System, Report of the Economic and Social Council for 1997, U.N. Doc. A/52/3, 18 September 1997, p. 27-35.

UN Treaty monitoring bodies

- CEDAW-Committee on the Elimination of Discrimination against Women
 - General Recommendation 19: Violence against Women', 11th session, U.N. Doc. HRI/GEN/1/Rev.1, p. 84, 1994
- CAT-Committee against Torture
- CCPR-Human Rights Committee
- CESCR-Committee on Economic, Social and Cultural Rights
- CMW-Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
- CRC-Committee on the Rights of the Child

UN Security Council

- Report of the Secretary-General on Women, Peace and Security', U.N. Doc. S/2002/1154, 16 October 2002
- Security Council Resolution 1325 (2000) on Women, Peace and Security', U.N. Doc. S/RES/1325 (2000), 31 October 2000

UN Economic and Social Council

- Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Addendum, Substantive Session in 2002, U.N. Doc. E/2002/68/Add.1, 20 May 2002

UN Commission on Human Rights

- Guiding Principles on Internal Displacement (Annex to U.N. Doc. E/CN.4/1998/53/Add.2 titled 'Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Human Rights, Mass Exoduses and Displaced Persons: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission Resolution 1997/39', 11 February 1998)

UN Secretary General

Women and International Migration: World survey on the role of women in development. Report of the UN Secretary General, 30 Sept 2004 A/59/287/Add.1

UN Special Rapporteurs – selected reports

- Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Intersections of violence against women and HIV/AIDS, E/CN.4/2005/72
- Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Towards an effective implementation of international norms to end violence against women, E/CN.4/2004/66
- Report of the Special Rapporteur on Violence against Women, Developments in the area of violence against women (1994-2002), E/CN.4/2003/75 and Corr.1. Addendum 1 to the Special Rapporteur's 2003 Report, International, regional and national developments in the area of violence against women 1994-2003, E/CN.4/2003/75/Add.1
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49 Cultural Practices in the Family that are Violence Towards Women, E/CN.4/2002/83
- Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference, Note by the Secretary-General, transmission of contribution by Special Rapporteur Radhika Coomaraswamy to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance on the subject of race, gender and violence against women, A/CONF.189/PC.3/5
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1997/44, Economic and social policy and its impact on violence against women, E/CN.4/2000/68/Add.5
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68
- Report of the Special Rapporteur on violence against women, its causes and consequences, Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women, E/CN.4/1999/68/Add.4
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, E/CN.4/1998/54 (this report focuses on the issue of violence against women in times of armed conflict)
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1996/53 (this report focuses on the issue of violence in the family)
- Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45, 'Integration of the Human Rights of Women and the Gender Perspective: Violence against Women', E/CN.4/2001/73
- Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, 'Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict', E/CN.4/Sub.2/1998/13
- Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission resolution 2002/31, The right of every one to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2003/58
- Note by the Secretary-General, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, , 1 September 2004, A/59/324

- Note by the Secretary-General, Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, 11 August 2000, A/55/290
- Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: Torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/1995/34

International Labour Office (ILO)

- Discrimination (Employment and Occupation) Convention, (1958)
- Equal Remuneration Convention, NO. 100, (1951)
- Maternity Protection Convention, No. 3, (1919)
- Maternity Protection Convention (Revised), No. 103, (1952)
- Workers with Family Responsibilities Convention, No. 156, (1981)
- Underground Work (Women) Convention, No. 45, (1935)
- Night Work (Women) (Revised) Convention, No. 89, (1948)
- The Night Work Convention, No. 171, (1990)
- Forced Labour Convention (1930)

UN World Conferences

- Commission on the Status of Women Forty-ninth session New York 28 February-11 March 2005; ("Beijing +10") Follow-up to the Fourth World Conference on Women and to the special session of the General Assembly entitled Women 2000: gender equality, development and peace for the twenty-first century: implementation of strategic objectives and action in the critical areas of concern and further actions and initiatives; Outcome document: Declaration adopted by the Commission on the Status of Women at its forty-ninth session as orally amended on the 4 March 2005" E/CN.6/2005/L.1
- Women 2000: Gender Equality, Development and Peace for the 21st Century, Beijing+5 (2000) 23rd Special Session of the General Assembly, New York, 5-9 June 2000; Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly, General Assembly Official Records Twenty-third special session Supplement No. 3 (A/S-23/10/Rev.1)
- Durban Declaration and Plan of Action, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and related Violence, 9 September 2001
- Fourth World Conference on Women (1995) Beijing, China, 4-15 September 1995, 'Beijing Declaration and Platform for Action', U.N. Docs. A/CONF.177/20 and A/CONF.177/20/Add.1, 15 September 1995
- United Nations International Conference on Population and Development (ICPD) 5-13 September 1994, Cairo, Egypt, Cairo Program of Action
- Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, World Summit for Social Development (Copenhagen: 6-12 March 1995), U.N. Doc. A/CONF.166/9, 19 April 1995
- Declaration and Agenda for Action, 1st World Congress against Commercial Sexual Exploitation of Children (Stockholm: 27-31 August 1996), 1996
- The Yokohama Global Commitment 2001, 2nd World Congress against Commercial Sexual Exploitation of Children (Yokohama: 17-20 December 2001), 2001
- World Conference on Human Rights; Vienna Declaration and Programme of Action, World Conference on Human Rights (Vienna: 14-25 June 1993), U.N. Doc. A/CONF.157/23, 12 July 1993

Regional Instruments

Africa

- African Charter on Human and People's Rights, (1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 21 I.L.M. 58, (1982)
- African Charter on the Rights and Welfare of the Child (1990)

Americas

- American Convention on Human Rights (1969)
- Convention on the Nationality of Women (1933)
- Inter-American Convention on the Granting of Civil Rights to Women (1948)
- Inter-American Convention on the Granting of Political Rights to Women (1948)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994)

Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination (2000)
- Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances (2002)
- Revised European Social Charter (1999)
- Convention on action against trafficking in human beings (2005)

UNHCR documents

UNHCR Executive Committee Conclusions

- Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, Document symbol: No. 101 (LV), (2004)
- Conclusion on Registration of Refugees and Asylum-Seekers, no. 91 (LII), (2001)
- Conclusion on International Protection, no. 85 (XLIX), (1998)
- General Conclusion on International Protection, no. 87 (L), (1999)
- General Conclusion on International Protection, no. 81 (XLVIII), (1997)
- Refugee Children and Adolescents, no. 84 (XLVIII), (1997)
- Refugee Protection and Sexual Violence, no. 73 (XLIV), (1993)
- Refugee Women, no. 60 (XL), (1989)
- Refugee Women, no. 54 (XXXIX), (1988)
- Refugee Women and International Protection, no. 64 (XLI), (1990)
- Refugee Women and International Protection, no. 39 (XXXVI), (1985)

UNHCR Policies, Guidelines and Training Materials

UNHCR handbook (1992) and guidelines can be found [here](#)

Documents relating to UNHCR's global consultations can be found [here](#))

- Building Partnerships through Equality. UNHCR Good Practices on Gender Mainstreaming, (2000)
- Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (2004)
- Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003)
- Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (2003)

- Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response (2003)
- Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses) (2003)
- Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (2002)
- 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 (2002)
- Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997)
- UNHCR Policy on Harmful Traditional Practices (Annexes) (1997)
- Sexual Violence against Refugees: Guidelines on Prevention and Response (1995)
- Refugee Children: Guidelines on Protection and Care (1994)
- Guidelines on the Protection of Refugee Women (1991)
- Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers' (revised), (1999)
- Resettlement Handbook (including revised Country Chapters of Australia and Canada dated September 2002 and Norway dated November 2003) (1997)
- Handbook - Voluntary Repatriation: International Protection (1996)
- Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/ IP/ 4/ Eng/ REV. 1 Reedited, Geneva, January 1992, UNHCR 1979 FOREWORD
- Global Consultations on International Protection/General: Agenda for Protection (2002)
- Global Consultations on International Protection/Third Track: Refugee Women (2002)
- Global Consultations on International Protection/Third Track: "The Search for Protection-Based Solutions; Protection of Refugee Women and Refugee Children", Chairman's Summary (2002)
- Global Consultations on International Protection/Third Track: Refugee Children (2002)
- Global Consultations on International Protection/Second Track: Summary Conclusions on Gender-Related Persecution (San Remo Expert Roundtable, 6-8 September 2001) (2001)
- UNHCR Code of Conduct (2002)
- Gender Training Kit on Refugee Protection and Resource Handbook (2002)
- Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe, by Heaven Crawley and Trine Lester, UNHCR EPAU/2004/05 (2004)

WHO training documents

- Guidelines for medico-legal care for victims of sexual violence (2003)
- WHO ethical and safety recommendations for interviewing trafficked women (2003)

THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK: THE LINK WITH REFUGEE PROTECTION AND WOMEN'S RIGHTS

by Rosa da Costa, Legal Consultant, UNHCR, 2002

(Excerpt)²⁶⁹

5. International human rights and refugee law

Human rights are an integral dimension of refugee law. Indeed, they are of special importance to refugees who have generally become refugees through the disregard of these rights in their country of origin. Human rights violations are also the reason why they sometimes cannot return or successfully reintegrate.

Furthermore, international human rights instruments play a pivotal role in the *protection* of refugees, in the following ways:

5.1. Reinforce existing refugee law and protect against refoulement:

Article 14 of the Universal Declaration of Human Rights recognizes the "right to seek and enjoy in other countries asylum from persecution". And while the "right to asylum" is not specifically mentioned in other human rights instruments, art. 3 of the European Convention on Human Rights (ECHR) and art. 3 of the UN Convention against Torture (CAT), for example, may act as protection mechanisms against *refoulement*. These two provisions are especially relevant in the context of deportations or other forcible returns to a country where the person risks being subject to torture or cruel punishment. Also of note, is that the protection offered by the ECHR and CAT is not restricted by the five grounds contained in the 1951 Refugee Convention.

Furthermore, for those countries that have not yet acceded to the 1951 Convention, international and regional human rights instruments, as well as customary international law (which is universally applicable) can serve to fill this gap and provide some basic protection and other rights to refugees. For example, many scholars hold that the principle of *non-refoulement* forms part of customary international law and is therefore automatically and universally applicable.

Moreover, while many refugee protection standards are contained in sources of soft law such as non-binding ExCom Conclusions, thus making it difficult to argue that states are *legally* obliged to follow them, international human rights instruments which actually contain many of these standards *do* create legal obligations for states which are party to them. Therefore, they can be invoked to support compliance with ExCom Conclusion standards.²⁷⁰

5.2 Guide us in the application/ interpretation of the 1951 Convention

International human rights instruments are also important to refugee law in view of the fact that the 1951 Convention itself contains no definition of 'persecution'. As such, it is the standards contained in international human rights instruments which assist and guide us in the application of the 1951 Convention and the interpretation of this concept.

²⁶⁹ Excerpts from the article The International Human Rights Framework – The Link with Refugee Protection and Women's Rights, by Rosa da Costa, which could be found in UNHCR Gender Training Kit on Refugee Protection and Resource Handbook – Chapter 3: Women's Human rights (December 2002);

²⁷⁰ UNHCR, Human Rights and Refugee Protection, Part 1: General Introduction, RLD 5, Training Module, October 1995, Training with UNHCR, p. 7-8. UNHCR ExCom Conclusions correlate with such diverse rights in international human rights instruments as: the freedom of movement; the right not to be subjected to cruel, inhuman or degrading treatment; the prohibition of discrimination; the right to family unity; and the right to be considered persons before the law.

Of course, not all human rights violations amount to persecution in the sense of the 1951 Convention. And here too, some basic human rights principles and concepts (e.g., the principle of non-discrimination, and non-derogable rights or 'core' rights) can assist us in making this determination.

Likewise, reports on the human rights situation in the refugee's country of origin, an essential tool in assessing refugee claims, are also fundamentally based on the framework provided by international human rights instrument (i.e., the standards and norms by which country practices are described and evaluated).

5.3. Provide general standards for the treatment of refugees and asylum seekers

Besides the threat of *refoulement*, refugees and asylum seekers also face a number of other problems such as prolonged or arbitrary detention, cruel or inhuman treatment and xenophobia. As the 1951 Convention cannot address the entire array of problems that refugees may experience, international human rights law provides the broader framework for the treatment of refugees. For example, basic or 'core' human rights are universal and non-derogable; they are therefore applicable to foreigners, whether they be asylum seekers, recognized refugees or ordinary aliens. These are rights they possess in addition to those specifically afforded them in the 1951 Convention. Indeed, standards contained in international and regional human rights instruments may serve to:

- (i) address gaps in the 1951 Convention;
- (ii) reinforce certain rights contained in that Convention (e.g., the right to family life and family unity, and to social and economic benefits and rights); and
- (iii) strengthen certain rights, since some instruments may provide for higher standards than those stipulated in the 1951 Convention.

5.4. Provide benefits of quasi-judicial and judicial implementing bodies

In contrast to the 1951 Convention, whose 'enforcement' power is limited to UNHCR's mandate and right to supervise the application of the Convention, international and regional human rights instruments are often vested with supervisory mechanisms (which can issue authoritative opinions on the nature of certain rights, require compliance with periodic reporting requirements, and if applicable, decide on individual or state complaints regarding alleged violations) and, in some cases, judicial enforcement mechanisms such as, the European Court of Human Rights which can issue binding legal decisions on states parties to the ECHR.²⁷¹

6. Women's Human Rights: Its impact on UNHCR and refugee law

6.1. International human rights law is fundamentally concerned with setting standards regulating the behaviour of states towards persons falling under their jurisdiction. These standards also constitute a binding value system for all UN agencies, including UNHCR²⁷², and effectively form the context for the evolution of refugee law.

6.2. Since the adoption of the 1951 Convention, many new international human rights instruments have come to the fore; some of these relating specifically to women. As such, especially over the last decade, UNHCR has taken some steps to adapt its policies and practices to reflect changes and new developments in the international community in this regard.

6.3. For example, their *Guidelines on the Protection of Refugee Women* (1991) specifically provides that:

²⁷¹. For a more comprehensive discussion of this topic of the link between human rights and refugee law, as well as UNHCR's policy on human rights, please see UNHCR and Human Rights: a policy paper available in this chapter (Part I).

²⁷² For example, DEVAW specifically states this in art. 5, and further declares that UN agencies should contribute, within their respective fields, to the realisation of the rights and principles in this Declaration by taking the specific actions detailed in that provision.

[T]he protection of refugee women requires adherence not only to the 1951 Convention and its 1967 Protocol but also to other relevant international instruments [...] While individual states may not be parties to all of these instruments, they do provide a framework of international human rights standards for carrying out protection and assistance activities related to refugee women. [...] From these various international instruments can be drawn principles of equity that should underlie all policies and programmes established for refugees by UNHCR. (Para. 8)

6.4. Similarly, UNHCR ExCom Conclusion no. 73 (XLIV) 1993 on *Refugee Protection and Sexual Violence*, condemns persecution through sexual violence in the language of human rights, stating that it “constitutes a gross violation of human rights [and] when committed in the context of armed conflict, [is] a grave breach of humanitarian law...” On the same topic, UNHCR’s 1995 guidelines, *Sexual Violence against Refugees: Guidelines on Prevention and Response*, also stresses the need for training courses on the topic, and to increase legal awareness among refugee women of their legal rights and responsibilities including of the UDHR, CEDAW and DEVAW.²⁷³ Other UNHCR policy papers, such as the UNHCR Guidelines on Gender-Related Persecution²⁷⁴, also refer to relevant international human rights instruments, to the principles and standards contained in these, and to the obligations imposed on states. It is largely by drawing on international human rights standards that UNHCR and other actors have been able to articulate the concept of persecution based on gender, and to provide guidelines for refugee status determination in gender cases.

6.5. Of all the human rights instruments, CEDAW and the DEVAW are certainly the most useful in this regard, making important contributions to the understanding of gender-related asylum claims. More specifically, these instruments:

- (i) [P]rovide a **framework of international human rights standards for carrying out protection** and assistance activities related to refugee women, [including the interpretation of the 1951 Convention]. (UNHCR Guidelines on the Protection of Refugee Women, para. 8)
- (ii) **Confirm** the view that many gender-related claims are related to membership in a **particular social group** specific to women. CEDAW and DEVAW articulate the extensiveness and pervasiveness of discrimination and gender-based violence that continues to exist, as well as the various forces that create and maintain them. This confirms and reinforces the validity of using the “particular social group” ground in the 1951 Convention to support certain types of refugee claims based on gender.
- (iii) **Provide definitions for important terms** such as **discrimination** and **gender-based violence**; definitions which characterise these practices as human rights violations. These definitions may be used to inform and analyze gender-related asylum claims and are helpful for understanding the nature and different forms that gender persecution can take.²⁷⁵
- (iv) **Reject and deconstruct the public/private divide**, which has traditionally characterised international law and undermined women’s legal and social position. CEDAW, as well as DEVAW, now impose a positive duty on states to intervene in what was traditionally considered the ‘private’ sphere; the context in which discrimination, violence and oppression of women and girls has often been practised with impunity. As such, issues and practices which were previously viewed as “domestic”, have been re-characterized as human rights issues and are now also within the domain of the state. This has implications for gender-related asylum claims, which amongst other things, must be assessed in the context of human

²⁷³ Furthermore, in its chapter on the ‘Legal Aspects of Sexual Violence’, it details the international standards relating to sexual violence, the specific provisions in existing international and regional human rights instruments which are relevant to sexual violence, and the treaty monitoring bodies responsible for monitoring compliance with these conventions. See in particular, pp. 22, 23, 24, 56-66.

²⁷⁴ The full title of these guidelines is as follows: Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, These new Guidelines were adopted by UNHCR 7 May 2002.

²⁷⁵ This is so even if not all human rights violations or instances of discrimination and gender-based violence amount to persecution.

rights standards and state obligations to extend protection to women in both the public and private spheres.

In particular, DEVAW declares that for its purposes, the term violence against women refers to such acts whether they occur in public or in private life (art. 1), or whether they are perpetrated within the family, general community or by the state (art. 2(a),(b), (c)). It further provides that the state should pursue by all appropriate means a policy of eliminating violence against women, including by exercising "due diligence to prevent, investigate and [...] punish acts of violence against women [regardless of whether these] are perpetrated by the state or by private persons..." (art. 4(c))

Similarly, CEDAW also imposes a duty on states parties to condemn and take all appropriate measure to eliminate discrimination against women whether it be by a person, organisation, enterprise or the state (i.e. public authorities and institutions), and whether it be in the form of existing laws, regulations, customs and practices (art. 2(d), (e), (f)). Article 16 further stipulates the state's obligation to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

- (v) **Reject the argument of cultural relativity** as it has been applied to the human rights of women. This approach should also facilitate and guide the refugee status determination process in certain gender-related asylum claims. Especially in view of the fact that traditional customs and practices have often been interpreted as having precedence over and nullifying women's claims to a well-founded fear of persecution. Such practices include FGM, forced marriages, dress codes, and other restrictions limiting the rights and role of women in both the public and private spheres.

Article 4 in DEVAW stipulates that states "should condemn violence against women and should not invoke any customs, traditions or religious consideration to avoid their obligations with respect to its elimination. Articles 1 and 2 of CEDAW are also noteworthy in this respect. The broad definition of 'discrimination against women' provided in art.1, and the comprehensive obligation imposed upon states parties to condemn and (pursue all appropriate means to) eliminate discrimination against women in all its forms, may be seen as a clear rejection of the concept of cultural relativity as applied to women's rights. Article 5 reinforces this interpretation by requiring that states parties take appropriate measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

- (vi) Spell out the specific **obligations of the state**, with regard to discrimination, gender-based violence and the human rights of women generally; making it easier to identify the failures of the state vis-à-vis the protection of women's rights in the country of origin. The failure of a state to ratify CEDAW, to incorporate its provisions and rights into domestic law, or to respect the rights and principles set forth in DEVAW, is also an indication of the willingness and the priority accorded by the state to the protection of women's rights.

DISCRIMINATION AGAINST WOMEN AND VIOLENCE AGAINST WOMEN IN INTERNATIONAL LAW - AN OVERVIEW

by Maria Bexelius, Consultant, UNHCR, 2005

Our reality is full of gendered dimensions. The meaning of the word *woman* and *man* vary from time to time, from place to place. Although the word is contextual, so far it largely has had a common characteristic, namely the tendency to attribute certain roles and values to femininity and masculinity which, irrespective of country or region of the world, has led to the on-going exclusion or disproportionate inclusion of women in many different forms of decision-making bodies, such as the family, the clan-, village-, city- and municipality council, the parliament, the government, the company, the general NGO, the educational or other professional institution etc. Men have traditionally been both constituting the norm and the main persons influencing the constant shaping and reshaping of governing social norms, laws and policies concerning gender i.e. concerning both women's and men's "recommendable" thoughts and behaviour in family, society and state. The prevailing norms, laws and policies have largely restricted women's lives in various ways and reaffirmed the constructed public/private divide, which has enforced male dominance and often made invisible women's experiences and activities. These norms, policies and laws on gender have not only contributed to worldwide discrimination against women but also to the fact that discrimination against women has often been perpetuated with impunity.

The link between discrimination against women and sex stereotyped roles has been explicitly recognized by the United Nations (UN) on several occasions, e.g. as expressed in the preamble to the Convention on the Elimination of all forms of Discrimination against Women (henceforth CEDAW) where it is declared that state parties are aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.²⁷⁶

What is Discrimination against Women?

Discrimination against women has been defined as follows by the United Nations in the CEDAW. It means:

any distinction, 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.²⁷⁷

The Link between Discrimination against Women and Violence against Women

The UN elaborates further on the definition of discrimination against women by linking it to violence against women. Violence against women is not explicitly mentioned in the CEDAW, but in 1992 the UN Committee monitoring its implementation clearly indicated that violence against women can not be seen as isolated from discrimination against women:

1. Gender-based violence is a form of discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects a woman disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention regardless of whether those provisions expressly mention violence.²⁷⁸

Elaborating on the argument that gender-based violence is a form of discrimination against women, the Special Rapporteur on Violence against Women in 1996 stated that:

Proponents of a broader interpretation of international law point out that virtually every society contains forms of brutality and violence directed at women. While assaults are

²⁷⁶ Preamble, Convention on the Elimination of all Forms of Discrimination against Women, General Assembly Resolution A/RES/34/180, 18 December 1979.

²⁷⁷ CEDAW, Art. 1.

²⁷⁸ The Committee on the Elimination of all forms of Discrimination against Women, General recommendation No 19, (11th session, 1992).

committed throughout all sectors of society, gender-based violence, such as domestic violence, is directed primarily at women with the intention of depriving them of a range of rights and maintaining their subordination as a group. Because of the systematic and pervasive nature of this form of female subordination worldwide, it is argued that gender-based violence is a distinct form of discrimination which should constitute a violation of international human rights law in itself.²⁷⁹

What is Violence against Women/Gender-Based Violence?

In 1993, the UN Declaration on the Elimination of Violence against Women (DEVAW) was established. It defined the term violence against women as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.²⁸⁰

And the definition was developed into encompassing, but not limited to:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.²⁸¹

Several international instruments specifically address sexual and gender-based violence against women and girls. However, it is worth recalling that these documents should be seen as complements to human rights treaties of a more general character as these treaties include several rights and freedoms which may be violated when a woman is subjected to gender-based violence, *inter alia*:

- The right to life, liberty and security of the person;
- The right to the highest attainable standard of physical and mental health;
- The right to freedom from torture or cruel, inhuman, or degrading treatment or punishment;
- The right to freedom of movement, opinion, expression, and association;
- The right to enter into marriage with free and full consent and the entitlement to equal rights to marriage, during marriage and at its dissolution;
- The right to education, social security and personal development;
- The right to cultural, political and public participation, equal access to public services, work and equal pay for equal work.²⁸²

²⁷⁹ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85; E/CN.4/1996/53 para 53, 5 February 1996.

²⁸⁰ DEVAW Art. 1.

²⁸¹ *Ibid.*, Art. 2

²⁸² See for example UNHCR Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, p. 8, May 2003.

INDIVIDUALS' HUMAN RIGHTS AND THE LAWS THAT PROTECT THEM²⁸³

RELEVANT CONVENTIONS

Universal Declaration of Human Rights (UDHR)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Convention on the Rights of the Child (CRC)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The UN Convention against Transnational Organised Crime (the Palermo Convention) (2003) and specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Air and Sea

OTHER DOCUMENTS

Declaration on the Elimination of Violence against Women (DEVAW)

UN Fourth World Conference on Women, Platform for Action (PFA)

Note: Numbers refer to paragraphs in the conventions.

THE RIGHT TO:²⁸⁴

... freedom, equality and physical integrity

- All human beings have the same human rights and freedoms. These rights are inherent in being a human being. They cannot be taken away. Everybody, no matter who we are or where we live, should be treated with equal dignity.
UDHR 1
- No one should be treated differently, or have his/her rights denied, because of his/her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
UDHR 2 • ICCPR 2:1 • ICESCR 2:2 • CRC 2 • PFA 232
- Everyone has the right to live without discrimination of any kind based on sex.
ICCPR 3 • ICESCR 3 • CEDAW 1, 2, 3 • PFA 214, 232 • DEVAW 3e
- Everyone has the right to live without discrimination of any kind based on race.
ICERD1, 2, 3 • DEVAW 3e
- All peoples have the right to self-determination. That means colonised or dominated peoples are free to choose their political status and to pursue their own economic, social and cultural development.
ICCPR 1 • ICESCR 1 • PFA 145a
- Everyone has the right to life, liberty and security of person.
UDHR 2 • ICCPR 2:1 • ICESCR 2: 2 • CRC 2 • DEVAW 3a, c
- No one has the right to enslave anyone else. Slavery is a crime.
UDHR 4 • ICCPR 8
- Women and children have the right to protection from all forms of traffic for the purposes of prostitution or any other forms of exploitation.
CEDAW 6 • CRC 35, 36 • PFA 230n • DEVAW 2b
- Everyone has the right to live without suffering, torture or any form of cruel, inhuman or degrading treatment or punishment.
UDHR 5 • ICCPR 7 • CRC 37 • CAT 12 • DEVAW 3h

... legal equality

- Everyone has the right to be recognized as a person before the law.
UDHR 6 • ICCPR 16 • CEDAW 15: 2,3

²⁸³ This section which is compiled by Maria Bexelius, Consultant at UNHCR, 2005, It is largely reproduced from: Rights of Women: A Guide to the Most Important United Nations Treaties on Women's Rights, International Women's Tribune Centre, 1998.

²⁸⁴ Please note that, in reality, breaches of social, cultural or economic rights are often interlinked with breaches of civil and political rights.

- Everyone has the right to be treated by the law in the same way as everyone else, and to be protected by the law without discrimination.
UDHR 7 • ICCPR 14:1,26 • CEDAW 2c, 15:1 • ICERD 5a • PFA 232 • DEVAW 3d
- If a person's rights under the law are violated, there is a right to an effective remedy.
UDHR 8
- No one shall be arrested or held without good reason. Everyone has the right to challenge his/her detention in a court of law.
UDHR 9 • ICCPR 9 • CRC 37d
- Anyone who suffer from any kind of racial discrimination, has the right to seek justice.
ICERD 6
- If charged with a crime, the person has the right to be presumed innocent until proven guilty.
UDHR11:1 • ICCPR14:2 • CRC 40: 2b
- If charged with a crime, the person has the right to a fair and public hearing by an independent and impartial tribunal.
UDHR 10 • ICCPR 14:1 • CRC 40: 2b
- A person cannot be found guilty of a crime that was not a crime when the act was committed.
UDHR 11:2 • ICCPR 15 • CRC 40:2a
- If a person is detained, he/she has the right to be treated with dignity.
ICCPR 10. CRC 37c
- In countries that have not abolished the death penalty, it can only be used for the most serious crimes, and those sentenced to death have the right to seek a pardon. Children under 18 and pregnant women shall not receive the death penalty.
ICCPR 6:2, 6: 4, 6: 5 • CRC 37a
See further, Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, 1989.
- No one shall be imprisoned for failing to fulfil a contract.
ICCPR 11
- A foreigner unlawfully present in another country shall not be expelled from that country without a fair process, except where compelling reasons of national security exist.
ICCPR 13

... nationality, freedom of movement and other civil and political rights

- Everyone has the right to a name and a nationality at birth. Everyone has the right to change his/her nationality, and marriage shall not affect the nationality.
UDHR15:1 • ICCPR 24 • CEDAW 9 • ICERD 5d, iii CRC 7
- No one has the right to intrude in private or family life without good reason, or to attack a person's good name.
UDHR 12 • ICCPR 17 • CRC16
- Everyone has the right to move freely within the borders of his/her country. That person can also leave and return to any country, including his/her own.
UDHR 13 • ICCPR 12 • ICERD 5d, i, ii
- Everyone has the right to seek asylum from persecution in other countries.
UDHR 14 • CAT 3 • ICCPR 13 • PFA 147,148
- Everyone has the right to be treated as a citizen of his/her country. No one can take away the citizenship or prevent him/her from changing his/her country without good reason. Marriage shall not affect the nationality.
UDHR 15 • CEDAW 9 • ICERD 5d, iii
- Everyone has the right to freedom of thought, conscience and religion.
UDHR18 • ICCPR18 • ICERD 5d, vii • CRC14
- Everyone has the right to freely express their opinion without fear of punishment, both within his/her country and to people in other countries.
UDHR 19 • ICCPR 19 • ICERD 5d, viii • CRC 12,13,17

- War propaganda shall be against the law. Any advocacy of national, racial or religious hatred that promotes discrimination, hostility or violence shall be prohibited by the law.
CCPR 20
- Everyone has the right to gather peacefully and associate with others in public or private. No one may force a person to join any group if he/she does not wish to.
UDHR 20 • ICCPR 21, 22 • ICERD 5d, ix • CRC 15 • PFA 190c
- Everyone has the right to take part in the government of your country, to vote and to have equal access to public services.
UDHR 21 • ICCPR 25 • CEDAW 7 • ICERD 5c • PFA 190,191,192,195
- Everyone has the right to represent your government and participate in international organizations.
CEDAW 8 • PFA 190,191,193,195
- Human beings have the right to live in the kind of world where their rights and freedoms are respected.
UDHR 28 • PFA 210-216, 221-223, 279c
- Everyone has the right to be free from all forms of apartheid, racism, colonialism, violence and foreign occupation that prevent him/her from enjoying his/her full rights.
ICERD 3 • CEDAW preamble • PFA 214, 216, 224-226, 232
- Human rights can be limited only by law and then only to protect other people's rights, meet society's sense of right and wrong, maintain order and look after the welfare of democratic society as a whole. We all have a responsibility to the people around us and we can only develop fully as individuals by taking care of each other.
UDHR 29

...economic and social rights

- Everyone is entitled to economic, social and cultural rights that allow them dignity and freedom to develop as individuals.
UDHR 22 • CEDAW11: 1e • ICERD 5e • CRC 27 • PFA 220
- Everyone has the right to an adequate standard of living for him/herself and his/her family, including food, clothing, housing and medical care.
ICESCR11 • CEDAW 14h • ICERD 5e, iii • CRC 27:1 • PFA 58
- Parents have the primary responsibility to ensure that their child has an adequate standard of living and states have a duty to assist those responsible to implement this right.
CRC 27: 2, 3
- Everyone has the right to social security.
UDHR 22 • ICESCR 9 • CEDAW 11: 1e, 14c, 13a ICERD 5e, iv . CRC 26 • PFA 580
- Everyone has the right to social services and security in the event of sickness, old age or other circumstances, including child-care for working parents.
UDHR 25 • CEDAW11: 2c • ICERD 5e, iv • CRC18:2, 3 • PFA 58o
- Rural women have the same rights as other women and men.
CEDAW 14 • PFA 58n, 62a

... employment rights

- Everyone has the right to work and to freely choose his/her job.
UDHR 23:1 • ICESCR 6 • CEDAW 11a • ICERD 5e, i
- Everyone has the right to work in fair and safe conditions and to be paid enough for an adequate standard of living, supplemented by social protections if necessary. Women have the right to the same working conditions as men, especially equal pay for equal work or work of equal value.
UDHR 23: 2, 3 • ICESCR 7a, b • CEDAW 11,14:2e ICERD 5e: i • PFA 165a, b • DEVAW 3g
- Everyone has the right to form or join trade unions.
UDHR 23: 4 • ICCPR 22 • ICESCR 8 • ICERD 5e, ii
PFA 165r, 178h, i, 190c
- Everyone has the right to rest and leisure. No one has to work unreasonable hours and everyone has the right to holidays with pay.
UDHR 24 • ICESCR 7d • CRC 31 • PFA 180a

- No one can be dismissed from employment because of pregnancy, while on maternity leave or because of his/her marital status.
CEDAW 11:2a • PFA 165c
- Everyone has the right to maternity leave with pay or to adequate social security benefits without loss of former employment, seniority or social allowances.
ICESCR 10: 2 • CEDAW 11: 2b • PFA 165a
- Everyone is entitled to special protection at work during pregnancy.
CEDAW11: 2d
- Children have the right to special protections from economic exploitation including a minimum age for employment.
ICESCR10: 3 • CRC 32 • PFA 1661,178m, n

... **housing**

- Everyone has the right to adequate housing.
UDHR 25:1 • ICESCR 11:1 • CEDAW 14:2h

... **property and credit**

- Everyone has the right to own goods, land and other property.
UDHR 17 • CEDAW 16:1h • ICERD 5d, v
- Everyone has the right to bank loans, mortgages and other forms of financial credit.
CEDAW 13b • PFA 62,165e, j, 166a, d
- As a rural woman, there is a right to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform.
CEDAW 14:2g . PFA 61b, 62,166c

... **health**

- Everyone has the right to the highest attainable level of physical and mental health and the right to equal access to health services, including family planning.
ICESCR 12 • CEDAW 12 • CRC 24
PFA 89,106b • DEVAW 3f
- Women have the right to special health services with respect to pregnancy, childbirth and the postnatal period.
ICESCR 12: 2a . CEDAW 12:2 . CRC 24: 1d, f
PFA 106e

... **education**

- Everyone has the right to an education. Elementary education shall be free and compulsory, secondary education shall be accessible to all, higher education shall be equally accessible to all on the basis of merit.
UDHR 26 • ICESCR13 and 14 • CEDAW10 • ICERD 5e, v • CRC 28 • PFA 80, 81, 279a
- Women and girls have the same rights to all forms of education as men and boys.
CEDAW 10. CRC 28 • PFA 80, 81, 82, **87a, b**
- Everyone has a continuing right to education and training throughout his/her life.
CEDAW 10e, f • PFA 82, 88
- The content of education must include development of respect for human rights and must promote understanding, tolerance and friendship among all groups and individuals.
UDHR 26:2 • ICESCR 13:1 • CRC 29 • PFA 233g, 279c
- Any stereotyped concept of the roles of women and men must be eliminated through education.
CEDAW 10c • PFA 83a, b, c, 236, 243 a, d, e

... **culture**

- Everyone has the right to participate freely in the cultural life of the community and to enjoy the arts and all the benefits of scientific progress.
UDHR 27 • ICESCR 15 • CEDAW 13c • ICERD 5e, vi • CRC 31 • PFA 75, 85b, 231a, 239g, d

- Ethnic, religious, linguistic or indigenous minorities have the right to enjoy their own culture, to practice their own religion and to use their own language.
ICCPR 27 • CRC 30 • PFA 232a, o, 242d
- Everyone has the right to go into any place and use any service that is used by the general public, including hotels, restaurants, cafes, theatres and parks, without distinction as to race, colour, or national or ethnic origin.
ICERD 5e, f

...rights concerning marriage and family

- Everyone has the right to marry, and both partners have equal rights in their marriage, in their family responsibilities, and at the dissolution of marriage. Both women and men must give their free and full agreement to marriage. The family is entitled to protection by the state.
UDHR16 • ICCPR 23 • ICESCR10:1 • CEDAW16: 1a, b, c ICERD 5d, iv • PFA 274e, 277a
- Women have the same right as their spouses to family planning services.
CEDAW 12:1,14:2b, 16: 1e • PFA 94, 95,106e
- Spouses have the same rights in all matters relating to their children.
CEDAW 16: 1d, e, f • CRC18.
- Spouses have the same rights to choose a family name, a profession and an occupation.
CEDAW 16: 1g
- Women can acquire, change or retain his/her nationality and the children's nationality regardless of the husband's nationality. Both spouses have the same rights with respect to the nationality of their children.
CEDAW 9:1 and 9: 2

... additional protections for children

- Every child has the right to special protections without discrimination, including discrimination because of what her/his parents or guardians do or believe.
ICCPR 24 • CRC 2:2 • PFA 259, 274f, 276b, d
- In any situation, the best interests of a child shall be a primary consideration. At the same time, parents' rights and responsibilities must also be taken into account.
CRC 3 • PFA 267
- Children have the right to live with their parent(s) unless separation is in the best interests of the child. In the case of separation from one or both parents, children have the right to maintain personal relations and direct contact with their parents.
CRC 9
- Children and their parents have the right to apply to enter or leave any country for the purpose of reunification. If children reside in a different state than their parent(s), they have the right to maintain personal relationships.
CRC 10
- Countries must prevent and remedy kidnapping or the keeping of children abroad.
CRC 11
- Countries must ensure that children have access to information from a variety of sources and that the mass media distributes information that is socially and culturally beneficial.
CRC 17 • PFA 239g, 242d
- Children are entitled to special protections when they do not have parents or are separated from their family, taking into account each child's cultural background.
CRC 20
- Refugee children are entitled to special protections.
CRC 22 • PFA 147b
- If adoption is permitted in a country, it must be carried out with the best interest of the child as the primary consideration.
CRC 21

- Children with disabilities have rights to special care, education and training to help them enjoy a full and decent life. **CRC 23** • PFA 280c
- Children have the right to protection from the illicit use of narcotic drugs and from participation in the production of such drugs.
CRC 33 • PFA 282a
- Children have the right to be protected from sexual exploitation and abuse, including unlawful sexual activity, prostitution and pornography.
CRC 34 .• PFA 230m, 283b, d
- Children under 15 have the right not to be recruited into armed forces or to have any direct part in armed conflict.
CRC 38:1,2, 3
- Child victims of armed conflict, torture or maltreatment have the right to treatment that promotes physical and psychological recovery and social reintegration.
CRC 39 • **CAT 12**
- Children in conflict with the law have the right to treatment that promotes each child's sense of dignity. Children have the right to basic guarantees as well as legal assistance for their defence.
CRC 40

CAUSES AND CONSEQUENCES OF SEXUAL AND GENDER-BASED VIOLENCE

(UNHCR)

Excerpts from Sexual and gender-based violence against refugees, returnees, internally displaced persons - Guidelines for prevention and response, UNHCR May 2003

The publication is available on the UNHCR website:

www.unhcr.ch/cgi-bin/teXis/vtx/protect/+bwwBmeMUIECnwwwxFqzvx8vw68m6hFqA72ZR0gRfZNTFqrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqmRbZ/opendoc.pdf

SEXUAL AND GENDER-BASED VIOLENCE DURING THE REFUGEE CYCLE

During armed conflict, social structures are disrupted. Women and children face the additional risks of being subjected to sexual and gender-based violence when fleeing the fighting and seeking asylum. Family members are often dispersed during flight, leaving children separated from the rest of their families and women as solely responsible for protecting and maintaining their households. The following chart, adapted from a table developed by S. Purdin, describes the types of violence that can occur during the various phases of the refugee cycle.

During conflict, Prior to Flight

Abuse by persons in power; sexual bartering of women; sexual assault, rape, abduction by armed members of parties in conflict, including security forces; mass rape and forced pregnancies.

During Flight

Sexual attack by bandits, border guards, pirates; capture for trafficking by smugglers, slave traders

In the country of Asylum

Sexual attack, coercion, extortion by persons in authority; sexual abuse of separated children in foster care; domestic violence; sexual assault when in transit facilities, collecting wood, water, etc. sex for survival/ forced prostitution; sexual exploitation of persons seeking legal status in asylum country or access to assistance and resources, resumption of harmful traditional practices.

During repatriation

Sexual abuse of women and children who have been separated from their families; sexual abuse by persons in power; sexual attacks, rape by bandits, border guards, forced/coerced repatriation.

During reintegration

Sexual abuse against returnees as a form of retribution; sexual extortion in order to regularise legal status, exclusion from decision-making processes; denial of or obstructed access to resources, right to individual documentation and right to recover/own property.

SEXUAL AND GENDER-BASED VIOLENCE DURING THE LIFE CYCLE

The following list, developed by L. Heise, describes the forms of violence to which women can be subjected to during the different stages of their lives.

PRE-BIRTH

Sex-selective abortion; battering during pregnancy; coerced pregnancy

INFANCY

Female infanticide; emotional and physical abuse; differential access to food and medical care

GIRLHOOD

Child marriage; genital mutilation; sexual abuse by family members and strangers; differential access to food, medical care and education

ADOLESCENCE

Violence during courtship; economically coerced sex (e.g. for school fees); sexual abuse in the workplace; rape; sexual harassment; arranged marriage; trafficking.

REPRODUCTIVE AGE

Physical, psychological and sexual abuse by intimate male partners and relatives; forced pregnancies by partner; sexual abuse in the workplace; sexual harassment; rape; abuse of widows, including property grabbing and sexual cleansing practices

ELDERLY

Abuse of widows, including property grabbing; accusations of witchcraft; physical and psychological violence by younger family members; differential access to food and medical care.

CAUSES AND CONSEQUENCES OF SEXUAL AND GENDER-BASED VIOLENCE

To plan appropriate programmes to prevent and respond to sexual and gender-based violence, it is important to analyze the causes and consequences of such violence in each setting. Understanding the causes will help you to develop effective actions to prevent the violence; understanding the consequences allows you to develop appropriate response packages for victims/survivors.

CAUSES > Prevention activities
CONSEQUENCES > Response activities

CAUSES OF SEXUAL AND GENDER-BASED VIOLENCE

The root causes of sexual and gender-based violence lie in a society's attitudes towards and practices of gender discrimination, which place women in a subordinate position in relation to men. The lack of social and economic value for women and women's work and accepted gender roles perpetuate and reinforce the assumption that men have decision-making power and control over women. Through acts of sexual and gender-based violence, whether individual or collective, perpetrators seek to maintain privileges, power and control over others.

Gender roles and identities are determined by sex, age, socio-economic conditions, ethnicity nationality and religion. Relationships between male and female, female and female, and male and male individuals are also marked by different levels of authority and power that maintain privileges and subordination among the members of a society. The disregard for or lack of awareness about human rights, gender equity, democracy and non-violent means of resolving problems help perpetuate these inequalities.

CONTRIBUTING RISK FACTORS

While gender inequality and discrimination are the root causes of sexual and gender-based violence, various other factors determine the type and extent of violence in each setting. It is important to understand these factors in order to design effective strategies to prevent and respond to sexual and gender-based violence.

Equal access to and control of material resources and assistance benefits and women's equal participation in decision-making processes should be reflected in all programmes, whether explicitly targeting sexual and gender-based violence or responding to the emergency, recovery or development of the population.

The following chart describes some causes or risk factors that can increase the risks of becoming a victim/survivor or perpetrator of sexual and gender-based violence:

CAUSES OR RISK FACTORS FOR SGBV

INDIVIDUAL RISKS

- Loss of Security
- Dependence
- Physical and mental disabilities
- Lack of alternatives to cope with changes in socio-economic status
- Alcohol, drug use/abuse
- Psychological trauma and stress of conflict, flight, displacement
- Disrupted roles within family and community
- Ignorance/lack of knowledge of individual rights enshrined under national and international law

SOCIAL NORMS AND CULTURE

- Discriminatory cultural and traditional beliefs and practices
- Religious beliefs

LEGAL FRAMEWORK AND PRACTICES IN HOST COUNTRY AND/OR COUNTRY OF ORIGIN

- Discrimination and condone sexual and gender-based violence
- Lack of legal protection for women's and children's rights
- Lack of laws against sexual and gender-based violence
- Lack of trust in the law enforcement authorities
- Application of customary and traditional laws and practices that enforce gender discrimination
- General insensitivity and lack of advocacy campaigns condemning and denouncing sexual and gender-based violence
- Discriminatory practice in justice administration and law enforcement
- Under-reporting of incidents and lack of confidence in the administration of justice
- Lack of willingness to effectively prosecute all cases reported to authorities
- Low number of prosecutions obtained in proportion to the number of cases reported
- Police and courts inaccessible because of remote location of camp
- Absence of female law enforcement officers

- Lack of administrative resources and equipment by local courts and security officials
- Laws or practices in the administration of justice that support gender

WAR AND ARMED CONFLICT

- Breakdown of social structures
- Exertion of political power and control over other communities
- Ethnic differences
- Socio-economic discrimination

REFUGEE, RETURNEE AND INTERNALLY DISPLACED SITUATIONS

- Collapse of social and family support structures
- Geographical location and local environment (high crime area)
- Design and social structure of camp (overcrowded, multi-household dwellings, communal shelter)
- Design of services and facilities
- Predominantly male camp leadership; gender-biased decisions
- Unavailability of food, fuel, income generation, leading to movement in isolated areas
- Lack of police protection
- Lack of security patrols
- Lack of individual registration and identity cards
- Hostility of local population (refugees are considered materially privileged)

CONSEQUENCES OF SEXUAL AND GENDER-BASED VIOLENCE

Victims/survivors of sexual and gender-based violence are at high risk of severe health and psycho-social problems, sometimes death, even in the absence of physical assault. The potential for debilitating long-term effects of emotional and physical trauma should never be underestimated.

Understanding the potential consequences of sexual and gender-based violence will help actors to develop appropriate strategies to respond to these after effects and prevent further harm.

A sectoral breakdown is used in the following summary of consequences.

HEALTH

They are serious and potentially life-threatening health outcomes with all types of sexual and gender-based violence.

FATAL OUTCOMES

- Homicide
- Suicide
- Maternal mortality

- Infant mortality
- AIDS-related mortality

NON-FATAL OUTCOMES

ACUTE PHYSICAL

- Injury
- Shock
- Disease
- Infection

CHRONIC PHYSICAL

- Disability
- Somatic complaints
- Chronic infections
- Chronic pain
- Gastrointestinal problems
- Eating disorders
- Sleep disorders
- Alcohol/drug abuse

REPRODUCTIVE

- Miscarriage
- Unwanted pregnancy
- Unsafe abortion
- STD's, including HIV/AIDS
- Menstrual disorders
- Pregnancy complications
- Gynaecological disorders
- Sexual disorders

PSYCHO-SOCIAL

EMOTIONAL AND PSYCHOLOGICAL CONSEQUENCES

- Post traumatic stress
- Depression
- Anxiety, fear
- Anger
- Shame, insecurity, self-hate, self-blame
- Mental illness
- Suicidal thoughts, behaviour

SOCIAL CONSEQUENCES

- Blaming the victim/survivor
- Loss of role/functions in society (e.g. earn income, child care)
- Social stigma
- Social rejection and isolation
- Feminisation of poverty
- Increased gender inequalities

Most societies tend to blame the victim/survivor. This social rejection results in further emotional damage, including shame, self-hate and depression.

As a result of the fear of social stigma, most victims/survivors never report the incident. Indeed, most incidents of sexual and gender-based violence go unreported.

LEGAL /JUSTICE

If national laws do not provide adequate safeguards against sexual and gender-based violence, or if practices in the judicial and law enforcement bodies are discriminatory, this kind of violence can be perpetrated with impunity.

Community attitudes of blaming the victim/survivor are often reflected in the courts. Many sexual and gender-based crimes are dismissed or guilty perpetrators are given light sentences. In some countries, the punishment meted out to perpetrators constitutes another violation of the victim's/survivor's rights and freedoms, such as in cases of forced marriage to the perpetrator. The emotional damage to victims/survivors is compounded by the implication that the perpetrator is not at fault.

SAFETY/SECURITY

The victim/survivor is insecure, threatened, afraid, unprotected and at risk of further violence.

When dealing with incidents of trafficking in persons, police and security workers are at risk of retaliation.

If police and security workers are not sensitive to the victim's/survivor's needs for immediate care, dignity and respect, further harm and trauma may result because of delayed assistance or insensitive behaviour.

**COMMON BURDENS AND STANDARDS:
LEGAL ELEMENTS IN ASSESSING CLAIMS TO REFUGEE STATUS**

by Brian Gorlick

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Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status

Brian Gorlick*

The 1951 UN Convention relating to the Status of Refugees (1951 Refugee Convention) does not specify the requirements for refugee status determination procedures, the idea being that state parties to the Convention would establish appropriate procedures having regard to the particular legal traditions and constitutional and administrative arrangements in the respective country. It should be recalled that at the time the Convention was adopted fifty years ago, various aspects of law and practice in the administrative law field for example, which is a common framework for refugee determination, were not very well developed. Since that time international and national legal standards and practices have significantly evolved. Of particular relevance in the refugee context is the development of international human rights law which has found form and application with the adoption of universal and regional human rights treaties and the establishment of enforcement mechanisms²⁸⁵. These complementary legal standards and practices have influenced the interpretation of the refugee law and practice. More generally they have informed the corpus of international and comparative jurisprudence to which UNHCR increasingly looks in developing its legal doctrine.

Different jurisdictions have developed a variety of refugee status determination procedures which serve the common objective of deciding on the claim of asylum seekers. Differences of terminology, procedural rules governing the administrative and juridical bases for determining refugee status in European countries and more generally differences between common and civil law traditions, adds to the difficulty of proposing international standards for assessing refugee status. Despite these differences it is apparent that harmonised procedural guarantees and interpretation of refugee law are generally desirable. In short, a common understanding and interpretation of the key aspects of refugee status determination would help avoid disparate interpretation of international standards²⁸⁶, first and foremost, and by

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²⁸⁵ The UNHCR paper on 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', has noted that that preamble of the 1951 Convention "contains strong human rights language". The paper notes that the drafters of the Convention assert that it was their aim "to incorporate human rights values in the *identification* and treatment of refugees", UNHCR Geneva, April 2001, at para 4.

²⁸⁶ In the UK House of Lords decision of *Regina v Secretary of State for the Home Department, Ex Parte Adan, Regina v Secretary of State for the Home Department, Ex Parte Aitseguer*, Judgments of 19 December 2000, available at www.parliament.the-stationary-office.co.uk/pa/Id200001/ljudmt/jd001219/adan-1.htm, Lord Steyn, in what is destined to become a oft-quoted passage concluded that:

"It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 (of the 1969 Vienna Treaty Convention) and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can be only one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. *But in doing so it must search, untram-*

consequence would result in more consistent recognition and treatment of refugees and asylum seekers. To this end common standards and approaches on refugee law and procedure are, slowly but surely, being promoted within the framework of the European Union²⁸⁷.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Handbook) has noted the “unlikelihood that all states bound by the 1951 Convention and the 1967 Protocol could establish identical procedures” (para 192). The Handbook nonetheless highlights that “determination of refugee status, which is closely related to questions of asylum and admission, is of concern to [UNHCR]” (para 194). It should be recognized that in some countries UNHCR either undertakes refugee status determination under its Statute or is a party to the national determination procedure. The Handbook, which was originally prepared by UNHCR in 1979 at the request of states parties to the Refugee Convention to assist them in applying the Convention, has been criticised by some commentators for not articulating very clear standards. Regardless of any apparent shortcomings, and the fact that since 1979 there has been a boon of developments in refugee law, the Handbook has been recognized by some courts²⁸⁸ as playing a useful role in interpreting the refugee definition and related procedural requirements. More recent developments deriving from international and national jurisprudence in addition to UNHCR policy papers and guidelines have added to our common understanding of refugee law²⁸⁹.

An aspect of refugee law which seems to have been largely ignored in the academic literature is how to deal with evidentiary questions. This paper will look at the basic aspects of evidence which are employed in refugee status determination. As part of this effort the concepts of ‘burden’ and ‘standard’ of proof as well as ‘benefit of the doubt’ and assessing ‘credibility’ will be defined. Differences in common and civil law traditions will be addressed in relation to some of these concepts and UNHCR’s pronouncements on these evidentiary questions will be surveyed.

melled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.” (emphasis added, at para 68)

²⁸⁷ The EU Presidency Conclusions from the Tampere Summit of October 1999 reaffirm the importance of the Union and Member states to “absolute respect of the right to seek asylum” and it “agree to work towards establishing a Common European Asylum System, based on the full and inclusive application of the (1951 Refugee Convention), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*.” The Conclusions note that “this System should include, in the short term, a clear and workable determination of the state responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status” (Tampere Summit Presidency Conclusions, paras 13 & 14)

²⁸⁸ In the 19 December 2000 UK House of Lords decision in *Regina v Secretary of State for the Home Department, ex parte Adan*, Lord Justice Steyn opined that: “Under articles 35 and 36 of the (1951 Refugee) Convention, and under article II of the Protocol of 1967, the UNHCR plays a critical role in the application of the Refugee Convention: compare the Statute of the Office of the UNHCR, General Assembly Resolution 428(V) of 14 December 1950, para. 8. Contracting states are obliged to cooperate with UNHCR. *It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals*” (emphasis added)

²⁸⁹ See note 1 above. Also see, for example, UNHCR ‘Note on Burden and Standard of Proof in Refugee Claims’ of 16 December 1998 and ‘An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR’, UNHCR European Series, Regional Bureau for Europe, September 1995, as well as the expert papers, conclusions and in particular the UNHCR Guidelines on International Protection which have developed out of the UNHCR Global Consultations process and which are intended to complement and update the understandings in the Handbook. These documents are all available on the UNHCR website.

A central argument put forward in this paper is that the humanitarian nature of international refugee law and the obligation of states to make good on the protection of refugees *a fortiori* requires that the refugee definition and determination procedures should be interpreted and applied in a liberal manner. Said another way, evidentiary standards in the refugee context should not be interpreted too strictly.

In this connection Hathaway has noted that:

... (T)he concept of persecution should be *interpreted and applied* liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted ... (A)ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments”.²⁹⁰

If we accept that the concept of ‘persecution’ should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high of a standard in order for a victim of persecution to *prove* his or her claim. Indeed, Hathaway, who is a proponent of the approach that decision-makers in refugee matters need only concern themselves with the *objective risk* of being persecuted²⁹¹, has floated the idea that “an individual can be untruthful and still be a Convention refugee”. In support of this seemingly odd comment he described the following scenario:

Take for example a case in which the decision-maker is satisfied of the identity of the claimant, and has adequate documentary evidence that persons of the claimant’s description face a well-founded fear of being persecuted. In such circumstances, no further evidence is required to recognize the refugee claim. If the applicant fails to testify truthfully – or indeed, to testify at all – then the decision-maker is left only with the documentary evidence as the basis for assessing the well-foundedness of the claim. But if that documentary evidence is in fact sufficient to make the case for a real chance or serious possibility of being persecuted, the fact of the applicant’s false statements does not negate the reality of the risk faced, and refugee status should be recognized.²⁹²

No one is suggesting that dishonesty be encouraged. Dishonesty is, however, sometimes explicable, especially in cases “when bad advice is received from traffickers or others viewed

²⁹⁰ Committee on Population and Refugees of the Council of Europe, cited by J. Thomas Woods ed., “Refugees: A New Dimension in International Human Rights”, (1976) 70 ASIL Proceedings 58, at 69, as cited in ‘Understanding Refugee Protection as Human Rights Protection’, James C Hathaway, paper presented at EU Presidency Seminar entitled ‘International Protection within One Single Asylum Procedure’ organised by the Swedish Migration Board, the EU Commission and the US Department of State, Norrköping, 23-24 April 2001. The paper is reproduced in the Report from the Seminar published by the Migration Board.

²⁹¹ This approach was also adopted by Professor Atle Grahl-Madsen in his treatise *The Status of Refugees in International Law* (1966), whereby he noted that: “ ‘Fear’ is, generally speaking, a subjective condition, a state of mind ... The adjective ‘well-founded’ suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugee, but that this claim should be measured by a more objective yardstick ... In fact, the frame of mind of the individual hardly matters at all. Every person claiming ... to be a refugee has ‘fear’ of being persecuted ... irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all the hazards, or is simply apathetic or even unconscious of the possible dangers.”, at 173-174.

²⁹² Hathaway, above.

by an asylum-seeker as experts; when fear of return drives an asylum seeker to embroider his or her real story; or when decision makers appear to attach weight to matters such as travel routes which are, in truth, substantively irrelevant to qualification for refugee status”.²⁹³ The following discussion will look more closely at what is meant by evidentiary terms used in refugee law.

1. Legal Terminology

In the refugee context, the terms ‘burden of proof’ and ‘standard of proof’ are used in the law of evidence in common law countries. In those common law countries which have adopted sophisticated systems for adjudicating refugee claims, legal arguments may revolve around whether the applicant has met the requisite evidentiary standard or degree of proof for demonstrating that he or she is a refugee. While the question of the *burden of proof* is also a relevant consideration in countries with legal systems based on civil law, the application of the *standard of proof* generally does not arise in the same manner as in common law jurisdictions. By comparison, the principle applicable in civil law systems is that of *liberté de la preuve* (freedom of proof) or ‘free assessment of the evidence’ according to which the evidence produced to prove the facts alleged by the claimant must create in the decision-maker the *intime conviction* (deep conviction) that the allegations are truthful.

While the above common law terms have technical meanings and are of particular relevance in certain countries, these evidentiary standards have been widely used in the substantiation of refugee claims including in the practice of UNHCR. However, the application of the concepts of burden and standard of proof may vary according to the different aspects of the refugee procedure being undertaken. For example, the standard of proof for excluding someone from refugee status or the level of proof required to determine that an individual has a *prima facie* refugee claim differs from inclusion considerations. The focus in this paper will be solely on the inclusion aspects of refugee determination.

2. Evidentiary Issues

2.1 Burden of Proof: A Shared Responsibility

It is normally considered that the burden of proof, or the obligation to prove a claim or allegation, lies with the applicant. In addition to the general duty to tell the truth and cooperate with the decision-making authority a refugee applicant should be provided a reasonable opportunity to present evidence to support his or her claim. A refugee claimant must therefore make reasonable efforts to establish the truthfulness of his or her allegations and the accuracy of the facts on which the claim is based.

In view of the particular nature of the refugee situation and the vulnerability of some asylum seekers, the decision-maker must share the duty to ascertain and evaluate all the relevant facts. Reference to relevant country of origin and human rights information by the decision maker will assist in assessing the objective situation in an applicant’s country of origin. In recent years, UNHCR as well as a number of states and non-governmental organisations have made significant advances in compiling and disseminating country of origin and related human rights information.²⁹⁴ Seeking and referring to such information

²⁹³ *Ibid.*

²⁹⁴ The UNHCR REFWORLD CD-ROM contains country of origin information including national legislation, case law, human rights reports and replies to queries on specific practices of states. The CD-ROM version of REFWORLD contains the full text of documents, but information is also available on the web:

in refugee status determination proceedings should be considered an essential undertaking by the decision-maker towards satisfying the shared responsibility of the burden of proof.

The Handbook acknowledges that evidentiary requirements should not be applied too strictly “in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself.” (para197) Although the burden of proof is discharged by the applicant providing evidence, in the end the only available evidence may be an applicant’s oral testimony. In addition to an applicant’s individual testimony, other evidence such as documents or the testimony of witnesses who have expertise on relevant country conditions may be considered as part of the determination procedure.

In some national procedures, decision-makers commonly make use of sources of information which are not available to a refugee applicant including reports from diplomatic missions or fellow governments or even, in some cases, reports from security intelligence agencies. Administrative law principles of natural justice and fairness provide that an applicant normally be permitted to know what evidence is being relied upon to reach a decision. The use of internal reports by decision-makers without providing the asylum applicant or his or her legal counsel disclosure of such information may actually prejudice an applicant, as they would be unable to refute the evidence or provide a full and informed explanation in case of perceived discrepancies.

2.2 Assessing Evidence and the Link to Credibility

The 1995 UNHCR European Series publication entitled ‘An Overview of Protection Issues in Western Europe’ noted that:

- In the refugee context, given the potential seriousness of an erroneous negative decision and because objective evidence will frequently be unavailable or inaccessible, assessing whether the applicant has proved a ‘well founded fear’ should be approached flexibly, in particular where;
- the fear which is the subject of an asylum claim relates to *sur place* or a future possibility and therefore is not capable of being demonstrated in the present;
- the circumstances of sudden and often clandestine flight and travel make it difficult or impossible to provide documentary evidence;
- the existence of fear and/or trauma following persecution and flight results in gaps or inconsistencies in the testimony;
- refugees cannot return to their country of origin, and enormous risks and difficulties are associated with obtaining original documentary evidence.²⁹⁵

www.unhcr.ch/refworld/refworld.htm. A special issue of 16 *Refugee Survey Quarterly*, (1997), contains an extensive list of websites providing legal and country of origin information. Needless to say, country of origin and human rights information available via the World Wide Web is growing at an enormous pace.

²⁹⁵ An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR (hereafter ‘UNHCR Overview’), above, European Series, vol. 1, no. 3, Geneva, September 1995, at 33. This document is available on the UNHCR REFWORLD CD-ROM.

The Resolution on Minimum Guarantees for Asylum Procedures²⁹⁶ which was adopted by the EU Council of Ministers in 1995, has noted that “when examining an application for asylum the competent authority must *ex officio* take into consideration and seek to establish all relevant facts and give the applicant the opportunity to present a substantial description of the circumstances of the case and to prove them”.²⁹⁷

As noted above, in order to discharge the burden of proof the applicant must make sincere attempts to access and present all the relevant facts and circumstances of his or her case. The Resolution on Minimum Guarantees explicitly states, however, that recognition of refugee status is not dependent on the production of any particular formal evidence. Even in the case of undocumented claims where the evidence is solely based on an applicant’s oral testimony, notwithstanding the inability to prove all the elements of the asylum claim, if an applicant’s statements are coherent, plausible, consistent and thereby credible it would be proper to grant the applicant ‘the benefit of the doubt’.

In assessing the evidence presented, which is of key importance in assessing an applicant’s credibility, the decision-maker must consider *all of the evidence*, both oral and documentary. Furthermore, the evidence must be assessed as a whole and not just in parts in isolation from the rest of the evidence. The decision-maker would be correct, however, to place greater weight on evidence that is directly relevant to the issues being addressed as some evidence may be more material to the refugee claim.

If there are inconsistencies or exaggerations in the evidence presented, the decision-maker must go on to assess those aspects of the evidence which are found to be credible to determine if they support the claim to refugee status in its totality. The rejection of some, and in some cases even substantial, evidence on account of lack of credibility does not necessarily lead to rejection of the refugee claim. The claim must still be assessed on the basis of the information that was found to be truthful, including documentary and other evidence relevant to the applicant’s situation, including, as required, persons who are similarly situated.²⁹⁸ If aspects of a claim are in doubt, the applicant should be provided a reasonable opportunity to present further evidence in order to clarify any aspects which the decision-maker deems not credible.

²⁹⁶ Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, T.12 Official Journal C274, 19/09/1996 p. 0013-0017 (EUDOR) 396Y0919 (05). Also see the Commission commentary prepared on the Resolution on Minimum Guarantees for Asylum Procedures dated 21 June 1995, document ref: OJ No. C274, 19.09.1996, 13.

²⁹⁷ ‘UNHCR Overview’, above.

²⁹⁸ An example of a refugee claim where the situation of ‘persons similarly situated’ would be a relevant consideration is where the claim is based on an individual’s ‘membership of a particular social group’. A 1998 decision of the Refugee Division of the Immigration and Refugee Board (IRB) of Canada is illustrative of this approach in assessing the standard of proof required to satisfy a well-founded fear of persecution. The case concerned a claimant who was homosexual of Iranian nationality. The Board summarized its decision as follows:

“... Even though there was evidence that very few homosexuals have in fact been tried, sentenced or executed in Iran, the possibility of abuse of power by the authorities to humiliate and abuse homosexuals existed. It was not reasonable to ask the claimant to be discreet in his homosexuality, as his sexual orientation was a basic human right ... Considering country conditions in Iran, the arbitrariness with which authority is exercised in Iran, and the aversion to western lifestyles (which the claimant, by virtue of his open homosexuality, would be perceived as exhibiting), *there was more than a mere possibility that the claimant would be persecuted if he returned to Iran.*”(emphasis added)

Decision CRDD V96-03502 of 7 August 1998, reported in the REFLEX case law database on the IRB website at: www.irb.gc.ca

Other considerations may come into play in assessing the evidence of children or persons suffering from mental or emotional disorders. In order to ensure that the *best interests* of a separated asylum-seeking child are taken into account, for example, a designated legal representative should be appointed to help the child through the determination proceeding.²⁹⁹ Factors to consider in assessing the evidence of children include: a child's age at the time of the events; the time that has elapsed since the events; level of education; ability to understand and relate his or her experiences; understanding of the need to tell the truth; capacity to recall certain events; and capacity to communicate intelligibly or in a form capable of being rendered intelligible.³⁰⁰ A minor refugee applicant may have difficulty recounting the events that led him or her to flee, and often the child's parents will not share distressing events with the intention of protecting the child. As a result, a child's testimony may appear vague and uninformed about key events which are relevant to the claim of persecution. It is therefore essential when assessing the credibility of a minor applicant, that the child's sources of knowledge and his or her maturity and intelligence be taken into account. The seriousness of the persecution alleged must also be considered to determine whether past events have traumatised the child and hindered his or her ability to recount certain details.

Persons who have suffered trauma or are suffering from mental or emotional disorders also require special care. The Handbook suggests that in such cases, whenever possible, the examiner should obtain expert medical advice. The Handbook further recommends that a medical report should provide information on the nature and degree of mental illness and assess the applicant's ability to fulfil the requirements normally expected of an asylum seeker in presenting his or her case. The Handbook proposes that the decision-maker "lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, eg. from friends, relatives and other persons closely acquainted with the applicant ... it may also be necessary to draw certain conclusions from the surrounding circumstances." (para 210)³⁰¹

Women asylum seekers may also experience particular problems in providing evidence and thereby supporting the credibility of their refugee claim when they are not given access to the determination process independently from their husbands or male relatives. In some cases, women may experience particular problems in obtaining travel documents prior to their flight, may lead to undermining their credibility. Similarly, women from certain cultures where men do not share the details of their political, military or social activities with their female partners or family members may find themselves in a difficult situation when questioned about the experiences of their relatives.³⁰²

²⁹⁹ See 'Separated Children in Europe Programme: Statement of Good Practice', (2nd edition, October 2000), which is a statement of protection principles for separated children jointly prepared by the International Save the Children Alliance in Europe and UNHCR. Also see the Immigration and Refugee Board (IRB) of Canada guidelines on 'Child Refugee Claimants: Procedural and Evidentiary Issues', IRB Ottawa, 30 September 1996, available at: www.irb.gc.ca.

³⁰⁰ The 'Statement of Good Practice' notes: "It is desirable, particularly for younger children or children with a disability, that an independent expert person carry out an assessment of the child's ability to articulate a well-founded fear of persecution Where interviews are required they should be carried out in a child-friendly manner (breaks, non-threatening atmosphere) by officers trained in interviewing children. Children should always be accompanied at each interview by their legal representative and, where the child so desires, by a significant adult (social worker, relative etc)" (at paras 11.4 and 11.5)

³⁰¹ Also, see UNHCR Training Module 'Interviewing Applicants for Refugee Status', Geneva, 1995, Chapter 5 'Interviewing Children' and Appendix 2 'Excerpt from UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence', The Training Module is available on the UNHCR REFWORLD CD-ROM.

³⁰² See IRB Guidelines on 'Women Refugee Claimants Fearing Gender-Related Persecution: Update' IRB Ottawa, 13 November 1996. Similar guidelines have also been developed in the UK, Australia and the USA. A European Parliament Resolution of 14 November 1996 also urged all member states to adopt guidelines on

3. The Benefit of the Doubt

The UNHCR Handbook provides the following guidance on when it is warranted to grant a refugee applicant the 'benefit of the doubt'. The relevant excerpts are:

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his [or her] statements by documentary or other proof, and cases in which an applicant can provide evidence of all his [or her] statements will be the exception rather than the rule ... Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt.

203. After the applicant has made a genuine effort to substantiate his [or her] story there may still be a lack of evidence for some of his [or her] statements. As explained above (para 196), it is hardly possible for a refugee to "prove" every part of his [or her] case, and indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

The application of the benefit of the doubt has been widely adopted in national determination procedures and as part of UNHCR's practices in the field. It is worth emphasising that a key element in its proper use is to ensure that the applicant is deemed credible. Given the difficulty or impossibility in establishing all the facts of a refugee claim, and on the basis that the claim presented satisfies the refugee definition, then the benefit of the doubt may be properly exercised provided a certain credibility threshold is met.

4. The Standard of Proof

In considering an applicant's responsibility to prove facts in support of his or her refugee claim, the term 'standard of proof' means the threshold to be met by the claimant in persuading the decision-maker of the truth of his or her factual assertions. Facts which need to be 'proved' are those which concern the background and personal experiences of the applicant which purportedly give rise to fear of persecution and the unwillingness to avail him or herself of the protection of the authorities in the country of origin. In this sense there must be a well-founded fear of persecution that has caused the applicant to flee the country of origin or residence. The applicant's fear must be genuine and this is assessed in the light of his or her personal situation and background, as well as the evidence presented and the situation in the country of origin.

The refugee definition requires that a fear of persecution must be well-founded, but this does not mean there must have been actual persecution. The *travaux préparatoires* to the 1951

women asylum seekers as agreed by the UNHCR Executive Committee. For a comprehensive study of gender issues and refugee status determination see *Refugees and Gender: Law and Process*, by Heaven Crawley, Jordan Publishing Limited, UK, 2001.

Refugee Convention support this approach. The drafting group's explanatory note on the refugee definition provides that an applicant:

(M)ust prove that he or she has either actually been a victim of persecution or can show 'good reason' why they he or she fears persecution. It is generally accepted that the 1951 Refugee Convention does not require a causal relationship between persecution and flight. Thus, if the reasons to fear persecution have occurred after the applicant had already left the country (eg. in case of a change of regime), the granting of refugee status due to those "post flight reasons" is nevertheless justified.³⁰³

In the UK House of Lords decision of *Sivakumaran*³⁰⁴, it was established that the appropriate test to determine whether an applicant's fear was well-founded was if there is a "reasonable chance", "substantial grounds for thinking" or a "serious possibility" of the feared event occurring. The applied test was intended to be a lesser standard than the civil standard of balance of probabilities³⁰⁵. The test for well-foundedness was further clarified by the Canadian Federal Court of Appeal in the case of *Ponniah*³⁰⁶, where Mr Justice Desjardins stated that:

'Good grounds' or 'reasonable chance' (of persecution) is defined in *Adjei*³⁰⁷ as occupying the field between upper and lower limits; it is less than a 50 per cent chance (ie. a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

³⁰³ 'UNHCR Overview', at 34-35.

³⁰⁴ *Regina v Secretary for the Home Department, ex parte Sivakumaran*, (1988) 1 All ER 193 (H.L.). In the decision, Lord Keith of Kinkel also cited with approval the US Supreme Court test in *INS v Cardoza-Fonseca*, 467 US 407 (1987) noted as follows: "In my opinion the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a *reasonable degree of likelihood* that he will be persecuted for a Convention reason if returned to his own country." (emphasis added, at pp 197-198)

A similar formulation is found in the UNHCR Handbook, at para 42, which states: "In general, *the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable for him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.*"

³⁰⁵ As noted by Hathaway, in their concurring judgments, both Lord Templeman and Lord Goff of Chieveley "softened the notion of "likelihood" in favour of a test which inquires whether there is evidence of a "real and substantial danger of persecution". This view was affirmed in the Canadian context by the Federal Court of Appeal "in the case of *Joseph Adjei v Minister of Employment and Immigration* (1989), 7 Imm. L.R. (2d) 169 (F.C.A.), at 172) in which the parties agreed to renounce ... the "balance of probabilities" test in favour of a new "reasonable chance" standard.", in Hathaway, James C., *The Law of Refugee Status* (1991), at 78-79.

According to Goodwin-Gill, "The debate regarding the standard of proof reveals some of the inherent weaknesses of a system of protection founded upon essays in prediction. It is no easy task to determine refugee status; decision-makers much assess credibility and will look to the demeanour of the applicant. Information on countries of origin will often be lacking or deficient, so that it is tempting to demand impossible degrees of corroboration. The applicant's testimony may seem unduly self-serving, though it could scarcely be otherwise, absent anyone else to speak on his or her behalf Credibility remains problematic, but *the nature of the exercise in prediction and the objective of protection call for account to be taken of consequences, and of degrees of likelihood far short of any balance of probability. This indeed seems now to have been recognized in most jurisdictions involved in individual refugee determination.*" (emphasis added), in Goodwin-Gill, G.S., *The Refugee in International Law* (1996), at 39.

³⁰⁶ *Ponniah, Manoharan v MEI* (Federal Court of Appeal, No. A-345-89), Heald, Hugessen, Desjardins, 16 May 1991, reported in 13 Imm. Law Reports (2nd) 241 (FCA), at 245.

³⁰⁷ *Joseph Adjei v Minister of Employment and Immigration* (1989), 57 Dominion Law Reports (DLR) (4th) 153.

The US Supreme Court has also articulated the test of well-foundedness in the leading case of *INS v Cardoza-Fonseca*³⁰⁸, which rejected the traditional “balance of probabilities” standard in favour of the more generous “reasonable probability” test. The Court stated:

There is simply no room in the United Nations definition for concluding that because an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening ... (A) moderate interpretation of the ‘well-founded fear standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a *reasonable possibility*³⁰⁹. (emphasis added)

The UNHCR Overview of Protection Issues in Western Europe also cites the example of the German Federal Constitutional Court which has ruled in a number of cases that there “should be a ‘considerable likelihood’ that the applicant would be exposed to persecution on return. However, according to the Court, ‘considerable likelihood’ of persecution exists even if the chances of persecution actually occurring are less than 50%. The important element is rather whether there are sufficient objective elements that would make a reasonable thinking person fear persecution”.³¹⁰

By comparison, the Nordic countries appear to place a relatively high standard of proof on the applicant. It must be recognized that the overall grant of Convention and subsidiary protection status in the Nordic countries is very generous. As reported in the annual publication of the UNHCR Headquarters Population Data Unit, the Convention recognition rate in Denmark has been between 15-17%, while the average Convention rates in the other Nordic countries is between 1-2%.³¹¹ Whether the low Convention recognition rate in some of the Nordic countries has anything to do with what is perceived to be a higher demand of ‘standard of proof’ is certainly a relevant consideration.³¹²

In common law countries the law of evidence relating to criminal prosecutions requires cases to be proved by the state ‘beyond a reasonable doubt’. In civil cases, the law does not require such a high standard; rather the decision-maker has to decide the case on a ‘balance of probabilities’. For refugee claims, there is no necessity for the decision-maker to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The decision-maker needs to decide if, based on the evidence provided as well as the verac-

³⁰⁸ 467 U.S. 407 (1987); also see *INS v Stevic* 467 US (1984)

³⁰⁹ *Ibid* (*Cardoza-Fonseca*), at 453, per Stevens J.

³¹⁰ ‘UNHCR Overview’ above at 35.

³¹¹ *Trends in Asylum Decisions in 38 Countries, 1999-2000*, UNHCR Population Data Unit, Geneva, 22 June 2001, at pp 2-4, available at: www.unhcr.ch. Figures made available to UNHCR for 2002 indicated the following Convention refugee recognition rates: Denmark (11.8%); Finland (0.8%); Norway (2.7%); Sweden (1.1%); and Iceland (0%). On average, the Nordics grant around 25% of all asylum applicants permission to stay, but Convention recognition rates remain a very low proportion of this equation. (%). This level of Convention recognition is six times lower than the EU average, and very much lower than US and Canadian recognition rates. For an interesting analysis and discussion of the legal importance to apply the Convention refugee definition instead of alternative statuses see, Hathaway, J.C., ‘What’s in a Label?’, 5 *European J of Migration and Law* (2003) 1-21 (2003).

³¹² The Deputy Director-General of the Swedish Aliens Appeals Board has written that: “Common law countries seem to apply a standard [of proof] below the concept “balance of probabilities”, while countries like Sweden applies a standard that is above the “balance of probabilities”. I believe, that this different approach emanates from differences in legal traditions rather than differences in interpreting the 1951 Refugee Convention.”, Sandesjö, Håkan, ‘Assessment of Evidence in Refugee Cases – Swedish Jurisprudence’, in *Asylum in Europe: Strategies, Problems and Solutions*, report from the Nordic Refugee Seminar, Lund, 28-29, Raoul Wallenberg Institute of Human Rights and Humanitarian Law (2001), at 42.

ity of the applicant's statements, there is a 'reasonable likelihood' or 'good reason' that the claimant has a well-founded fear of persecution.

UNHCR favours the more generous test of 'standard of proof' as developed in some common law countries as the correct approach.³¹³ The flexibility which the decision-maker must take into account in assessing evidence on a refugee application, as well as the concern that placing too high an evidentiary burden on refugee applicants is inconsistent with the humanitarian nature of refugee law, supports the view that the standard of proof is satisfied if an applicant has demonstrated a 'serious possibility', 'good reason', 'valid basis' or 'real or reasonable chance or likelihood' of persecution³¹⁴. The following illustration portrays these different standards:

'Well-Founded Fear' Test³¹⁵			
	Refugee Law		→
		Civil Law	→
			Criminal Law
			→
mere possibility	<ul style="list-style-type: none"> *serious possibility *good reason *valid basis *reasonably possible *real or reasonable chance or likelihood 	51% balance of probabilities	beyond a reasonable doubt

³¹³ The 'UNHCR Overview' under the sub-heading 'Standard of Proof' provides that: "The applicant has to show 'good reason' to fear persecution and that the fear is reasonable and plausible, based on an objective evaluation of the situation in the country of origin. The general civil standard in law, the balance of probabilities, is too strict in that it is difficult for an applicant to establish that persecution will 'probably' take place. In addition the possible repercussions of an erroneous decision renders such a level of proof inappropriate. *It is sufficient for him (or her) to show that his (or her) fear in this connection is a reasonable one.* If the asylum seeker satisfies this test, s/he should be considered a refugee even if s/he is unable to prove his (or her) case in full. S/he should be given the benefit of the doubt, subject of course to also satisfying the test of credibility."(emphasis added, at 36)

The UNHCR paper on 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', *op cit*, citing the December 1998 UNHCR *Note on Burden and Standard of Proof in Asylum Claims*, has employed slightly different language as follows:

"The standard of proof for establishing a well-founded fear of persecution has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters. It is generally agreed that persecution must be provided to be "reasonably possible" in order to be well-founded."(emphasis added, at p 3).

Also see UNHCR Training Module 'Interviewing Applicants for Refugee Status', *op cit*, at Chapter 6.
³¹⁴ The Introduction to the December 1998 UNHCR 'Note on Burden and Standard of Proof in Refugee Claims' suggests that: "In examining refugee claims, the particular situation of asylum seekers should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian. On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood. Nonetheless, not all levels of likelihood can be sufficient to give rise to refugee status. A key question is whether the degree of likelihood which has to be shown by the applicant to qualify for refugee status has been established." (on file with the author)

³¹⁵ The illustration has been adapted from training materials prepared by Richard Stainsby, Director General, Professional Development Branch, IRB Canada, as presented at the Summer Course on Refugee Issues, Centre for Refugee Studies, York University, Toronto, June 1997.

5. Credibility

Credibility is a key factor in establishing the validity of the refugee claim. The overall credibility of an applicant's claim to refugee status is normally assessed by examining a number of factors including: the reasonableness of the facts alleged; the overall consistency and coherence of the applicant's story; corroborative evidence adduced by the applicant in support of his or her statements; consistency with common knowledge or generally known facts; and the known situation in the country of origin.

The applicant's demeanour or behaviour may also be a relevant consideration.

Credibility is established where the applicant has presented a claim that is coherent and plausible and does not contradict generally known facts and is therefore, on balance, capable of being believed. There are a number of factors that may tend to place credibility in doubt. As noted in the UNHCR Overview, factors reducing credibility may include that: the applicant has withheld information, personal history data or submitted new information in a second interview; the applicant is unwilling to supply information; the behaviour of the applicant is inappropriate; the applicant has deliberately destroyed his passport or other documentation; the professed inability of the applicant to name the transit countries through which he or she has travelled.³¹⁶

However, these factors may be capable of rational explanation and should be assessed in each individual case in the broader context of refugee status determination. This requires that an asylum seeker be provided a sufficient opportunity to explain or help clarify any aspects of the claim which a decision-maker finds doubtful or simply not credible.

A number of national authorities are particularly strict when assessing an applicant's credibility. Even inconsistencies which are not central or material to the basis of the refugee claim may be considered as grounds for rejection. For example, some countries place great emphasis on an applicant's travel route when considering credibility or determining whether a third country may be considered responsible for assessing a particular refugee claim. Given the extensive legislative and other measures states have in place in order to 'legally' access European territory, it is not surprising that many genuine asylum seekers would be obliged to resort to illegal or irregular means to enter a country.³¹⁷ Inconsistencies concerning a person's travel route may then be offered in order to protect the identity of the individuals who provided assistance, or to safeguard the travel route for future asylum seekers or to avoid return to a third country.

A more balanced analysis may be achieved by focussing on contradictions or discrepancies that are of a significant or serious nature. Inconsistencies, misrepresentations or concealment of certain facts should not lead to a rejection of the asylum application where they are not material to the refugee claim. Where an applicant is found to be lying and the mistruth is material to the claim, then it is necessary for the decision-maker to take this into account in light of the entire body of evidence to be assessed and decided upon.

³¹⁶ 'UNHCR Overview', above at 35.

³¹⁷ See Gregor Noll, *Negotiating Asylum*, Chapter 5 on 'Access to Territory under the EU Acquis', Martinus Nijhoff Publishers, 2000.

A study by John Morrison sums up the problem as follows: "Although there is a growing body of work that looks at the phenomenon of human trafficking from a human rights perspective, very little have raised the question of refugee protection and the fact that *for many asylum seekers, clandestine entry now represents the only way of claiming asylum in Europe, in particular the countries of the European Union* ... There is nothing particularly new about the trafficking or smuggling of refugees as the war time activities of Raoul Wallenberg or Oscar Schindler testify ...", 'The Policy Implications Arising from the Trafficking and Smuggling of Refugees into Europe', presented at the European Conference 'Children First and Foremost – Policies towards Separated Children in Europe', 21-22 September 2000 at Save the Children Sweden in cooperation with UNHCR.

Contradictions or inconsistencies should relate to the fundamental or critical aspects of the claim to be deemed to undermine an applicant's credibility. Rejecting a claim based solely on the non-credibility of marginal issues (eg. delay in applying for refugee status), without evaluating the credibility of the evidence concerning the substance of the claim, is not a desirable practice. On the other hand, just as an applicant may be able to show on cumulative grounds that he or she has a well-founded fear of persecution, a series of discrepancies and contradictions taken individually which may appear insignificant, when considered together may support a finding of lack of credibility.

6. Relevant Considerations under the UN Convention against Torture

A further element that may arise in assessing the credibility of a refugee applicant is the behaviour of victims of torture or trauma. In a number of decisions taken by the UN Committee against Torture³¹⁸ in cases of rejected asylum seekers, the Committee has stated that torture survivors may be unable to provide exact details about elements of their refugee claims. Furthermore, the memory of individuals who are under stress or have suffered harm or are fearful of expressing themselves to a person in authority can play a crucial role in an applicant's inability to provide testimony which is consistent and coherent.³¹⁹ Although the scope of the protection granted to persons fearing 'torture' in their country of origin or any other territory to which they could be returned is considerably broader under article 3 of the Torture

³¹⁸ The Committee against Torture, established under article 17 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA resolution 39/46 of 10 December 1984), took up its duties in January 1988. The Committee is composed of 10 expert members who are elected by state parties to the Convention for four-year terms. The Committee meets twice a year in Geneva. Its sessions can last three weeks and its functions are to examine state party reports, raise issues of concern and make observations and recommendations; review states and individual complaints in respect of states which have made declarations under articles 21 and 22; and conduct confidential inquiries where reliable information about the systematic practice of torture in a state party is received pursuant to its authority under article 20.

³¹⁹ CAT Communication No. 41/1996 concerned an activist of a Zairean opposition party who claimed to have been arrested by government security forces, detained for one year without trial, raped more than ten times and subjected to torture. The concerned authorities rejected Ms Kisoki's asylum request in a final decision, noting contradictions and inconsistencies in her story. In reaching its decision the authorities argued that country conditions had changed to a sufficient degree to permit Ms Kisoki to return to her country of origin. In its decision on the individual complaint the Committee against Torture acknowledged that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims". The Committee also referred to the position of UNHCR that country conditions indicated that persons who have a high profile continue to be at risk of persecution in the former Zaire.

Convention³²⁰ than under article 33 of the 1951 Refugee Convention³²¹, the decision of the Committee in the case of an Iranian asylum seeking woman is particularly instructive³²².

CAT communication no. 149/1999 concerned an Iranian asylum seeker who claimed a fear of torture if returned to Iran. The applicant's asylum claim had been rejected by the concerned authorities based on her general lack of credibility as she *inter alia* reportedly failed to provide sufficient evidence which could be checked and verified, presumably in the country of origin. In reaching its decision the Committee noted that the applicant was the widow of a martyr, her deceased husband having been a high ranking official in the Iranian air force. As a result, the applicant was supported and supervised by the Committee of Martyrs, the *Bonyad-e Shahid*. The Committee further noted that the applicant claimed she was forced into a *sighe* or *mutah* marriage (that is, a short-term marriage). The applicant's son who was seeking asylum in another European country also provided evidence which, in the Committee's view, assisted in corroborating her story.

An important aspect of the Committee's decision concerned the burden and standard of proof the applicant had to meet. In a key passage of the decision, the Committee commented as follows:

...the state party ... questions the author's credibility primarily based on her failure to submit controllable information and the reference in this context to international standards, i.e. UNHCR's Handbook, according to which an asylum seeker has an obligation to make an effort to support his (or her) statements by any available evidence and give a satisfactory explanation for any lack of evidence. The Committee draws the attention of the parties to its General Comment on the implementation of article 3 of the Convention in the context of article 22, adopted on 21 November 1997, according to which the burden to present an arguable case is on the author of a communication. The Committee notes the state party's position that the author has not fulfilled her obligation to submit the controllable information that would enable her to enjoy the benefit of the doubt. However, the Committee is of the view that the author has submitted sufficient details regarding her *sighe* or *mutah* marriage and the alleged arrest, such as names of persons, their positions, dates, addresses, name of police station etc, that could have, and to a certain extent have been, verified by the ... immigration authorities, to shift the burden of proof. In this context the Committee is of the view that the state party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being sub-

³²⁰ Article 3 of the 1984 Convention against Torture declares that:

No state party shall expel, return (*refouler*) or extradite a person to another state where there are *substantial grounds for believing* that he (or she) would be in danger of being subjected to torture ... For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights. (emphasis added)

³²¹ Article 33 of the 1951 Refugee Convention prohibits the expulsion or return (*refoulement*) of a refugee in the following terms:

1. No Contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his (or her) life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds to regard as a danger to the security of the country in which he (or she) is, or who, having been convicted by a final judgment of a particularly serious offence, constitutes a danger to the community of that country.

³²² UN Committee against Torture Communication No. 149/1999. The full text of this and other decisions of the Committee as well as its general comment no. 1 of 27 November 1997 on the 'Implementation of article 3' are available on the Office of the UN High Commissioner for Human Rights website at: www.unhchr.ch

jected to torture ... The state party does not dispute that gross, flagrant or mass violations of human rights have been committed in Iran.

The Committee decided in favour of the applicant taking into account various UN human rights reports which concluded that "little progress is being made with regard to remaining systematic barriers to equality" and for "the removal of patriarchal attitudes in society". The Committee's decision also refers to reports of non-governmental organisations which confirmed that "married women have recently been sentenced to death by stoning for adultery".

Notwithstanding that the Committee has no legal mandate to take a decision on the grant or refusal of asylum claims, a positive finding in respect of a communication based on a violation of article 3 would certainly be a relevant consideration in granting asylum, refugee or subsidiary protection status to an individual who is the subject of the communication³²³. What is of interest in the decision is that the Committee suggests the state party demanded too much evidence, or too high a standard of proof, in terms of verifiable information to support the claim of being at risk of torture.

By comparison with refugee determination, one should recall that the standard of proof is ostensibly lower in the refugee context than that required under the UN Torture Convention. It is not required that a refugee applicant submit verifiable evidence to prove an asylum claim. In fact, there may be serious risks involved for an applicant or his or her remaining family members or friends if asylum states systematically demand and try to confirm certain information in a country of origin.

As a UN human rights treaty body which provides a mechanism to prevent the *refoulement* of genuine refugees or other cases of concern to UNHCR, the work of the Committee against Torture is of particular interest to UNHCR³²⁴. The decisions of the Committee are important sources of jurisprudence in furthering understanding of international human rights protection as it relates to persons who may risk a particular form of persecution, that being torture³²⁵. In

³²³ The European Commission *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection* notes in the explanatory memorandum that:

"The subsidiary protection measures proposed are considered complementary to the protection regime enshrined in the Geneva Convention and its 1967 Protocol and are to be implemented in such a manner that they do not undermine but instead complement the existing refugee protection regime. The definition of subsidiary protection employed in this Proposal is based largely on international human rights instruments relevant to subsidiary protection. The most pertinent of them being (Article 3 of) the European Convention on Human Rights and Fundamental Freedoms, (Article 3 of) the UN Convention against Torture, and (Article 7 of) the International Covenant on Civil and Political Rights". (emphasis added, at 5, the full text of the Proposal is available at: europa.eu.int/eur-lex)

³²⁴ The relevance of the work of the international human rights mechanisms has not been lost on UNHCR. The Office's interest in these bodies can be summed up as follows:

"As a rule, UNHCR's interaction with the human rights mechanisms generally, and the torture provisions (in the Convention against Torture) in particular, should be linked to its mandate to protect from *refoulement*, all *bona fide* refugees and other individuals "of concern" to the Office. Where the treaty mechanisms and the torture provisions can be used to prevent the *refoulement* of *bona fide* refugees or other cases of concern, then UNHCR will have a legitimate interest in those alternative and parallel systems." (UNHCR Memorandum nos 57/98 & 61/98 of 28 August 1998, at para 1.9, on file with the author).

³²⁵ For example, in 1997 one state party carried out a deportation in contravention of a request by the Committee (re: CAT Communication No 99/1997). The applicant was expelled on the basis that he posed a security risk. The applicant acknowledged that he was an active member of the Dal Khalsa movement, a Sikh militant group. In finding a violation of article 3 Committee member Guibril Camara issued an additional individual opinion which noted the time to assess whether there are substantial grounds for believing that the concerned individual would be in danger of being subjected to torture is at the moment of expulsion, return or extradition. The Committee member further noted that, in what may be considered a positive pronouncement for asylum seekers:

terms of developing international standards concerning the assessment of evidence which is relevant to refugees, the pronouncements and observations of the Committee should also be of interest to decision-makers and refugee advocates. There is nevertheless concern that with increased demands on the Committee, and in view of its limited resources, the quality of its decision-making could be affected.

7. Conclusion

There is presently an absence of consensus amongst states on common standards for assessing evidence in refugee determination procedures. States with different legal traditions and histories have shown a reluctance to open the discussion on how the rules and standards on evidentiary questions are dealt with. Some commentators have argued that the task is just too difficult, which may speak more to obstacles in reaching political agreement than to articulating common rules and standards. The UNHCR Handbook provides a framework of concepts and procedural approaches for assessing evidence in this area of decision-making. In addition to the Handbook, which should be considered a starting point, guidelines and legal doctrine developed by national authorities and UNHCR. The work of human rights bodies such as the Committee against Torture as well as regional human rights mechanisms should be viewed as complementary sources of norms and standards. As part of ongoing efforts in Europe, and globally, to reaffirm and harmonise standards of refugee law these procedural questions, however tricky and difficult, should not be avoided.

“The facts clearly show that, at the time of his expulsion to India there were substantial grounds for believing that the author would be subjected to torture ... the fact that in this case the author was not subsequently subjected to torture has no bearing on whether the state party violated the CAT in expelling him. *The question of whether the risk – in this case, of acts of torture – actually materialises is of relevance only to any reparation or damages sought by the victim or by other persons entitled to claim. The competence of the Committee against Torture should also be exercised in the interests of prevention.* In cases relating to article 3, it would surely be unreasonable to wait for a violation to occur before taking note of it.” (at paras 16.3 & 16.4)

THE MICHIGAN GUIDELINES ON WELL-FOUNDED FEAR

The Michigan Guidelines on Well-Founded Fear, March 2004, is the outcome document of the Third Colloquium on Challenges in International Refugee Law Convened by The Program in Refugee and Asylum Law, University of Michigan Law School March 26-28, 2004

The Guidelines are available at the website of University of Michigan Law School:
www.refugeecaselaw.org/fear.pdf

Third Colloquium on Challenges in International Refugee Law

Convened by
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The Michigan Guidelines on Well-Founded Fear

An individual qualifies as a Convention refugee only if he or she has a “well-founded fear” of being persecuted. While it is generally agreed that the “well-founded fear” requirement limits refugee status to persons who face an actual, forward-looking risk of being persecuted (the “objective element”), linguistic ambiguity has resulted in a divergence of views regarding whether the test also involves assessment of the state of mind of the person seeking recognition of refugee status (the “subjective element”).

The view that the assessment of well-founded fear includes consideration of the state of mind of the person seeking recognition of refugee status is usually implemented in one of three ways. The predominant approach defines a showing of “fear” in the sense of trepidation as one of two essential elements of the well-founded fear test. In the result, refugee status may be denied to at-risk applicants who are not in fact subjectively fearful, or whose subjective fear is not identified as such by the decision-maker. A second view does not treat the existence of subjective fear as an essential element, but considers it instead to be a factor capable of overcoming an insufficiency of evidence of actual risk. Under this formulation, persons who are more timid or demonstrative, or who are simply able to articulate their trepidation in ways recognizable as such by the decision-maker, are advantaged relative to others who face the same level of actual risk, but who are more courageous, more reserved, or whose expressions of trepidation are not identified as such. A third understanding of a subjective element neither conditions refugee status on evidence of trepidation, nor advantages claims where such trepidation exists. The requirement to take account of “fear” is instead treated as a general duty to give attention to an applicant’s specific circumstances and personal vulnerabilities in the assessment of refugee status.

We have engaged in sustained collaborative study and reflection on the doctrinal and jurisprudential foundations of the well-founded fear standard, and have concluded that continued reference to distinct “subjective” and “objective” elements of the well-founded fear standard risks distortion of the process of refugee status determination. The existence of subjective fearfulness in the sense of trepidation should neither be a condition precedent to recognition of refugee status, nor advantage an applicant who faces an otherwise insufficiently well-established risk. An approach which recognizes a subjective element in order to take account of an applicant’s circumstances and vulnerabilities does not pose protection risks of the kind of the second approach. Reliance on a subjective element to particularize the inquiry into well-founded fear is, however, unnecessary, and may result in the devaluation of evidence of real value to the assessment of actual risk of being persecuted.

These Guidelines are intended to promote a shared understanding of a unified approach to the well-founded fear inquiry and related aspects of the Convention refugee definition that both avoids the protection risks increasingly associated with assertions of a “subjective element”

and ensures that due regard is accorded all particularized risks faced by an applicant for recognition of refugee status.

Unable or unwilling

1. An applicant's state of mind is relevant to determining whether he or she "is unable or, owing to such fear, is unwilling to avail himself (or herself)" of the protection of his or her country or countries of citizenship or, in the case of a stateless person, country or countries of former habitual residence. Specifically, a state party's duty of protection under the Convention is engaged through an expression by or on behalf of an applicant of inability or unwillingness to avail himself or herself of the protection of the relevant country or countries.
2. The required assertion of inability or unwillingness need not be made in any particular form. In substance, the applicant need only provide information or make claims which *may* engage the refugee Convention obligations of the state.

Well-founded fear

3. In contrast to the question of whether an applicant is unable or unwilling to avail himself or herself of the country of origin's protection, the assessment of well-founded fear does not comprise any evaluation of an applicant's state of mind.
4. Most critically, the protection of the refugee Convention is not predicated on the existence of "fear" in the sense of trepidation. It requires instead the demonstration of "fear" understood as a forward-looking expectation of risk. Once fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case. If it is, then the applicant's fear (that is, his or her expectation) of being persecuted should be adjudged well-founded.
5. An understanding of "fear" as forward-looking expectation of risk is fully justified by one of the plain meanings of the English text, and is confirmed by dominant interpretations of the equally authoritative French language text ("craignant avec raison"), which do not canvass subjective trepidation. This construction avoids the enormous practical risks inherent in attempting objectively to assess the feelings and emotions of an applicant. It is moreover consistent with the internal structure of the Convention, for example with the principle that refugee status ceases when the actual risk of being persecuted comes to an end, though not on the basis of an absence of trepidation (Art.1C, 5-6), and with the fact that the core duty of *non-refoulement* applies where there is a genuine risk of being persecuted, with no account taken of whether a refugee stands in trepidation of that risk (Art.33). More generally, the human rights context of the Convention requires that protection be equally open to all on the basis of evidence of an actual and relevant form of risk.
6. The determination of whether an applicant's "fear"- in the sense of forward-looking expectation of risk – is, or is not, "well-founded" is thus purely evidentiary in nature. It requires the state party assessing refugee status to determine whether there is a significant risk that the applicant may be persecuted. While the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear, the applicant need not show that there is a clear probability that he or she will be persecuted.

Establishing well-founded fear

7. To determine whether an applicant faces a significant risk of being persecuted, all material evidence from whatever source must be considered with care, and in context. Equivalent attention must be given to all forms of material evidence, with a decision

on the relative weight to be assigned to different forms of evidence made on the basis of the relative veracity and cogency of the evidence adduced.

8. Evidence unique to the applicant, including evidence of personalized and relevant past persecution, is directly relevant to the determination of well-founded fear, but is not a prerequisite. An applicant who, prior to departure from his or her country of origin, was not subject to persecution, nor directly threatened with persecution, can establish by other evidence a well-founded fear of being persecuted in the foreseeable future.
9. The assessment of well-founded fear may be based largely, or even primarily, on the applicant's own credible testimony. While the applicant's testimony is not necessarily the best evidence of forward-looking risk, it may well constitute the best evidence of risk, depending on the circumstances of the case.
10. In light of the shared duty of fact-finding, an applicant must make best efforts to provide the state party assessing refugee status with corroboration of his or her testimony. However, where such corroboration cannot reasonably be secured, an applicant's credible and unrefuted testimony standing alone is sufficient to establish a well-founded fear of being persecuted.
11. An applicant's testimony may only be deemed not credible on the basis of a specific, cogent concern about its veracity on a significant and substantively relevant point.
12. Even where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision-maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence. In particular, the existence of a well-founded fear may be grounded in evidence that the applicant is a member of a relevant, at-risk group of persons shown by credible country data or the credible testimony of other persons to face a significant risk of being persecuted.

Being persecuted

13. The particular circumstances of a person seeking recognition of refugee status are not relevant simply to the question of whether he or she can be said to have a well-founded fear. The determination of whether the risk faced is appropriately adjudged to amount to a risk of "being persecuted" also requires careful consideration of matters which may be unique to the individual concerned.
14. As a general rule, the determination of whether a given risk amounts to a risk of "being persecuted" must enquire into the personal circumstances and characteristics of each applicant, recognizing that by virtue of such circumstances and characteristics some persons will experience different degrees of harm as the result of a common threat or action.
15. Thus, for example, the psychological vulnerabilities of a specific applicant may be such that the risk of harms which would be insufficiently grave to justify recognition of refugee status for most persons will nonetheless amount to torture, cruel, inhuman or degrading treatment for him or her. Where this is so, the forward-looking risk of such psychological harms may appropriately be regarded as a risk of "being persecuted".

These Guidelines reflect the consensus of all participants at the Third Colloquium on Challenges in International Refugee Law, held at the university of Michigan Law School, Ann Arbor, Michigan, USA, on March 26-28, 2004.

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**UNHCR GUIDELINES ON INTERNATIONAL PROTECTION:
“INTERNAL FLIGHT OR RELOCATION ALTERNATIVE” WITHIN THE CONTEXT OF
ARTICLE 1 A(2) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELAT-
ING TO THE STATUS OF REFUGEES**

UNHCR Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1 A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/03/04 23 July 2003

The guidelines are available at the UNHCR website: www.unhcr.ch

**GUIDELINES ON INTERNATIONAL PROTECTION:
“Internal Flight or Relocation Alternative” within the Context of
Article 1A(2) of the 1951 Convention and/or 1967 Protocol
relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in *the Statute of the Office of the United Nations High Commissioner for Refugees*, and Article 35 of the *1951 Convention relating to the Status of Refugees and/or its 1967 Protocol*. These Guidelines supplement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, January 1992). They further supersede UNHCR’s Position Paper, *Relocating Internally as a Reasonable Alternative to Seeking Asylum – (The So-Called “Internal Flight Alternative” or “Relocation Principle”)* (Geneva, February 1999). They result, *inter alia*, from the Second Track of the Global Consultations on International Protection which examined this subject at its expert meeting in San Remo, Italy, in September 2001 and seek to consolidate appropriate standards and practice on this issue in light of recent developments in State practice.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

“Internal Flight or Relocation Alternative” in the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

I. INTRODUCTION

1. Internal flight or relocation alternative is a concept that is increasingly considered by decision-makers in refugee status determination. To date, there has been no consistent approach to this concept and consequently divergent practices have emerged both within and across jurisdictions. Given the differing approaches, these Guidelines are designed to offer decision-makers a more structured approach to analysis of this aspect of refugee status determination.

2. The concept of an internal flight or relocation alternative is not a stand-alone principle of refugee law, nor is it an independent test in the determination of refugee status. A Convention refugee is a person who meets the criteria set out in Article 1A(2) of the *1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (hereinafter “1951 Convention”). These criteria are to be interpreted in a liberal and humanitarian spirit, in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention. The concept of an internal flight or relocation alternative is not explicitly referred to in these criteria. The question of whether the claimant has an internal flight or relocation alternative may, however, arise as part of the refugee status determination process.

3. Some have located the concept of internal flight or relocation alternative in the “wellfounded fear of being persecuted” clause of the definition, and others in the “unwilling ... or unable ... to avail himself of the protection of that country” clause. These approaches are not necessarily contradictory, since the definition comprises one holistic test of interrelated elements. How these elements relate, and the importance to be accorded to one or another element, necessarily falls to be determined on the facts of each individual case.³²⁶

4. International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort. The concept of internal flight or relocation alternative should therefore not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one’s country, the right to seek asylum and protection against *refoulement*. Moreover, since the concept can only arise in the context of an assessment of the refugee claim on its merits, it cannot be used to deny access to refugee status determination procedures. A consideration of internal flight or relocation necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the internal flight or relocation alternative is proposed.³²⁷

5. Consideration of possible internal relocation areas is not relevant for refugees coming under the purview of Article I(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969*. Article I(2) specifically clarifies the definition of a refugee as follows: “every person who, 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*, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.³²⁸

II. SUBSTANTIVE ANALYSIS

A. Part of the holistic assessment of refugee status

6. The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the *whole* territory of the refugee’s country of origin.³²⁹ The concept of

³²⁶ 1 For further details, see UNHCR, “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees”, Geneva, April 2001, (hereafter UNHCR, “Interpreting Article 1”), para. 12.

³²⁷ *Ibid.*, paras. 35–37.

³²⁸ 3 (Emphasis added.) The *1984 Cartagena Declaration* also specifically refers to Article I(2) of the OAU Refugee Convention

³²⁹ 4 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, Geneva, re-edited 1992), (hereinafter “UNHCR Handbook”), para. 91.

an internal flight or relocation alternative therefore refers to a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life.³³⁰ Consequently, if internal flight or relocation is to be considered in the context of refugee status determination, a particular area must be identified and the claimant provided with an adequate opportunity to respond.

7. In the context of the holistic assessment of a claim to refugee status, in which a well-founded fear of persecution for a Convention reason has been established in some localised part of the country of origin, the assessment of whether or not there is a relocation possibility requires two main sets of analyses, undertaken on the basis of answers to the following sets of questions:

I. The Relevance Analysis

a) *Is the area of relocation practically, safely, and legally accessible to the individual?* If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.

b) *Is the agent of persecution the State?* National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.

c) *Is the agent of persecution a non-state agent?* Where there is a risk that the non-state actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

d) *Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?* This would include the original or any new form of persecution or other serious harm in the area of relocation.

II. The Reasonableness Analysis

a) *Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?* If not, it would not be reasonable to expect the person to move there.

Scope of assessment

8. The determination of whether the proposed internal flight or relocation area is an appropriate alternative in the particular case requires an assessment over time, taking into account not only the circumstances that gave rise to the persecution feared, and that prompted flight from the original area, but also whether the proposed area provides a meaningful alternative in the future. The forward-looking assessment is all the more important since, although rejection of status does not automatically determine the course of action to be followed, forcible return may be a consequence.

B. The relevance analysis

9. The questions outlined in paragraph 7 can be analyzed further as follows:

³³⁰ For issues concerning the burden of proof in establishing these issues see section III.A below.

Is the area of relocation practically, safely, and legally accessible to the individual?

10. An area is not an internal flight or relocation alternative if there are barriers to reaching the area which are not reasonably surmountable. For example, the claimant should not be required to encounter physical dangers en route to the area such as mine fields, factional fighting, shifting war fronts, banditry or other forms of harassment or exploitation.

11. If the refugee claimant would have to pass through the original area of persecution in order to access the proposed area, that area cannot be considered an internal flight or relocation alternative. Similarly, passage through airports may render access unsafe, especially in cases where the State is the persecutor or where the persecutor is a non-state group in control of the airport.

12. The proposed area must also be legally accessible, that is, the individual must have the legal right to travel there, to enter, and to remain. Uncertain legal status can create pressure to move to unsafe areas, or to the area of original persecution. This issue may require particular attention in the case of stateless persons or those without documentation.

Is the agent of persecution the State?

13. The need for an analysis of internal relocation only arises where the fear of being persecuted is limited to a specific part of the country, outside of which the feared harm cannot materialise. In practical terms, this normally excludes cases where the feared persecution emanates from or is condoned or tolerated by State agents, including the official party in one party States, as these are presumed to exercise authority in all parts of the country³³¹. Under such circumstances the person is threatened with persecution countrywide unless exceptionally it is clearly established that the risk of persecution stems from an authority of the State whose power is clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country.³³²

14. Where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a State, it will rarely be necessary to consider potential relocation, as it can generally be presumed that such local or regional bodies derive their authority from the State. The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government's failure to counteract the localised harm.

Is the agent of persecution a non-state agent?

15. Where the claimant fears persecution by a non-state agent of persecution, the main inquiries should include an assessment of the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the protection available to the claimant in that area from State authorities. As with questions involving State protection generally, the latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution.

16. Not all sources of possible protection are tantamount to State protection. For example, if the area is under the control of an international organisation, refugee status should not be

³³¹ See Summary Conclusions – Internal Protection/Relocation/Flight Alternative, Global Consultations on International Protection, San Remo Expert Roundtable, 6–8 September 2001 (hereinafter "Summary Conclusions – Internal Protection/Relocation/Flight Alternative"), para. 2; UNHCR, "Interpreting Article 1", paras. 12–13.

³³² See also paragraphs 16, 17 and 27 of these Guidelines

denied solely on the assumption that the threatened individual could be protected by that organisation. The facts of the individual case will be particularly important. The general rule is that it is inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis with national protection provided by States. Under international law, international organisations do not have the attributes of a State.

17. Similarly, it is inappropriate to find that the claimant will be protected by a local clan or militia in an area where they are not the recognized authority in that territory and/or where their control over the area may only be temporary. Protection must be effective and of a durable nature: It must be provided by an organised and stable authority exercising full control over the territory and population in question.

Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

18. It is not sufficient simply to find that the original agent of persecution has not *yet* established a presence in the proposed area. Rather, there must be reason to believe that the reach of the agent of persecution is likely to remain localised and outside the designated place of internal relocation.

19. Claimants are not expected or required to suppress their political or religious views or other protected characteristics to avoid persecution in the internal flight or relocation area. The relocation alternative must be more than a “safe haven” away from the area of origin.

20. In addition, a person with an established fear of persecution for a 1951 Convention reason in one part of the country cannot be expected to relocate to another area of serious harm. If the claimant would be exposed to a new risk of serious harm, including a serious risk to life, safety, liberty or health, or one of serious discrimination³³³, an internal flight or relocation alternative does not arise, irrespective of whether or not there is a link to one of the Convention grounds.³³⁴ The assessment of new risks would therefore also need to take into account serious harm generally covered under complementary forms of protection.³³⁵

21. The proposed area is also not an internal flight or relocation alternative if the conditions there are such that the claimant may be compelled to go back to the original area of persecution, or indeed to another part of the country where persecution or other forms of serious harm may be a possibility.

C. The reasonableness analysis

22. In addition to there not being a fear of persecution in the internal flight or relocation alternative, it must be reasonable in all the circumstances for the claimant to relocate there. This test of “reasonableness” has been adopted by many jurisdictions. It is also referred to as a test of “undue hardship” or “meaningful protection”.

23. The “reasonableness test” is a useful legal tool which, while not specifically derived from the language of the 1951 Convention, has proved sufficiently flexible to address the issue of whether or not, in all the circumstances, the particular claimant could reasonably be expected to move to the proposed area to overcome his or her well-founded fear of being persecuted. It is not an analysis based on what a hypothetical “reasonable person” should be expected to do. The question is what is reasonable, both subjectively and objectively, given the individual claimant and the conditions in the proposed internal flight or relocation alternative.

³³³ See UNHCR Handbook, paras. 51–52.

³³⁴ A more general right not to be returned to a country where there is a risk of torture or cruel or inhuman treatment is found, either explicitly or by interpretation, in international human rights instruments. The most prominent are Article 3 of the Convention against Torture 1984, Article 7 of the International Covenant on Civil and Political Rights 1966, and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

³³⁵ See UN docs. EC/50/SC/CRP.18, 9 June 2000 and EC/GC/01/18, 4 September 2001

Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?

24. In answering this question, it is necessary to assess the applicant's personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival.

Personal circumstances

25. The personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area. Of relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects. In particular, lack of ethnic or other cultural ties may result in isolation of the individual and even discrimination in communities where close ties of this kind are a dominant feature of daily life. Factors which may not on their own preclude relocation may do so when their cumulative effect is taken into account. Depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.

Past persecution

26. Psychological trauma arising out of past persecution may be relevant in determining whether it is reasonable to expect the claimant to relocate in the proposed area. The provision of psychological assessments attesting to the likelihood of further psychological trauma upon return would militate against finding that relocation to the area is a reasonable alternative. In some jurisdictions, the very fact that the individual suffered persecution in the past is sufficient in itself to obviate any need to address the internal relocation issue.

Safety and security

27. The claimant must be able to find safety and security and be free from danger and risk of injury. This must be durable, not illusory or unpredictable. In most cases, countries in the grip of armed conflict would not be safe for relocation, especially in light of shifting armed fronts which could suddenly bring insecurity to an area hitherto considered safe. In situations where the proposed internal flight or relocation alternative is under the control of an armed group and/or State-like entity, careful examination must be made of the durability of the situation there and the ability of the controlling entity to provide protection and stability.

Respect for human rights

28. Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in the proposed area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.

Economic survival

29. The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights

perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level.

30. If the person would be denied access to land, resources and protection in the proposed area because he or she does not belong to the dominant clan, tribe, ethnic, religious and/or cultural group, relocation there would not be reasonable. For example, in many parts of Africa, Asia and elsewhere, common ethnic, tribal, religious and/or cultural factors enable access to land, resources and protection. In such situations, it would not be reasonable to expect someone who does not belong to the dominant group, to take up residence there. A person should also not be required to relocate to areas, such as the slums of an urban area, where they would be required to live in conditions of severe hardship.

D. Relocation and internally displaced persons

31. The presence of internally displaced persons who are receiving international assistance in one part of the country is not in itself conclusive evidence that it is reasonable for the claimant to relocate there. For example, the standard and quality of life of the internally displaced are often insufficient to support a finding that living in the area would be a reasonable alternative to flight. Moreover, where internal displacement is a result of “ethnic cleansing” policies, denying refugee status on the basis of the internal flight or relocation concept could be interpreted as condoning the resulting situation on the ground and therefore raises additional concerns.

32. The reality is that many thousands of internally displaced persons do not enjoy basic rights and have no opportunity to exercise the right to seek asylum outside their country. Thus, although standards largely agreed by the international community now exist, their implementation is by no means assured in practice. Moreover, the *Guiding Principles on Internal Displacement* specifically affirm in Principle 2(2) that they are not to be interpreted as “restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law” and in particular, they are “without prejudice to the right to seek and enjoy asylum in other countries.”³³⁶

III. PROCEDURAL ISSUES

A. Burden of proof

33. The use of the relocation concept should not lead to additional burdens on asylumseekers. The usual rule must continue to apply, that is, the burden of proving an allegation rests on the one who asserts it. This is consistent with paragraph 196 of the *Handbook* which states that

... while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his [or her] disposal to produce the necessary evidence in support of the application.

34. On this basis, the decision-maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation and provide evidence establishing that it is a reasonable alternative for the individual concerned.

³³⁶ See also W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, Studies in Transnational Legal Policy No. 32, 2000 (The American Society of International Law, The Brookings Institution, Project on Internal Displacement), pp. 8-10.

35. Basic rules of procedural fairness require that the asylum-seeker be given clear and adequate notice that such a possibility is under consideration.³³⁷ They also require that the person be given an opportunity to provide arguments why (a) the consideration of an alternative location is not relevant in the case, and (b) if deemed relevant, that the proposed area would be unreasonable.

B. Accelerated or admissibility procedures

36. Given the complex and substantive nature of the inquiry, the examination of an internal flight or relocation alternative is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure.³³⁸

C. Country of origin information

37. While examination of the relevance and reasonableness of a potential internal relocation area always requires an assessment of the individual's own particular circumstances, well documented, good quality and current information and research on conditions in the country of origin are important components for the purpose of such examination. The usefulness of such information may, however, be limited in cases where the situation in the country of origin is volatile and sudden changes may occur in areas hitherto considered safe. Such changes may not have been recorded by the time the claim is being heard.

IV. CONCLUSION

38. The concept of internal flight or relocation alternative is not explicitly referred to in the criteria set out in Article 1A(2) of the 1951 Convention. The question of whether the claimant has an internal flight or relocation alternative may, however, arise as part of the holistic determination of refugee status. It is relevant only in certain cases, particularly when the source of persecution emanates from a non-state actor. Even when relevant, its applicability will depend on a full consideration of all the circumstances of the case and the reasonableness of relocation to another area in the country of origin.

³³⁷ See Summary Conclusions – Internal Protection/Relocation/Flight Alternative, para. 7.

³³⁸ See Summary Conclusions – Internal Protection/Relocation/Flight Alternative, para. 6; Executive Committee Conclusion No. 87 (L), 1999, para. j; and Note on International Protection, 1999, para. 26 (UN doc. A/AC.96/914, 7 July 1999).

GENDER SENSITIVITY AND THE 1951 REFUGEE DEFINITION - A CHECKLIST³³⁹

DOES THE HARM FEARED AMOUNT TO PERSECUTION?

- The question of persecution was assessed with reference to relevant international human rights instruments;
- It was taken into account that gender-based violence and discrimination may constitute serious harm amounting to persecution, irrespective of the agent of persecution or where the harm takes place;
- It was taken into account that gender-based violence and discrimination may amount to torture;

IS THE FEAR WELL-FOUNDED?

- The assessment of well-founded fear was based on detailed and specific information on personal characteristics, circumstances, experiences and fears;
- The assessment was based on relevant and detailed country of origin information, e.g. information on the prevalence of different forms of state discriminatory laws, policies and practices, discriminatory social norms, prevalence of different forms of gender-based violence by state and non-state actors and the authorities ability and willingness to provide effective and durable protection against such human rights violations.
- Case-specific factors correlating with gender was considered, e.g. age, education, ethnicity, class, caste, rural or city-belonging, political and religions etc.;
- It was taken into account that the required country of origin information is often lacking in gender-related cases, and that there is a need to recall the principle the-benefit-of-the-doubt and that an applicant's testimony may stand alone and be the basis of a grant of refugee status.
- It was taken into account that where a woman's fear relates to personal-status laws an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution.
- It was taken into account that where a well-founded fear of state persecution is concluded to exist, there is a presumption of absence of state protection in all parts of the country.
- The RSD worker had knowledge on different forms of gender-based violence and discrimination, its causes as well as possible psychological, physical, social and legal consequences.

IF THE PERSECUTOR IS NOT AN AGENT OF THE STATE, IS THE STATE ABLE AND WILLING TO OFFER PROTECTION?

- The assessment of whether the state is unwilling or unable to give protection from gender-based violence and discrimination or other abuses committed by non-state actors, was based on relevant and detailed country of origin information, e.g. state laws, policy and practice relating to protection from various forms of gender-based violence and discrimination. The following questions were answered, as appropriate:

³³⁹ This checklist is compiled by Maria Bexelius, Consultant, UNHCR, 2005. The content of it is largely based upon various UNHCR gender guidelines (e.g. Gender Guidelines dated 1991 and 2002 respectively), reports, documents, including other UNHCR guidelines, training materials (e.g. UNHCR Gender Training Kit on Refugee Protection – Handbook, UNHCR Geneva, December 2002) and the UNHCR Handbook (1992). Other main sources of inspiration and information have been various national gender guidelines (such as guidelines produced by authorities in Canada, the USA, Australia, New Zealand, United Kingdom, Sweden etc.) as well as guidelines produced by national NGOs (i.e. gender guidelines produced by the UK NGO Refugee Women's Legal Group (2000)). The book "Refugees and Gender: Law and Process", by Heaven Crawley (Jordan Publications, London, 2001) has also been a major source of information and inspiration as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Declaration on the Elimination of Violence against Women (DEVAW) and various reports submitted by the UN Special Rapporteur on violence against women. This checklist should be used as a tool for RSD workers or others who are involved in the assessment of refugee status according to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; a tool complementary to the various UNHCR and country guidelines which should be used as main sources of reference.

- Has the State Party ratified all the international human rights instruments including the Convention on the Elimination of All Forms of Discrimination against Women?
 - Is there constitutional authority guaranteeing equality for women or the prohibition of violence against women?
 - Is there national legislation and/or administrative sanctions providing adequate redress for women victims of violence?
 - Are there executive policies or plans of actions that attempt to deal with the question of violence against women?
 - Is the criminal justice system sensitive to the issue of violence against women? In this regard, what is the police practice? How many cases are investigated by the police? How are victims dealt with by the police? How many cases are prosecuted? What type of judgements are given in such cases? Are the health professionals who assist the prosecution sensitive to issues of violence against women?
 - Do women who are victims of violence have support services such as shelters, legal and psychological counselling, specialized assistance and rehabilitation provided either by the Government or by non-governmental organizations?
 - Have appropriate measures been taken in the field of education and the media to raise awareness of violence against women as a human rights violation and to modify practices that discriminate against women?
 - Are data and statistics being collected in a manner that ensures that the problem of violence against women is not visible?
- ❑ A reasonability analysis formed part of the assessment, establishing whether it was reasonable or not to expect the applicant to seek state protection, e.g. by taking into account³⁴⁰:
 - whether the applicant sought and was denied protection by the government;
 - whether the governing institutions and/or government agents were aware of the harm to the applicant and did nothing to protect her or were unable to;
 - whether the applicant has reasons to believe that it was or would be futile to seek the protection of the government (e.g. if the government has denied protection to similarly situated women, or if the government has systematically failed to apply existing laws).
 - ❑ It was taken into account that the required country of origin information is often lacking in gender-related cases, and that there is a need to recall the principle the-benefit-of-the-doubt and that an applicant's testimony may stand alone and be the basis of a grant of refugee status.
 - ❑ It was taken into account that a claimant does not need to have approached non-state organizations for protection. NGOs can never replace the state responsibility to give protection.
 - ❑ It was taken into account that where a woman's human rights are being violated by private citizens, an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution.
 - ❑ The assessment of whether or not there exists an internal flight alternative was based on a relevance analysis and a reasonableness analysis, which at least answered the following questions:
 - Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.
 - Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.
 - Is the agent of persecution a non-state agent? Where there is a risk that the non-state actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.
 - Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.
 - Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.

³⁴⁰ These three points to consider has been presented by Heaven Crawley in "Refugees and Gender: Law and Process", Jordan Publications, London 2001

- ❑ It was taken into account that international law does not require threatened individuals to exhaust all options within their own country first before seeking asylum.

IS THE FEAR OF PERSECUTION LINKED TO A CONVENTION GROUND?

General

- ❑ It was taken into account that a claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted.
- ❑ It was taken into account that the convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause.
- ❑ It was taken into account that attribution of a convention ground to a claimant by the State or non-state agent of persecution is sufficient to establish the required causal connection.
- ❑ It was taken into account that where there is a risk of being persecuted at the hands of a non-state agents (e.g. husband, partner or other non-state agent) for reasons which are related to one of the convention grounds, the causal link is established, whether or not the absence of State protection is convention related. Alternatively, where the risk of being persecuted at the hands of a non-state agent is unrelated to a convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.

Political opinion

- ❑ Political opinion was understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the state, government, society or policy may be engaged (This would include an opinion has to gender roles, but it would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her).
- ❑ It was taken into account that a claim on the basis of political opinion does presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant.
- ❑ It was taken into account that the image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies.
- ❑ It was taken into account that 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, such as nursing sick rebel soldiers, cooking for rebel soldiers, recruiting of sympathisers, preparation and dissemination of leaflets.
- ❑ It was considered that women are frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives.

Religion

- ❑ It was taken into account that there is an overlap between the grounds of religion and political opinion, especially in the realm of imputed political opinion.
- ❑ It was understood 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.

Race

- ❑ It was taken into account that persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction.
- ❑ It was understood that the state failure of extending protection could be highly influenced of a person belonging to a particular ethnic group. Being a woman or homosexual man of a specific ethnicity would therefore indicate a greater risk of persecution.

Nationality

- ❑ Nationality was not understood only as citizenship. It also referred to membership of an ethnic or linguistic group and may occasionally have overlapped with the term race.
- ❑ It was taken into account that although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution

takes a gender-specific form, most commonly that of sexual violence directed against women and girls.

- ❑ It was considered that state failure of extending protection could be highly influenced of a person belonging to a particular ethnic group. Being a woman or homosexual man of a specific ethnicity, could therefore indicate a greater risk of persecution.

Particular Social Group (PSG)

- ❑ The PSG was understood as “A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”.
- ❑ Following the above definition, a particular social group was understood as holding characteristics which are historical and therefore cannot be changed or characteristics which ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.
- ❑ Sex was understood as an 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 to men
- ❑ There was no requirement that the group should be cohesive.
- ❑ There was no requirement to demonstrate that all members of a particular social group would be at risk of persecution
- ❑ It was taken into account that the size of the purported social group is not a relevant criterion.

- ❑ The RSD officer is familiar with the UNHCR Sexual and Gender-based Violence against Refugees, Returnees and Internally-Displaced People: Guidelines for Prevention and Response (2003) and checklists exist in order to ensure that adequate measures are in place to both identify and respond to gender-based violence.

FRAMEWORK OF ANALYSIS – A GUIDE TO A GENDER-SENSITIVE RSD³⁴¹

DOES THE HARM FEARED AMOUNT TO PERSECUTION?

- Gender-based violence and discrimination may constitute serious harm amounting to persecution, irrespective of the agent of persecution or where the harm takes place;
- Gender-based violence may amount to torture and other cruel, inhuman or degrading treatment or punishment;
- The concept of persecution should be assessed with reference to relevant international human rights instruments, e.g. both general human rights treaties and decisions by international and regional bodies and courts³⁴²;

AGENT OF PERSECUTION

As stated in the UNHCR Gender Guidelines (2002):

"There is a scope within the refugee definition to recognize both state and non-state actors of persecution. While persecution is most often perpetrated by the authorities of a country, 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."³⁴³

³⁴¹ This framework of analysis is compiled by Maria Bexelius, Consultant, UNHCR, 2005. The content of it is largely based upon various UNHCR gender guidelines (e.g. Gender Guidelines dated 1991 and 2002 respectively), reports, documents, including other UNHCR guidelines, training materials (e.g. UNHCR Gender Training Kit on Refugee Protection – Handbook, UNHCR Geneva, December 2002) and the UNHCR Handbook (1992). Other main sources of inspiration and information have been various national gender guidelines (such as guidelines produced by authorities in Canada, the USA, Australia, New Zealand, United Kingdom, Sweden etc.) as well as guidelines produced by national NGOs (i.e. gender guidelines produced by the UK NGO Refugee Women's Legal Group (2000)). The book "Refugees and Gender: Law and Process", by Heaven Crawley (Jordan Publications, London, 2001) has also been a major source of information and inspiration as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Declaration on the Elimination of Violence against Women (DEVAW) and various reports submitted by the UN Special Rapporteur on violence against women. This framework could be used as a tool for RSD workers or others who are involved in the assessment of refugee status according to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; a tool complementary to the various UNHCR and country guidelines which should be used as main sources of reference.

³⁴² e.g. International Covenant on Civil and Political Rights (ICCPR) and its supervisory committee; International Covenant on Economic, Social and Cultural Rights (ICESCR) and its supervisory committee; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its supervisory committee; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its supervisory committee; Convention on the Rights of the Child (CRC) and its supervisory committee; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its supervisory committee; Declaration on the Elimination of Violence against Women (DEVAW); Beijing Declaration and Platform for Action, Fourth World Conference on Women (PFA); Rome Statute of the International Criminal Court and the its; European Convention on the Human Rights and Fundamental Freedoms as well as the European Court of Human Rights.

³⁴³ UNHCR Gender Guidelines (2002) para. II.B.19. See also UNHCR Handbook para.65.

The recognition of both state and non-state agents of persecution corresponds with the principle, enshrined in international law, that states may be responsible for acts of violence committed by both state and non-state actors, hereafter summarized by the UN Special Rapporteur on Violence against Women:

Except for categories such as pirates and international war criminals, private individuals and agencies are not generally bound by international human rights law. But States may be responsible for their failure to meet international obligations even when violations originate in the conduct of private individuals. State responsibility for the violation of women's human rights by private actors is anticipated by customary international law. States are held legally responsible for acts or omissions of private persons in the following instances:

- a) The person is an agent of the state;
- b) Private acts are covered by provisions of a treaty obligation;
- c) There is State complicity in the wrongs perpetrated by private actors;
- d) State failure to exercise due diligence in the control of private actors."³⁴⁴

However, despite clear provisions in various human rights documents, which require states not only to refrain from committing human rights violations but also to prevent and respond to human rights abuses, without discrimination, the issue of states' inaction to prevent and punish violations committed by private actors is often overlooked.³⁴⁵ The Special Rapporteur on Violence against Women in 1995 outlined three doctrines put forward by scholars and experts in international law in attempting to deal with the issue of violence against women by private actors. As summarized by the Special Rapporteur on Violence against Women, "The first, taken from the international law doctrine of State responsibility, was that States have a *due diligence (emphasis added)* duty to prevent, investigate and punish international law violations and pay just compensation. The second doctrine is related to the question of equality and *equal protection (emphasis added)*. If it can be shown that law enforcement discriminates against the victims in cases involving violence against women, then States may be held liable for violating international human rights standards of equality"³⁴⁶. Finally, as for the third doctrine the Special Rapporteur also highlights that scholars also have "argued that domestic violence is a form of *torture (emphasis added)* and should be dealt with accordingly"³⁴⁷, an argument which has increasingly been widened to include many different forms of gender-based violence. The argument that gender-based violence, including domestic violence,

³⁴⁴ Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, 1994/45; E/CN.4/1995/42 para.102, November 22, 1994.

³⁴⁵ See for example Report of the Special Rapporteur on violence against women, its causes and consequences, 1995/85, E/CN.4/1996/53, para. 30-31, February 6, 1996.

³⁴⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1999/68 para. 22, March 10, 1999.

³⁴⁷ See for example Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1999/68 para.22, March 10, 1999. However, it may be relevant to highlight the similarities argued to exist between certain forms of violence against women perpetrated by private individuals, including domestic violence, on the one hand and torture and ill-treatment by state officials on the other: The physical and psychological abuse is often similar in nature and severity; rape is common and the acts of violence are often inflicted for similar purposes which are listed in Article 1 of the Convention against Torture, e.g. in cases of domestic violence, it may be to punish women for alleged transgression of social norms, to obtain information, to intimidate and to break their will and enforce their submission. Furthermore, although the state perpetrators may not be state officials, the pervasive impunity surrounding such violence involves states as impunity is contrary to states' responsibility under international human rights law. The "complicity", "consent" or acquiescence" of public officials could be present where women do not obtain effective and legal protection against e.g. beatings, marital rape, death threats and deprivations of the freedom of movement. The failure to exercise due diligence in cases of domestic violence could also breach the obligation to ensure the right to live a life in freedom from torture and ill-treatment.

may amount to torture has increasingly been put forward by key UN bodies in the process of gender-mainstreaming the policy and practice of the UN.³⁴⁸

IS THE FEAR WELL-FOUNDED?

A gender-sensitive assessment of well-foundedness encompasses special considerations as regards both:

- the subjective element (the existence of a genuine fear), and
- the objective element (the existence of an objective fear on the basis of personal circumstances and country of origin situation).

Subjective element³⁴⁹

- There is a need for a holistic assessment taking into account the absence of a stereotyped behaviour and expression of fear as well as possible psychological effects of torture, including gender-based violence by state and non-state agents.

Objective element - personal circumstances

- There is a need to explore personal characteristics, experiences, thoughts and feelings related to gender-relations, gender-based violence and discrimination, and the experiences of similarly situated women i.e.:
 - personal characteristics such as age, class, cast, ethnicity, educational level, health status, political- and religions etc.;
 - personal experiences, thoughts and feelings of gender-relations in his/her family, the community and the state as from the time of childhood until flight;
 - personal experiences of past persecution in the form of gender-based violence and discrimination; and/or whether
 - female relatives, or other similarly situated women in society, have experienced the type of violence and discrimination she fears, but also other forms of gender-based violence and discrimination including state or non-state punishment for transgression of gendered social mores or laws.

³⁴⁸ See for example Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/55/290, para 1.5.8. August, 11, 2000; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/59/324, para. 19, September 1, 2004; General Comment No. 31 (2004), para. 8, of the UN Human Rights Committee. Trends regarding the integration of a gender perspective into the work of united nations human rights treaty bodies para. 43-56, Gender Integration into the Human Rights System, Report of the Workshop, United Nations Office in Geneva, 26 to 28 May 1999.

³⁴⁹ Please note that the UNHCR, according to its 1992 handbook, includes in the assessment of the subjective element an examination of "a state of mind and a subjective condition" (UNHCR Handbook [1992], para.38) as well as of "the personality of the applicant" (para. 40) and an "assessment of credibility is indispensable where the case is not sufficiently clear from the facts of the record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified" (para.42). In this analysis of framework, the assessment of credibility and thus the examination of the applicants personal and family background, his various ideological or other belongings as well as his personal experiences are all issues which are rather dealt with under the objective element (in light of personal circumstances) than under the subjective element, in order to illustrate how the applicant's statements is not considered in the abstract but "viewed in the context of the relevant background situation." (Handbook [1992] para. 42). Please also note the critical views of many academics on the subjective element, as summarized in the Michigan Guidelines on well-founded fear (2004).

- There is a need to recall the principle of the benefit-of-the-doubt as survivors of gender-based violence all over the world, including in European countries, often lack documentary evidence, e.g. medical certificates, police reports, witness' reports of threats, sexual, physical and psychological violence committed by agents of the state or the husband, a family member or other non-state agents of persecution;
- Past persecution is neither a requirement for the granting of refugee status, nor a criteria automatically leading to refugee status, but a factor which would create an assumption that there is a well-founded fear of (future) persecution;
- It is important to have thorough knowledge of the issue of gender-based violence and discrimination, in order to limit the risks of unreasonably questioning a woman's experiences and fear of persecution.³⁵⁰

As stated in the UNHCR Gender Guidelines (2002):

Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.³⁵¹

Objective element – Country of origin situation

- There is a need to collect detailed information of the prevalence of the specific form of persecution feared, e.g. domestic violence, forced marriage, social ostracism;
- There is a need to collect detailed information of the different forms of gender state discriminatory laws, policies and/or practices, discriminatory social norms, prevalence of different forms of gender-based violence by state and non-state agents and the authorities' ability and willingness to provide effective and durable protection.

As stated in the UNHCR Gender Guidelines (2002):

Country of origin information should be collected that has relevance in women's claims, such as:

- the position of women before the law;
- the political rights of women;
- the social and economic rights of women;
- the cultural and social mores of the country and consequences for non-adherence;
- the prevalence of such harmful traditional practices;
- the incidence and forms of reported violence against women;
- the protection available to them;
- any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country-of-origin after making a claim for refugee status.³⁵²

³⁵⁰ This includes knowledge on different forms of gender-based violence and discrimination, its causes as well as possible psychological, physical, social and legal consequences and how the psychological consequences may affect the ability to present an asylum claim etc.

³⁵¹ UNHCR Gender Guidelines (2002) para III.35.

³⁵² UNHCR Gender Guidelines (2002) para. III.36x. Please note that the text is identical with the one in the guidelines, although the layout is different.

As stated in the UNHCR Guidelines on the Protection of Refugee Women:

Adjudicators should be familiar with the status and experiences of women in the country from which a refugee claimant has fled. Among the issues of which interviewers should be aware are:

- the position of women before the law, including their standing in court, the right to lay a complaint and give evidence, divorce and custody law, the right to own property, the right to have or refuse an abortion;
- the political rights of women, including the right to vote, to hold office and to belong to a political party;
- the social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, and a job or remunerated activities, the status of a widow or divorcee, and freedom of dress;
- the incidence of reported violence against women, the forms it takes (such as sexual assaults, honour killings, bride burnings), protection available to women and the sanctions or penalties on those who perpetrate the violence; and
- the consequences that may befall a woman on her return in light of the circumstances described in her claim.³⁵³

- There is a need to collect country of origin information which includes information correlating with gender, such as age, educational level, ethnicity, class, caste, place of residence, political and religion etc;
- There may be little or no information supporting a gender-related claim, which should not unreasonably contribute to a rejection of refugee status. Consequently, there is a need to recall the principle the-benefit-of-the-doubt and that an applicant's testimony may stand alone and form the basis of a grant of refugee status.

As stated in the UNHCR Gender Guidelines (2002):

No documentary proof as such is required in order for the authorities to recognize a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognize that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution...³⁵⁴

- Alternative forms of collecting information might assist, such as the collection of testimonies from similarly situated women. The applicant may also choose to write down her testimony if it is too hard to talk about the traumatic experiences.

As stated in the UNHCR Gender Guidelines (2002):

...The testimonies of other women similarly situated in written reports or oral testimony of non-governmental or international organisations or other independent research.³⁵⁵

³⁵³ UNHCR Guidelines on the Protection of Refugee Women, para.73, Geneva 1991, Please note that the text is identical with the one in the guidelines, although the layout is different.

³⁵⁴ UNHCR Gender Guidelines (2002) para. III.37.

³⁵⁵ UNHCR Gender Guidelines (2002) para. III.37.

As stated in the UNHCR Gender Guidelines (2002):

The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that the cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is not necessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers/civilians) etc. as well as the motivation of the perpetrators may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.³⁵⁶

- Where a woman's fear relates to personal-status laws or where her human rights are being violated by private citizens, an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution;
- Concluding there is a well-founded fear of state persecution would mean that there is a presumption of state protection being absent and that no internal flight alternative would exist.

IF THE PERSECUTOR IS NOT AN AGENT OF THE STATE, IS THE STATE ABLE AND WILLING TO OFFER PROTECTION?

There is a need to at least make the following considerations in cases where the applicant claims a fear of non-state agents of persecution and that the state is unable or unwilling to offer effective and durable protection. Note that it is relevant to assess the availability of state protection, although it is equally important to bear in mind that a woman qualifies for refugee status if she, in addition to meeting the other criteria, can show that *she is unable or, because of her fear, unwilling to avail herself of the protection of the state* (emphasis added).

Unwillingness and/or inability of the State to give protection

- States are obliged by international law to give individuals effective and durable protection against human rights abuses including gender-based violence and discrimination, irrespective of who is the perpetrator or where the abuse takes place;
- An assessment of the availability of state protection requires relevant country of origin information, with focus on state laws, policies and practices relating to the protection a person can obtain against different forms of gender-based violence and discrimination committed by non-state agents.

³⁵⁶ UNHCR Gender Guidelines (2002) para III.36xi.

THE ASSESSMENT OF THE STATE'S WILLINGNESS AND/OR ABILITY TO GIVE PROTECTION
– HOW TO MAKE IT?

In the course of assessing whether the applicant is unable to, or because of her fear, is unwilling to avail herself of the protection of the state, assistance can be provided from provisions outlined in CEDAW and DEVAW as well as from the concept of "due diligence" mentioned in the DEVAW and elaborated on by *inter alia* the Inter-American Court of Human Rights and the CEDAW Committee recommendation no 19.

One tool to establish whether the state has acted with due diligence would be to see to what extent the state has followed the recommendation no 19 (1992) of the Committee on the Elimination of Discrimination against Women, and thus whether the state has launched:

- Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace;
- Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
- Protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or who are at risk of violence.

Another tool to further evaluate the existence of state protection could be to answer the following questions, originally put up by the UN Special Rapporteur on Violence against Women in her 1999 report :

- Has the State Party ratified all the international human rights instruments including the Convention on the Elimination of All Forms of Discrimination against Women?
- Is there constitutional authority guaranteeing equality for women or the prohibition of violence against women?
- Is there national legislation and/or administrative sanctions providing adequate redress for women victims of violence?
- Are there executive policies or plans of actions that attempt to deal with the question of violence against women?
- Is the criminal justice system sensitive to the issue of violence against women? In this regard, what is the police practice? How many cases are investigated by the police? How are victims dealt with by the police? How many cases are prosecuted? What type of judgments are given in such cases?
- Are the health professionals who assist the prosecution sensitive to issues of violence against women?
- Do women who are victims of violence have support services such as shelters, legal and psychological counselling, specialized assistance and rehabilitation provided either by the Government or by non-governmental organizations?
- Have appropriate measures been taken in the field of education and the media to raise awareness of violence against women as a human rights violation and to modify practices that discriminate against women?
- Are data and statistics being collected in a manner that ensures that the problem of violence against women is not visible?

Yet another tool would be check whether the state has acted in accordance with the Declaration on the Elimination of Violence against Women, Article 4³⁵⁷:

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

³⁵⁷ Please note that text is identical to the text in article 4 of DEDAW, as only the design has changed.

- Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
- Refrain from engaging in violence against women;
- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

- The country of origin information collected on the issue of state protection should include information correlating with gender, such as age, education, ethnicity, class, caste, place of residence, political and/or religions etc.;
- There may be little or no documentary evidence presented with regards to the inadequacy of state protection as concerns gender-related persecution, which should not unreasonably contribute to a rejection of refugee status. Consequently, there is a need to recall the principle of *the benefit-of-the-doubt* and that an applicant's testimony may stand alone and form the basis of a grant of refugee status;
- A reasonability analysis concerning the availability of state protection should be made on the basis of the applicant's personal circumstances and of relevant country of origin information.

According to Dr. Heaven Crawley, a tool to assess the reasonability could be to consider:

- a) whether the applicant sought and was denied protection by the government;
- b) whether the governing institutions and/or government agents were aware of the harm to the applicant and did nothing to protect her or were unable to;
- c) whether the applicant has reasons to believe that it was or would be futile to seek the protection of the government (e.g. if the government has denied protection to similarly situated women, or if the government has systematically failed to apply existing laws).³⁵⁸

- The claimant needs not to have approached non-state organizations for protection. NGOs can never replace the state responsibility;
- Where a woman's fear relates to personal-status laws or where her human rights are being violated by private citizens, an otherwise positive change in the country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution;
- It is important to have a thorough knowledge of the issue of gender-based violence and discrimination, in order to limit the risks of unreasonably questioning a woman's experiences and fear of persecution, e.g. including her persuasion that state protection would not be available for women.³⁵⁹

³⁵⁸ Crawley Heaven, *Refugees and Gender: Law and Process*, Jordan Publications, London 2001, p. 53.

³⁵⁹ This includes knowledge on different forms of gender-based violence and discrimination, its causes as well as possible psychological, physical, social and legal consequences and how the psychological consequences may affect the ability to present an asylum claim etc.

Internal Flight Alternative

- International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort;
- The 1951 Convention does not require or even suggest that the fear of being persecuted needs always extend to the *whole* territory of the refugee's country of origin;
- Religious, economic, social and cultural factors, among others, may be relevant in determining the reasonableness of an IFA for a woman fearing gender-related persecution;
- There is a need to make a relevance analysis, which is further elaborated on in the UNHCR Guidelines on Internal Flight or Relocation Alternative (2003).

IFA - Relevance analysis

The main questions to be answered are:

- Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.
- Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.
- Is the agent of persecution a non-state agent? Where there is a risk that the non-state actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.
- Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.³⁶⁰

- There is a need to make a reasonableness analysis, which is further elaborated on in the UNHCR Guidelines on Internal Flight or Relocation Alternative (2003).

IFA - Reasonableness analysis

The main question to be answered is:

- Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.³⁶¹

³⁶⁰ The UNHCR Guidelines on Internal Flight Alternative (2003), para. II.A.7.

³⁶¹ UNHCR Guidelines on Internal Flight Alternative (2003), para. II.A.7.

IS THE FEAR OF PERSECUTION LINKED TO A CONVENTION GROUND?

- The claimant is not required to identify accurately the reasons why he or she has a well-founded fear of being persecuted;
- The convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause;
- Attribution of a convention ground to the claimant by the State or non-state agent of persecution is sufficient to establish the required causal connection;
- In cases where there is a risk of being persecuted at the hands of a non-state agents (e.g. husband, partner or other non-state agent) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-state agent is unrelated to a convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.

Political opinion

- The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies;
- Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the state, government, society or policy may be engaged. This may include an opinion related to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her;

You may mention that this implies that a woman may fear persecution as a result of her actual or perceived organised political activity e.g. activity or support of a political party, organisation or grassroots group. It could also imply that she may fear persecution because of her actual or perceived individual political activity e.g. the transgression of the social norms or laws on gender roles by consciously or unconsciously speaking and/or acting in opposition to prevailing gender norms in the family and/or the community and/or the state;

- A claim on the basis of political opinion does however, presupposes that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant;
- 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, such as nursing sick rebel soldiers, cooking for rebel soldiers, recruiting of sympathisers, preparation and dissemination of leaflets;

- Women are frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives;
- The state failure to extend protection could be highly influenced by a person having an actual or imputed political opinion. Being a woman or homosexual man who consciously or unconsciously transgresses the laws or norms on gender roles may therefore result in a risk of state persecution.

Religion

There is a need to consider the following:

- There is an overlap between the grounds of religion and political opinion, especially in the realm of imputed political opinion;
- 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;
- The state failure to extend protection could be highly influenced by religion or religious beliefs.

Race

- Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and therefore be persecuted in a different way, such as through sexual violence or control of reproduction;
- The state failure to extend protection could be highly influenced by a person belonging to a particular ethnic group. Being a woman or homosexual man of a specific ethnicity could therefore indicate a greater risk of persecution.

Nationality

- Nationality is not to be understood only as citizenship. It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term race;
- Although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls;
- State failure to extend protection could be highly influenced by a person belonging to a particular ethnic group. Being a woman or homosexual man of a specific ethnicity could therefore indicate a greater risk of persecution.

Particular Social Group (PSG)

- UNHCR definition of a PSG: A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights;
- A PSG thus includes:
 - Characteristics which are historical and therefore cannot be changed;
 - Characteristics which ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.
- A PSG cannot be defined from persecution;
- Sex can properly be within the ambit of the PSG category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men;
- There is no requirement that the group be cohesive;
- There is no need to demonstrate that all members of a PSG are at risk of persecution;
- The size of the purported social group is not a relevant criterion.

THE MICHIGAN GUIDELINES ON NEXUS TO A CONVENTION GROUND

The Michigan Guidelines on Nexus to Convention Ground is the outcome document of the Second Colloquium on Challenges in International Refugee Law, held at Ann Arbor, Michigan, USA, on March 23–25, 2001.

The Guidelines are available at the website of University of Michigan Law School:
www.refugeecaselaw.org/nexus.asp

THE MICHIGAN GUIDELINES ON NEXUS TO A CONVENTION GROUND

Efforts to promote the contemporary vitality of the Convention refugee definition have usually focussed on refining our understanding of the circumstances in which an individual may be said to be at risk of “being persecuted,” or on giving contemporary relevance to the content of the five grounds upon which risk must be based—race, religion, nationality, membership of a particular social group or political opinion. Comparatively little thought has been given to how best to conceive the causal linkage or nexus between the Convention ground and the risk of being persecuted. In what circumstances may the risk be said to be “for reasons of” one of the five Convention grounds?

The jurisprudence of many leading asylum states is simply silent on this issue, while decisions rendered in other states assume that causation in refugee law can be defined by uncritical analogy to standards in other branches of the law. Only rarely have senior courts sought carefully to conceive an understanding of causation of specific relevance to refugee law, including the critical questions of a standard of causation and the types of evidence which should inform the causation inquiry.

With a view to promoting a shared understanding of the basic requirements for the recognition of Convention refugee status, we have engaged in sustained collaborative study and reflection on the norms and state practice relevant to the causation inquiry. This research was debated and refined at the Second Colloquium on Challenges in International Refugee Law, convened in March 2001 by the University of Michigan’s Program in Refugee and Asylum Law. These Guidelines are the product of that endeavour, and reflect the consensus of Colloquium participants on how the causal nexus to a Convention ground should be understood in international refugee law.

General Considerations

1. Not every person who is outside his or her own country and has a well-founded fear of being persecuted is a Convention refugee. The risk faced by the applicant must be causally linked to at least one of the five grounds enumerated in the Convention—race, religion, nationality, membership of a particular social group or political opinion.

2. In many states, the requisite causal linkage is explicitly addressed on the basis of the requirement that a refugee’s well-founded fear of being persecuted be “. . . for reasons of race, religion, nationality, membership of a particular social group or political opinion . . .” In other states causation is not treated as a free-standing definitional requirement, but rather is subsumed within the analysis of other Convention re-

quirements. Whether treated as an independent definitional factor or as part of a general understanding of refugee status, the existence of a nexus to a Convention ground must be assessed in the light of the text, context, objects and purposes of the Refugee Convention and Protocol.

3. It is not the duty of the applicant accurately to identify the reason that he or she has a well-founded fear of being persecuted. The state assessing the claim to refugee status shall decide which, if any, Convention ground is relevant to the applicant's well-founded fear of being persecuted.

4. The risk of being persecuted may sometimes arise in circumstances where two or more Convention grounds combine in the same person, in which case the combination of such grounds defines the causal connection to the well-founded fear of being persecuted.

5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution.

Nature of the Required Causal Link

6. The causal connection required is between a Convention ground and the applicant's well-founded fear of "being persecuted" (in French, ". . . d'être persécutée . . .") The focus on the applicant's predicament follows both from the passive voice employed in the official texts of the Convention and from the Convention's fundamental purpose of defining the circumstances in which surrogate international protection is warranted.

7. Because it is the applicant's predicament which must be causally linked to a Convention ground, the fact that his or her subjective fear is based on a Convention ground is insufficient to justify recognition of refugee status.

8. The causal link between the applicant's predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.

9. A causal link may be established whether or not there is evidence of particularized enmity, malignity or animus on the

part of the person or group responsible for infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.

10. The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant's exposure to the risk of being persecuted.

Standard of Causation

11. Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.

12. The standard of causation must also take account of the practical realities of refugee status determination, in particular the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.

13. In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

Evidence of Causation

14. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.

15. A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group. Thus, evidence that persons who share the applicant's race, religion, nationality, membership of a particular social group or political opinion are more at risk of being

persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted.

16. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicant's predicament, irrespective of whether other individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.

17. No special rule governs application of the causal nexus standard in the case of refugees who come from a country in which there is a risk of war or other large-scale violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.

18. Refugee status is not restricted to persons who are members of a political, religious or other minority group. While members of minority groups are in practice more commonly exposed to the risk of being persecuted than are persons who are part of majority populations, the only requirement for recognition of refugee status is demonstration that a Convention ground is a contributing factor to the risk of being persecuted.

UNHCR GUIDELINES ON INTERNATIONAL PROTECTION:

“MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (HCR/GIP/02/02, 7 MAY 2002)

UNHCR Guidelines on International Protection No 2: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002)

The guidelines can be found at the UNHCR website:

www.unhcr.bg/coi/files/02_en.pdf

**GUIDELINES ON INTERNATIONAL PROTECTION:
“Membership of a particular social group” within the context
of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol
relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in *the Statute of the Office of the United Nations High Commissioner for Refugees*, and Article 35 of the *1951 Convention relating to the Status of Refugees and/or its 1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*. They further supersede IOM/132/1989 – FOM/110/1989 *Membership of a Particular Social Group* (UNHCR, Geneva, 12 December 1989), and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.

**“Membership of a particular social group” within the context of
Article 1A(2) of the 1951 Convention and/or its 1967 Protocol
relating to the Status of Refugees**

I. INTRODUCTION

1. “Membership of a particular social group” is one of the five grounds enumerated in Article 1A(2) of the *1951 Convention relating to the Status of Refugees* (“1951 Convention”). It is the ground with the least clarity and it is not defined by the 1951 Convention itself. It is being invoked with increasing frequency in refugee status determinations, with States having recognized women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group for the purposes of the 1951 Convention. The evolution of this ground has advanced the understanding of the refugee definition as a whole. These Guidelines provide legal interpretative guidance on assessing claims which assert that a claimant has a well-founded fear of being persecuted for reasons of his or her membership of a particular social group.

2. While the ground needs delimiting—that is, it cannot be interpreted to render the other four Convention grounds superfluous—a proper interpretation must be consistent with the object and purpose of the Convention.³⁶² Consistent with the language of the Convention, this category cannot be interpreted as a “catch all” that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention’s definition of a refugee, a social group cannot be defined *exclusively* by

³⁶² ¹ See Summary Conclusions – Membership of a Particular Social Group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no.2 (“Summary Conclusions – Membership of a Particular Social Group”).

the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group).

3. There is no “closed list” of what groups may constitute a “particular social group” within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.

4. The Convention grounds are not mutually exclusive. An applicant may be eligible for refugee status under more than one of the grounds identified in Article 1A(2).³⁶³ For example, a claimant may allege that she is at risk of persecution because of her refusal to wear traditional clothing. Depending on the particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State) or membership in a particular social group.

II. SUBSTANTIVE ANALYSIS

A. Summary of State Practice

5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.

6. The first, the “protected characteristics” approach (sometimes referred to as an “immutability” approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at

³⁶³ See UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Reedited, Geneva, January 1992), paragraphs 66-67, 77; and see also Summary Conclusions – Membership of a Particular Social Group, no.3.

large. This has been referred to as the “social perception” approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.

8. In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.

9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.

B. UNHCR’s Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that 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 to men.³⁶⁴

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a

³⁶⁴ For more information on gender-related claims, see UNHCR’s *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 10 May 2002), as well as Summary Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, 6-8 September 2001, no.5.

certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The role of persecution

14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.⁴ To use an example from a widely cited decision, “[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society³⁶⁵. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.”³⁶⁶

No requirement of cohesiveness

15. It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be “cohesive.”³⁶⁷ The relevant inquiry is whether there is a common element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or holders of a political opinion associate together, or belong to a “cohesive” group. Thus women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.

16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.³⁶⁸

Not all members of the group must be at risk of being persecuted

17. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group³⁶⁹. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain

³⁶⁵ See Summary Conclusions – Membership of a Particular Social Group, no.6

³⁶⁶ McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264, 142 ALR 331.

³⁶⁷ See Summary Conclusions – Membership of a Particular Social Group, no.4.

³⁶⁸ See UNHCR’s Handbook, paragraph 79.

³⁶⁹ See Summary Conclusions – Membership of a Particular Social Group, no.7.

members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.

Relevance of size

18. The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

19. Cases in a number of jurisdictions have recognized “women” as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.

Non-State actors and the causal link (“for reasons of”)

20. Cases asserting refugee status based on membership of a particular social group frequently involve claimants who face risks of harm at the hands of non-state actors, and which have involved an analysis of the causal link. For example, homosexuals may be victims of violence from private groups; women may risk abuse from their husbands or partners. Under the Convention a person must have a well-founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the Convention grounds. There is no requirement that the persecutor be a State actor. Where 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.³⁷⁰

21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention. So, if a non-state actor inflicts or threatens persecution based on a Convention ground and the State is unwilling or unable to protect the claimant, then the causal link has been established. That is, the harm is being visited upon the victim for reasons of a Convention ground.

22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-state actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her

³⁷⁰ ⁹ See UNHCR's *Handbook*, paragraph 65.

husband is based on the State's unwillingness to protect her for reasons of a Convention ground.

23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-state actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.

GUIDELINES ON INTERNATIONAL PROTECTION:

**RELIGION-BASED REFUGEE CLAIMS UNDER ARTICLE 1A(2) OF THE 1951
CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES**

Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/04/06, 28 April 2004)

The guidelines can be found at the website below:

www.unhcr.ch/cgi-bin/texis/vtx/home/+wwwBme9znWewxwwwnwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFq3Gncotod15axw5nmaDzmxwwwwww/opendoc.pdf

**GUIDELINES ON INTERNATIONAL PROTECTION:
Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention
and/or the 1967 Protocol relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 *Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reedited, Geneva, January 1992). They are informed, *inter alia*, by a roundtable organised by UNHCR and the Church World Service in Baltimore, Maryland, United States, in October 2002, as well as by an analysis of relevant State practice and international law.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

**GUIDELINES ON INTERNATIONAL PROTECTION
Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention
and/or the 1967 Protocol relating to the Status of Refugees**

I. INTRODUCTION

1. Claims to refugee status based on religion can be among the most complex. Decision-makers have not always taken a consistent approach, especially when applying the term “religion” contained in the refugee definition of the 1951 Convention relating to the Status of Refugees and when determining what constitutes “persecution” in this context. Religion-based refugee claims may overlap with one or more of the other grounds in the refugee definition or, as can often happen, they may involve post departure conversions, that is, *sur place* claims. While these Guidelines do not purport to offer a definitive definition of “religion”, they provide decisionmakers with guiding parameters to facilitate refugee status determination in such cases.

2. The right to freedom of thought, conscience and religion is one of the fundamental rights and freedoms in international human rights law. In determining religion-based claims, it is therefore useful, *inter alia*, to draw on Article 18 of the 1948 Universal Declaration of Human Rights (the “Universal Declaration”) and Articles 18 and 27 of the 1966 International Covenant on Civil and Political Rights (the “International Covenant”). Also relevant are the General Comments issued by the Human Rights Committee³⁷¹, the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, the 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities and the

³⁷¹ See, in particular, Human Rights Committee, General Comment No. 22, adopted 20 July 1993, UN doc. CCPR/C/21/Rev.1/ADD.4, 27 September 1993.

body of reports of the Special Rapporteur on Religious Intolerance³⁷². These international human rights standards provide guidance in defining the term “religion” also in the context of international refugee law, against which action taken by States to restrict or prohibit certain practices can be examined.

II. SUBSTANTIVE ANALYSIS

A. Defining “religion”

3. The refugee definition contained in Article 1A(2) of the 1951 Convention states:

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who: ...

(2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

4. The *travaux préparatoires* of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process. There was, however, no attempt to define the term as such³⁷³. No universally accepted definition of “religion” exists, but the instruments mentioned in paragraph 2 above certainly inform the interpretation of the term “religion” in the international refugee law context. Its use in the 1951 Convention can therefore be taken to encompass freedom of thought, conscience or belief.³⁷⁴ As the Human Rights Committee notes, “religion” is “not limited ... to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions”³⁷⁵. It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief. The term is not, however, without limits and international human rights law foresees a number of legitimate boundaries on the exercise of religious freedom as outlined in greater detail in paragraphs 15–16 below.

³⁷² The latter can be found at www.unhcr.ch/huridocda/huridoca.nsf/FramePage/intolerance+En?OpenDocument. Relevant regional instruments include Article 9 of the 1950 European Convention on Human Rights; Article 12 of the 1969 American Convention on Human Rights; Article 8 of the 1981 African Charter on Human and Peoples’ Rights.

³⁷³ A key source in States’ deliberations was the refugee definition set out in the 1946 Constitution of the International Refugee Organisation (IRO). This included those expressing valid objections to return because of a fear of persecution on grounds of “race, religion, nationality or political opinions”. (A fifth ground, membership of a particular social group, was approved later in the negotiating process for the 1951 Convention.)

³⁷⁴ See, also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Geneva, re-edited 1992 (hereafter “UNHCR Handbook”), paragraph 71.

³⁷⁵ Human Rights Committee, General Comment No. 22, above note 1, paragraph 2

5. Claims based on “religion” may involve one or more of the following elements:

- a) religion as belief (including non-belief);
- b) religion as identity;
- c) religion as a way of life.

6. “Belief”, in this context, should be interpreted so as to include theistic, nontheistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason.

7. “Identity” is less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry. A claimant may identify with, or have a sense of belonging to, or be identified by others as belonging to, a particular group or community. In many cases, persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy.

8. For some individuals, “religion” is a vital aspect of their “way of life” and how they relate, either completely or partially, to the world. Their religion may manifest itself in such activities as the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements. Such practices may seem trivial to non-adherents, but may be at the core of the religion for the adherent concerned.

9. Establishing sincerity of belief, identity and/or a certain way of life may not necessarily be relevant in every case.³⁷⁶ It may not be necessary, for instance, for an individual (or a group) to declare that he or she belongs to a religion, is of a particular religious faith, or adheres to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group. As is discussed further below in paragraph 31, it may also not be necessary for the claimant to know or understand anything about the religion, if he or she has been identified by others as belonging to that group and fears persecution as a result. An individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a “religion”.

10. Similarly, birth into a particular religious community, or a close correlation between race and/or ethnicity on the one hand and religion on the other could preclude the need to enquire into the adherence of an individual to a particular faith or the bona fides of a claim to membership of that community, if adherence to that religion is attributed to the individual.

B. Well-founded fear of persecution

a) General

11. The right to freedom of religion includes the freedom to manifest one’s religion or

³⁷⁶For further analysis of credibility issues, see paragraphs 28–33 below.

belief, either individually or in community with others and in public or private in worship, observance, practice and teaching³⁷⁷. The only circumstances under which this freedom may be restricted are set out in Article 18(3) of the International Covenant, as described in paragraphs 15–16 below.

12. Persecution for reasons of religion may therefore take various forms. Depending on the particular circumstances of the case, including the effect on the individual concerned, examples could include prohibition of membership of a religious community, of worship in community with others in public or in private, of religious instruction, or serious measures of discrimination imposed on individuals because they practise their religion, belong to or are identified with a particular religious community, or have changed their faith³⁷⁸. Equally, in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, discrimination on account of one's failure to adopt the dominant religion or to adhere to its practices, could amount to persecution in a particular case³⁷⁹. Persecution may be inter-religious (directed against adherents or communities of different faiths), intra-religious (within the same religion, but between different sects, or among members of the same sect), or a combination of both³⁸⁰. The claimant may belong to a religious minority or majority. Religion-based claims may also be made by individuals in marriages of mixed religions.

13. Applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution³⁸¹. Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions.

14. Each claim requires examination on its merits on the basis of the individual's situation. Relevant areas of enquiry include the individual profile and personal

³⁷⁷ See Universal Declaration, Article 18 and International Covenant, Article 18(1).

³⁷⁸ UNHCR Handbook, above note 4, paragraph 72.

³⁷⁹ In this context, Article 27 of the International Covenant reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

³⁸⁰ ¹⁰ Interim Report of the Special Rapporteur on Religious Intolerance, "Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief", UN doc. A/53/279, 24 August 1998, paragraph 129.

³⁸¹ See also, UNHCR, "Guidelines on International Protection: 'Membership of a particular social group' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/02, 7 May 2002, paragraph 6. Similarly, in internal flight or relocation cases, the claimant should not be expected or required to suppress his or her religious views to avoid persecution in the internal flight or relocation area. See UNHCR, "Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", HCR/GIP/03/04, 23 July 2003, paragraphs 19, 25.

experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution. In this context, the well-founded fear “need not necessarily be based on the applicant’s own personal experience”. What, for example, happened to the claimant’s friends and relatives, other members of the same religious group, that is to say to other similarly situated individuals, “may well show that his [or her] fear that sooner or later he [or she] also will become a victim of persecution is well-founded”³⁸². Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. As the UNHCR Handbook notes, there may, however, be special circumstances where mere membership suffices, particularly when taking account of the overall political and religious situation in the country of origin, which may indicate a climate of genuine insecurity for the members of the religious community concerned.³⁸³

b) Restrictions or limitations on the exercise of religious freedom

15. Article 18(3) of the International Covenant permits restrictions on the “freedom to manifest one’s religion or beliefs” if these limits “are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. As the Human Rights Committee notes: “Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”³⁸⁴ In assessing the legitimacy of the restriction or limitation at issue, it is therefore necessary to analyze carefully why and how it was imposed.

Permissible restrictions or limitations could include measures to prevent criminal activities (for example, ritual killings), or harmful traditional practices and/or limitations on religious practices injurious to the best interests of the child, as judged by international law standards. Another justifiable, even necessary, restriction could involve the criminalisation of hate speech, including when committed in the name of religion. The fact that a restriction on the exercise of a religious freedom finds the support of the majority of the population in the claimant’s country of origin and/or is limited to the manifestation of the religion in public is irrelevant.

16. In determining whether restrictions or limitations rise to the level of persecution, the decision-maker must not only take into account international human rights standards, including lawful limitations on the exercise of religious freedom, but also evaluate the breadth of the restriction and the severity of any punishment for noncompliance. The importance or centrality of the practice within the religion and/or to the individual personally is also relevant. The decision-maker should proceed cautiously with such inquiries, taking into account the fact that what may seem trivial to an outsider may be central to the claimant’s beliefs. Where the restricted practice is not important to the individual, but important to the religion, then it is unlikely to rise to the level of persecution without additional factors. By contrast, the restricted

³⁸² UNHCR Handbook, above note 4, paragraph 43.

³⁸³ UNHCR Handbook, above note 4, paragraph 73.

³⁸⁴ See Human Rights Committee, General Comment No. 22, above note 1, paragraph 8.

religious practice may not be so significant to the religion, but may be particularly important to the individual, and could therefore still constitute persecution on the basis of his or her conscience or belief.

c) Discrimination

17. Religion-based claims often involve discrimination.³⁸⁵ Even though discrimination for reasons of religion is prohibited under international human rights law, all discrimination does not necessarily rise to the level required for recognition of refugee status. For the purposes of analysing an asylum claim, a distinction should be made between discrimination resulting merely in preferential treatment and discrimination amounting to persecution because, in aggregate or of itself, it seriously restricts the claimant's enjoyment of fundamental human rights. Examples of discrimination amounting to persecution would include, but are not limited to, discrimination with consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood, or to access normally available educational institutions and/or health services. This may also be so where economic measures imposed "destroy the economic existence" of a particular religious group.³⁸⁶

18. The existence of discriminatory laws will not normally in itself constitute persecution, although they can be an important, even indicative, factor which therefore needs to be taken into account. An assessment of the implementation of such laws and their effect is in any case crucial to establishing persecution. Similarly, the existence of legislation on religious freedom does not of itself mean individuals are protected. In many cases, such legislation may not be implemented in practice or custom or tradition may, for instance, in practice override this.

19. Discrimination may also take the form of restrictions or limitations on religious belief or practice. Restrictions have, for instance, included penalties for converting to a different faith (apostasy) or for proselytising, or for celebrating religious festivals particular to the religion concerned. The compulsory registration of religious groups and the imposition of specific regulations governing them to restrict the exercise of freedom of religion or belief can also have a discriminatory aim or results. Such actions are legitimate only if they are "specified by law, objective, reasonable and transparent and, consequently, if they do not have the aim or the result of creating discrimination".³⁸⁷

d) Forced conversion

20. Forced conversion to a religion is a serious violation of the fundamental human right to freedom of thought, conscience and religion and would often satisfy the objective component of persecution. The claimant would still need to demonstrate a subjective fear that the conversion would be persecutory to him or her personally. Generally, this would be satisfied if the individual held convictions or faith or had a clear identity or way of life in relation to a different religion, or if he or she had

³⁸⁵ See generally, UNHCR Handbook, above note 4, paragraphs 54–55

³⁸⁶ UNHCR Handbook, above note 4, paragraphs 54 and 63.

³⁸⁷ Special Rapporteur on freedom of religion or belief, interim report annexed to Note by the Secretary-General, "Elimination of All Forms of Religious Intolerance", UN doc. A/58/296, 19 August 2003, paragraphs 134–35.

chosen to be disassociated from any religious denomination or community. Where a claimant held no particular religious conviction (including one of atheism) nor a clear identification with a particular religion or religious community before the conversion or threat of conversion, it would be necessary to assess the impact of such a conversion on the individual (for example, it may be an act without correlative personal effects).

e) Forced compliance or conformity with religious practices

21. Forced compliance with religious practices might, for example, take the form of mandated religious education that is incompatible with the religious convictions, identity or way of life of the child or the child's parents³⁸⁸. It might also involve an obligation to attend religious ceremonies or swear an oath of allegiance to a particular religious symbol. In determining whether such forced compliance constitutes persecution, the policies or acts with which the person or group is required to comply, the extent to which they are contrary to the person's belief, identity or way of life and the punishment for non-compliance should be examined. Such forced compliance could rise to the level of persecution if it becomes an intolerable interference with the individual's own religious belief, identity or way of life and/or if non-compliance would result in disproportionate punishment.

22. Forced compliance may also involve the imposition of a particular criminal or civil legal code purported to be based on a religious doctrine to which non-observers might object. Where such a code contains discriminatory substantive or procedural safeguards and especially where it imposes different levels of punishment upon adherents and non-adherents, it could well be regarded as persecutory. Where the law imposes disproportionate punishment for breaches of the law (for example, imprisonment for blasphemy or practising an alternative religion, or death for adultery), whether or not for adherents of the same religion, it would constitute persecution. Such cases are more common where there is limited or no separation between the State and the religion.

23. A specific religious code may be persecutory not just when enforced against non-observers, but also when applied to dissidents within or members of the same faith. The enforcement of anti-blasphemy laws, for example, can often be used to stifle political debate among co-religionists and could constitute persecution on religious and/or political grounds even when enforced against members of the same religion.

C. Special considerations

a) Gender

24. Particular attention should be paid to the impact of gender on religion-based refugee claims, as women and men may fear or suffer persecution for reasons of religion in different ways to each other. Clothing requirements, restrictions on

³⁸⁸This would be likely also to interfere with the undertaking of States to respect the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions under Article 18(4) of the International Covenant.

movement, harmful traditional practices, or unequal or discriminatory treatment, including subjection to discriminatory laws and/or punishment, may all be relevant³⁸⁹. In some countries, young girls are pledged in the name of religion to perform traditional slave duties or to provide sexual services to the clergy or other men. They may also be forced into underage marriages, punished for honour crimes in the name of religion, or subjected to forced genital mutilation for religious reasons. Others are offered to deities and subsequently bought by individuals believing that they will be granted certain wishes. Women are still identified as “witches” in some communities and burned or stoned to death³⁹⁰. These practices may be culturally condoned in the claimant’s community of origin but still amount to persecution. In addition, individuals may be persecuted because of their marriage or relationship to someone of a different religion than their own. When, due to the claimant’s gender, State actors are unwilling or unable to protect the claimant from such treatment, it should not be mistaken as a private conflict, but should be considered as valid grounds for refugee status.

b) Conscientious objection

25. A number of religions or sects within particular religions have abstention from military service as a central tenet and a significant number of religion-based claimants seek protection on the basis of refusal to serve in the military. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably a criminal offence.³⁹¹

26. Where military service is compulsory, refugee status may be established if the refusal to serve is based on genuine political, religious, or moral convictions, or valid reasons of conscience³⁹². Such claims raise the distinction between prosecution and persecution. Prosecution and punishment pursuant to a law of general application is not generally considered to constitute persecution³⁹³, although there are some notable exceptions. In conscientious objector cases, a law purporting to be of general

³⁸⁹For more information, see UNHCR, “Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, HCR/GIP/02/01, 7 May 2002, especially paragraphs 25–26.

³⁹⁰For description of these practices, see “Integration of the Human Rights of Women and the Gender Perspective Violence against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49, Cultural practices in the family that are violent towards women”, E/CN.4/2002/83, 31 January 2002, available at [www.unhchr.ch/huridocda/huridoca.nsf/0/42E7191FAE543562C1256BA7004E963C/\\$File/G0210428.doc?OpenElement](http://www.unhchr.ch/huridocda/huridoca.nsf/0/42E7191FAE543562C1256BA7004E963C/$File/G0210428.doc?OpenElement); “Droits Civils et Politiques et, Notamment: Intolérance Religieuse”, Rapport soumis par M. Abdelfattah Amor, Rapporteur spécial, conformément à la résolution 2001/42 de la Commission des droits de l’homme, Additif: “Étude sur la liberté de religion ou de conviction et la condition de la femme au regard de la religion et des traditions”, E/CN.4/2002/73/Add.2, 5 avril 2002, available (only in French) at www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/9fa99a4d3f9eade5c1256b9e00510d71?OpenDocument&Highlight=2,E%2FCN.4%2F2002%2F73%2FAdd.2.

³⁹¹See generally, UNHCR Handbook, above note 4, paragraphs 167–74.

³⁹²UNHCR Handbook, above note 4, paragraph 170.

³⁹³UNHCR Handbook, above note 4, paragraph 55–60.

application may, depending on the circumstances, nonetheless be persecutory where, for instance, it impacts differently on particular groups, where it is applied or enforced in a discriminatory manner, where the punishment itself is excessive or disproportionately severe, or where the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions. Where alternatives to military service, such as community service, are imposed there would not usually be a basis for a claim. Having said this, some forms of community service may be so excessively burdensome as to constitute a form of punishment, or the community service might require the carrying out of acts which clearly also defy the claimant's religious beliefs. In addition, the claimant may be able to establish a claim to refugee status where the refusal to serve in the military is not occasioned by any harsh penalties, but the individual has a well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities, or neighbours) for his or her refusal to serve.

III. PROCEDURAL ISSUES

a) General

27. The following are some general points of particular relevance to examining religion-based refugee claims:

- a) Religious practices, traditions or beliefs can be complex and may vary from one branch or sect of a religion to another or from one country or region to another. For this reason, there is a need for reliable, accurate, up-to-date, and country- or region-specific as well as branch- or sect-specific information.
- b) Refugee status determinations based on religion could also benefit from the assistance of independent experts with *particularised* knowledge of the country, region and context of the particular claim and/or the use of corroborating testimony from other adherents of the same faith.
- c) Decision-makers need to be objective and not arrive at conclusions based solely upon their own experiences, even where they may belong to the same religion as the claimant. General assumptions about a particular religion or its adherents should be avoided.
- d) In assessing religion-based claims, decision-makers need to appreciate the frequent interplay between religion and gender, race, ethnicity, cultural norms, identity, way of life and other factors.
- e) In the selection of interviewers and interpreters, there should be sensitivity regarding any cultural, religious or gender aspects that could hinder open communication.³⁹⁴
- f) Interviewers should also be aware of the potential for hostile biases toward the claimant by an interpreter, either because he or she shares the same religion or is not of the same religion, or of any potential fear of the same by the claimant, which could adversely affect his or her testimony. As with all refugee claims, it can be critical that interpreters are well-versed in the relevant terminology.

³⁹⁴ See also, UNHCR, "Guidelines on Gender-Related Persecution", above note 19.

b) Credibility

28. Credibility is a central issue in religion-based refugee claims. While decisionmakers will often find it helpful during research and preparation to list certain issues to cover during an interview, extensive examination or testing of the tenets or knowledge of the claimant's religion may not always be necessary or useful. In any case, knowledge tests need to take account of individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex.

29. Experience has shown that it is useful to resort to a narrative form of questioning, including through open-ended questions allowing the claimant to explain the personal significance of the religion to him or her, the practices he or she has engaged in (or has avoided engaging in out of a fear of persecution), or any other factors relevant to the reasons for his or her fear of being persecuted. Information may be elicited about the individual's religious experiences, such as asking him or her to describe in detail how he or she adopted the religion, the place and manner of worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses. For example, the individual may not be able to list the Ten Commandments or name the Twelve Imams, but may be able to indicate an understanding of the religion's basic tenets more generally. Eliciting information regarding the individual's religious identity or way of life will often be more appropriate and useful and may even be necessary. It should also be noted that a claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief.

30. As indicated in paragraph 9 above, individuals may be persecuted on the basis of their religion even though they have little or no substantive knowledge of its tenets or practices. A lack of knowledge may be explained by further research into the particular practices of that religion in the area in question or by an understanding of the subjective and personal aspects of the claimant's case. For instance, the level of repression against a religious group in a society may severely restrict the ability of an individual to study or practise his or her religion. Even when the individual is able to receive religious education in a repressive environment, it may not be from qualified leaders. Women, in particular, are often denied access to religious education. Individuals in geographically remote communities may espouse adherence to a particular religion and face persecution as a result, yet have little knowledge of its formal practices. Over time, communities may adapt particular religious practices or faith to serve their own needs, or combine them with their more traditional practices and beliefs, especially where the religion has been introduced into a community with long-established traditions. For example, the claimant may not be able to distinguish between those practices which are Christian and those which are animist.

31. Less formal knowledge may also be required of someone who obtained a particular religion by birth and who has not widely practised it. No knowledge is required where a particular religious belief or adherence is imputed or attributed to a claimant.

32. Greater knowledge may be expected, however, of individuals asserting they are religious leaders or who have undergone substantial religious instruction. It is not

necessary for such teaching or training to conform fully to objectively tested standards, as these may vary from region to region and country to country, but some clarification of their role and the significance of certain practices or rites to the religion would be relevant. Even claimants with a high level of education or schooling in their religion may not have knowledge of teachings and practices of a more complex, formal or obscure nature.

33. Subsequent and additional interviews may be required where certain statements or claims made by the claimant are incompatible with earlier statements or with general understandings of the religious practices of other members of that religion in the area or region in question. Claimants must be given an opportunity to explain any inconsistencies or discrepancies in their story.

c) Conversion post departure

34. Where individuals convert after their departure from the country of origin, this may have the effect of creating a *sur place* claim³⁹⁵. In such situations, particular credibility concerns tend to arise and a rigorous and in depth examination of the circumstances and genuineness of the conversion will be necessary. Issues which the decision-maker will need to assess include the nature of and connection between any religious convictions held in the country of origin and those now held, any disaffection with the religion held in the country of origin, for instance, because of its position on gender issues or sexual orientation, how the claimant came to know about the new religion in the country of asylum, his or her experience of this religion, his or her mental state and the existence of corroborating evidence regarding involvement in and membership of the new religion.

35. Both the specific circumstances in the country of asylum and the individual case may justify additional probing into particular claims. Where, for example, systematic and organised conversions are carried out by local religious groups in the country of asylum for the purposes of accessing resettlement options, and/or where “coaching” or “mentoring” of claimants is commonplace, testing of knowledge is of limited value. Rather, the interviewer needs to ask open questions and try to elicit the motivations for conversion and what effect the conversion has had on the claimant’s life. The test remains, however, whether he or she would have a well-founded fear of persecution on a Convention ground if returned. Regard should therefore be had as to whether the conversion may come to the notice of the authorities of the person’s country of origin and how this is likely to be viewed by those authorities³⁹⁶. Detailed country of origin information is required to determine whether a fear of persecution is objectively well-founded.

36. So-called “self-serving” activities do not create a well-founded fear of persecution on a Convention ground in the claimant’s country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned.

³⁹⁵ Such a claim may also arise if a claimant marries someone of another religion in the country of asylum or educates his or her children in that other religion there and the country of origin would use this as the basis for persecution.

³⁹⁶ See UNHCR Handbook, above note 4, paragraph 96

Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection. In the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required. Where the opportunistic nature of the action is clearly apparent, however, this could weigh heavily in the balance when considering potential durable solutions that may be available in such cases, as well as, for example, the type of residency status.

Handout no. 19

IMMIGRATION APPELLATE AUTHORITY - ASYLUM GENDER GUIDELINES (2000)
(excerpts)

Excerpts from (UK) Immigration Appellate Authority (IAA). Asylum gender guidelines, p. 36-40 (on the convention ground political opinion). London: Asylum Appellate Authority, 2000.

The guidelines can be found at the following website: www.asylumsupport.info/publications/iaa/gender.pdf

Political Opinion

3.17 The Refugee Convention does not provide a definition of persecution, but guidance may be sought from international human rights law, the views of academics and the UNHCR Handbook 82 as well as from caselaw.

'In the 1951 Convention, 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.'

[Goodwin-Gill, G. *The Refugee in International Law*, Oxford University Press, (1996) page 49]

'The notion of persecution on account of political opinion was conceived in liberal terms [by the drafters of the Refugee Convention] ... protection on the ground of political opinion was to be extended not only to those with identifiable political affiliations or roles, by also to other persons at risk from political forces within their home community.' [Hathaway, J, *The Law of Refugee Status*, Butterworths Canada (1991), page 149]

3.18 What makes an action or opinion political or non-political is the social structure and social context of the asylum-seeker's country of origin 83. This point is considered further at paragraph 3.22.

3.19 The Convention ground 'political opinion' covers both the holding of the opinion itself and the expression of that opinion 84.

'... there is merit in [the] submissions that it would be wrong to deny this appellant the protection afforded by the Convention on the basis that the authorities may leave him alone if he refrains from expressing any political opinion whatsoever.' [Bakor (IAT) (13793)]

"[the adjudicator drew a distinction between actions and political beliefs], a distinction which we find to be of limited value in asylum law, with great respect to the Special Adjudicator." [The Home Office Presenting Officer]
"properly in our view, accepts that this was a misdirection of law. A political belief or affiliation may be manifested in more than one way. An intellectual might pen a tract or a pamphlet, a cinematographer might make a propaganda film, a political activist might campaign for his or her party in an election, or someone may simply go to fight for a cause in which they believe." [Orlov (IAT) (18505)]

82 UNHCR Handbook paragraphs 80-86.

83 see letter from Patrick Tigere, Legal Adviser Standards and Legal Advice Section, Department of International Protection UNHCR Geneva to IAA dated 20 February 2000 - *'What makes an action or opinion political or non-political is the social structure and therefore depends on the social context within which the action in question is deemed to take place. This concept has been well-established in refugee studies and needs to be applied in considering female asylum claims in a gender sensitive way'*.

84 see for example UNHCR Handbook paragraphs 80 - 86:

Article 19 of the ICCPR also links opinions and the expression of those opinions:

1) *Everyone shall have the right to hold opinions without interference.*
2) *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

Article 10 ECHR:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

Article 11 ECHR:

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

3.20 It is important not to underestimate or overlook the political reasons for a woman's persecution even though she may not regard herself as acting politically. She may not directly claim, orally or in writing, that she has been persecuted for reasons of political opinion and may find it difficult to explain the reasons for her persecution 85.

Mainstream and Grassroots Politics and Political Activity

3.21 Both women and men are visibly active in conventional politics and political activities such as, *but not limited to*, belonging to political parties, trade unions or other groups / associations / movements, making speeches, attending demonstrations and writing publications.

3.22 Women's role in society means that they may be more active forms of political activity seen more often as being within women's domain or in keeping with women's roles. It is necessary to ensure that 'political opinion' is interpreted to include women's political activities.

3.23 Political activities often undertaken by women (as well as by men) may include (but are not limited to): providing community services, food, clothing, medical care, hiding people and passing messages from one person to another. The context in which these activities are performed makes them political, regardless of whether they are inherently political. For example posting posters is not inherently political, but will be if, for example, they support a particular party or cause; cooking food is not inherently political, but will be if for example, it is part of or supportive of Trade Union activities. Such political activities may put women at risk of persecution on the basis of an actual or imputed political opinion.

3.24 The penalty for engaging in political activity, whether actual or imputed, may be more severe for women than men if engaging in such activities also involves breaching social and cultural norms precluding women's involvement in such matters. For example women may both receive punishment from the state for their activities and be socially ostracised.

Opposition to discrimination against women

3.25 Involvement in the women's movement with the aim of improving women's position within society is political activity.
there is '*little doubt that feminism qualifies as a political opinion*' [*Fatin v INS* [1993] 12 F.3d 1233 (3rd Circuit) 86]

Non-compliance with Societal / Religious Codes of Behaviour for Women

3.26 Opinions and conflicts concerning the role of women within society and women's behaviour are conflicts of a political nature. Thus where a woman is 85 UNHCR Handbook paragraph 67: 'It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 [Refugee] Convention is met with in this respect.' and paragraph 66: 'Often the applicant [for asylum] himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail'.

⁸⁶ US Court of Appeals, Third Circuit.

persecuted as a result of her opposition to, or refusal to comply with, the prescribed role of women in her country of origin such persecution will be on the basis of her political opinion 87. There may also be overlaps with persecution on other grounds.

3.27 In many countries clear social roles and behaviour are prescribed for women 88.

They may be:

- ? prescribed by the state through law, legal structures and social policies;
- ? prescribed by society, or individuals or groups within society, and upheld or tolerated by the state; and
- ? prescribed by society, or individuals or groups within society, and the state may or be unable, or otherwise fail, to protect those who refuse or fail to conform.

Such social roles and behaviour may be extremely wide ranging, including, for example: restrictions on ability to vote, to access education, to control reproduction through contraception, to drive a car, to travel alone, to leave the home, to choose a marriage partner, to take employment or to practice certain professions, to dress without adherence to dress codes, to live without male protection, to apply for a passport or identity card, to choose a lesbian sexual partner, and to reject female genital mutilation.

The Islamic state [of Iran] uses without any restraint the enormous state power in order to regulate the life of women from the moment they are born to the last stage in the burial ceremonies. Every moment in the life of women is regulated in one way or another by the powerful state machinery. [Re MN, Refugee Appeal NO 2039/93, 12 February 1996, Chairman: R.Haines, New Zealand Refugee Status Appeals Authority]

3.28 Women may also be persecuted under this head where they do not intentionally or openly oppose or reject the prescribed social roles and behaviour, but do so inadvertently, accidentally or are perceived to do so 89.

“The 9th Circuit in Fisher ... held that [in order to prove that she would be persecuted if returned to her country of origin] the refugee claimant did not have to show that she would take conscious steps to violate the moral codes to discharge this burden. Recognition had to be given to the fact that violation of the codes could occur inadvertently.... [in relation to this case] the relentless pressure and harassment to which the appellant was subjected drove her to breaking point and led others to observe that she was likely to explode at the slightest provocation. Given who she is and given her deeply held beliefs, we find it would be highly likely that before long she would be driven to the same point. [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

87 90 Spijkerboer, Thomas, *Women and refugee status: Beyond the public / private distinction*, Emancipation Council (1994) 'women who fear persecution because they transgress social mores in general are not persecuted because they are women. They are persecuted because they refuse to be 'proper' women. When seen in its context one cannot but consider such an act of defiance as being both political and religious'.

88 Note: roles and behaviour may also be prescribed for men.

89 see also UNHCR Handbook paragraphs 82 and 83.

“Furthermore, it was not necessary for a claimant to intend to make her views known to the Iranian regime. Martyrdom is not required. [for an asylum seeker to prove persecution].” [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

3.29 A woman who opposes discrimination against women may be perceived as also holding particular other political views and thus may be persecuted for political opinions attributed to her, regardless of whether she does actually hold those views.

3.30 A woman who expresses views of independence from or refuses or fails to conform to the legal, social or cultural norms of society regarding women's behaviour may be perceived as holding certain political views and thus persecuted on the basis of political opinions attributed to her, regardless of whether she does actually hold those views.⁹⁰ [See *Fathi and Ahmady* (IAT) (14264) above at paragraph 3.14 above].

Sexual Orientation

3.31 A woman's choice of sexual orientation may itself be, or may be perceived as, an expression of political opinion ⁹¹.

Imputed / Attributed Political Opinion - Family and Community

3.32 A woman may suffer harm on the basis of an imputed political opinion as a result of the perception that her political views are aligned with those of dominant community or family members including both her own birth family and community and that which she has married into.

"Mr Hurst [the HOPO] in his submissions before us submitted that if we were to find that the second appellant had been raped and tortured then we should conclude that this had nothing to do with the husband's political activities and views. We have to say that this suggestion is not an attractive argument, and that the whole story is really linked to the husband's activities. In her evidence before us, the second appellant specifically said that she was questioned about her husband and that the authorities were concerned to find out about him. We reject Mr Hurst's submission and find as a fact that the detentions, tortures and rape arose as a result of her husband's political activities."
[Findik (17029), (IAT)]

"The [European] Commission [of Human Rights] found it established that during her custody in the Derik gendarmarie station [in Turkey]: '... the applicant [a 17 year old Kurdish woman] was blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water, and raped. It would appear probable that the applicant was subjected to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and / or to deter her family and other villagers from becoming implicated in terrorist activities.'" [Aydin v Turkey (ECHR) (1997) 25 EHRR 251]

⁹⁰ Women's dress may be seen as symbolising particular political views, thus in Turkey attempts were taken to prevent an elected female politician from taking her seat on the basis that she wore a headscarf, viewed by Turkey's secular elite as a symbol of political Islam and fundamentalism (The Guardian, 'Headscarf MP warns off army' 4 May 1999) and women are barred from wearing religious head coverings in government offices and other state-run facilities - see footnote 79 above.

⁹¹ For example, this may be the situation where laws, policies or society prescribe a sole or primary role for women as wives and mothers.

3.33 A woman may be harmed not simply for her own political views or those attributed/imputed to her but also to harm an entire family or community for its political views or affiliations.

In Sierra Leone the 'RUF forces perpetrated systematic, organised and widespread sexual violence against girls and women including individual and gang-rape, sexual assault with objects such as sticks and firewood, and sexual slavery. These sexual crimes were most often characterised by extraordinary brutality and frequently preceded or followed by violent acts against other family members...

The motive of the attackers, according to what they told the victims, was both to be rewarded for having endured hardship in the bush and to punish their victims for supporting the current government or having sexually accommodated ECOMOG soldiers...

*The rebels sought not only to control and degrade their victims but also to undermine and degrade the authority of the family and community. The victims described feeling terror, humiliation, and shame, and their parents, husbands, and community elders described feeling powerless at their inability to protect them.' [Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, July 1999]*

Membership of a Particular Social Group

Brief Framework of Analysis

3.34 The three questions to be asked in this framework of analysis are set out below and then referred to in detail.

In considering whether an appellant is a member of a 'particular social group' it may be useful for decision-makers to ask:

1. what is the 'particular social group' in question - is the group definable? *and* 2 *or* 3
 2. does the 'particular social group' have an identity in the country of origin in the eyes of a) the community at large or b) the persecutors; *or*
 3. do the members of the 'particular social group' have a 'shared immutable characteristic' i.e. one which either (a) is beyond the ability of the appellant to change either because it is innate and unchangeable or because it is a former characteristic of the appellant which cannot now be changed (e.g. previous membership of the army) or (b) is so fundamental to their identity, their human dignity or conscience that they ought not to be required to change. [see *Re ZWD*, Refugee Appeal No. 3/91 (New Zealand Refugee Review Board) 92]
- The existence of discrimination against the group in question may have a particular role in determining whether the group is a particular social group under the Refugee Convention [see *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283].

**GENDER SENSITIVITY AND PROCEDURAL ISSUES IN THE CONTEXT OF
REFUGEE STATUS DETERMINATION AND DURABLE SOLUTIONS
- A CHECKLIST³⁹⁷**

1. Overall Standard

- The presence of qualified and gender trained staff, (i.e. border guards, RSD workers, resettlement officers, protection officers, interpreters, adjudicators, counsellors, doctors and psychologist and other law enforcement personnel, who meet asylum seekers and refugees) is promoted and, where possible, ensured at all stages of the asylum procedures and the resettlement procedures, in order to facilitate sensitivity to gender needs and issues.
- Checklists and guidelines on gender issues exist and are used by government, law enforcement personnel, UNHCR, and NGO staff;
- Men and women have equal access to all forms of assistance;
- No barriers exist for women to get access to the asylum process as well as to resettlement procedures, e.g. male guardians outside the office, fear of sexual harassment, not enough female interpreters, no information about the asylum system at places women may visit.. ;
- Equal and easy access to legal counselling and orientation of asylum seekers is ensured for both women and men upon arrival at the entry points;
- Special support is given to women asylum seekers, especially women who are unaccompanied, and pregnant and nursing mothers, including provision of play corner for children and private areas for breast-feeding/baby care;
- Emergency medical assistance is provided equally to male and female asylum seekers awaiting registration;
- The office has a policy of giving expedited procedures for groups, such as traumatised women and children and unaccompanied children etc.;
- Routine assessment of needs and analysis of risks are made in order to ensure appropriate protection and assistance to men and women;
- Activities are undertaken to promote awareness and understanding of human rights and to ensure appropriate protection and assistance to men and women;
- Opportunities are created for equal representation of women and men in structures/mechanisms of co-operation between refugees and UNHCR, and its partners, as well as in decision-making mechanisms within their own communities;
- UNHCR and counterparts (both government and NGO) include in all their reports gender/age disaggregated information and statistical analysis which should be the basis for targeting population and assistance planning (POP);
- Regular trainings take place of UNHCR, NGO, and government staff to recognize gender issues;
- Local, government, UN and other international agencies that have a gender-specific programme as part of their priority agenda are identified. Advocacy, capacity-building, and networking with these agencies are initiated or sustained;
- Mechanisms exist for women to provide feedback on appropriateness of systems and services.

2. Refugee Status Determination Procedures (RSD)

Before or at a very early stage of the interview

- Ensure that the interview room is arranged to encourage discussion, promote confidentiality and lessen possibility of perceived power imbalances and ensure that you and the interpreter adopt an appropriate dress code and approach to ensure establishment of a trusting and respectful atmosphere;
- The RSD worker is familiar with the UNHCR Sexual and Gender-based Violence against Refugees, Returnees and Internally-Displaced People: Guidelines for Prevention and Response (2003) and checklists exist in order to ensure that adequate measures are in place to both identify and respond to gender-based violence;
- Ensure availability of trained psychosocial counsellors before, during and after interview;

³⁹⁷ This handout is compiled by Maria Bexelius, Consultant, UNHCR, 2005. It is largely based upon training document "Interviewing applicants for refugee status, UNHCR Training module R2D4, 1995, as well as UNHCR Gender Guidelines dated 2002 and 1991 and the UK Gender Guidelines (2000).

- ❑ Ensure that questionnaires are gender-sensitive;
- ❑ Ensure that the interview is performed in a way which corresponds with a gender-sensitive interpretation of the 1951 UN Refugee Convention's definition of who is a refugee (see separate checklist on how to ensure a gender-sensitive interpretation of the refugee definition);
- ❑ Where it is envisaged that a case may give rise to a gender-related claim, adequate preparation is needed, both with regard to procedural issues and the interpretation of the 1951 Refugee Convention (see separate checklist for the latter);
- ❑ Provide same sex RSD workers and interpreters automatically for women claimants. For claimants who allege to have been victims of sexual attack, a trained staff member of the same sex must always conduct the interviews unless the applicant requests otherwise. The same RSD worker should remain involved in the case in order to avoid the applicant being handed from one person to another. This would include arranging for the applicant to have follow-up counselling or medical and legal assistance;
- ❑ The applicant is informed of choice to have RSD workers and interpreters of the same sex as herself/himself;
- ❑ Ensure that there will be separate interviews - without the presence of family members.
- ❑ RSD worker explains that every person, including a woman and a child, may have a valid claim in their own right;
- ❑ The RSD worker is well informed about the human rights situation for women and lesbian, gay, bisexual and transgender refugees in the relevant country of asylum as well as in the country of asylum, e.g. discriminatory laws, policies and practices as well as the prevalence of sexual and other forms of gender-based violence in refugee camps or other settings committed by male guards, humanitarian workers or by others within the refugee community or the family (domestic violence etc.);
- ❑ The RSD worker is familiar with the UNHCR Sexual and Gender-based Violence against Refugees, Returnees and Internally-Displaced People: Guidelines for Prevention and Response (2003) and checklists exist in order to ensure that adequate measures are in place to both identify and respond to gender-based violence.

The initial part of the interview

- ❑ Introduce yourself and the interpreter to the applicant, and explain the roles of each person as well as the purpose of the interview;
- ❑ Make sure the applicant and interpreter understand one another before proceeding with the interview;
- ❑ Review the information provided on the basic data/registration form with the applicant to ensure it is accurate and complete;
- ❑ Provide the applicant with information about the RSD process and legal advice in a manner and language they understand;
- ❑ Explain to the applicant the refugee definition and the type of questions you will be asking, including questions relating to gender roles in the family, community and the state as well as opinions on the same;
- ❑ Remind the applicant of his or her right to confidentiality, right to counsel, obligation to provide evidence, and obligation to tell the truth;
- ❑ Reassure the applicant of the confidentiality principle (including with regard to members of own family);
- ❑ Inform the applicant that you meet a lot of asylum seekers, including women subjected to torture and different forms of violence (as appropriate), who carry very difficult experiences and that you thus understand that it sometimes can be very hard to share his/her difficult experiences made before, during and after flight, and even more difficult to share these with a public official. Emphasize this, while explaining that it is also essential that s/he reveal as much as possible about his/her experiences in order for you to understand his/her situation as correct as possible and to have as much information as possible when the risk assessment will take place and the decision will be made on whether or not s/he qualify for refugee status;
- ❑ Inform the applicant that it is ok to take breaks, if s/he feels very bad, and explain that you would be very grateful if s/he can inform you of his feelings if, for example, it feels very difficult to answer some questions because the memories are so painful. Tell him/her that you are well aware of the fact that it sometimes may be difficult to remember details, but that the more details s/he remembers the better as it helps you understand his/her case better;

- ❑ Mention that some answers to questions may appear very self-evident for the applicant, and explain that you might still have to ask some of those questions in order to understand the point of view of the applicant and to avoid unnecessary misunderstandings;
- ❑ Explain that you are not a trauma counsellor.

During the interview

- ❑ Be aware and responsive to cultural or religious sensitivities or other personal factors (gender, age, education);
- ❑ Remain neutral, compassionate and objective during the interview;
- ❑ Avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate;
- ❑ Ensure minimal interruption while applicant presents his/her claim;
- ❑ Ensure that you are aware of gender differences in communication, especially regarding non-verbal communication. This is particularly important in the context of cross-cultural communication (e.g. a female may avoid eye contact with the interviewer due to her culture);
- ❑ Employ the eligibility criteria related to gender-related persecution and ask questions in a manner which encourage women to speak out about their experiences;
- ❑ Use both 'open-ended' and specific questions, as appropriate. It may be more appropriate to for example ask about her/his "problems" and when these started, instead of asking a specific question;
- ❑ Remember that questions about political activities should not focus only on political activities as narrowly defined, such as office holding, but should be wider ranging as political activities may also include, but not be limited to, providing food or shelter, message taking, hiding people or refusing to conform to particular social norms regarding gender roles;
- ❑ Ensure that issues regarding gender roles and thus the status of women in the state, society and family are covered, as are opinions around these issues;
- ❑ Ensure that issues regarding the state's willingness and ability to give effective protection to women who are at risk of violence by the husband or other non-state actors are covered and that it is explored whether it would be reasonable or not to require a person to seek state protection;
- ❑ Ensure that issues regarding the reasonability to apply an internal flight alternative are covered;
- ❑ Remember that where questions are asked about "persecution" or "torture" female asylum seekers may not give information about the particular ill-treatment which they have suffered. This may occur because she might not herself understand that the term "torture" or "persecution" may include sexual violence, violence within the family, abortion or other forms of harm suffered by women. A different approach might be to ask whether an applicant has been, and fear to be "treated badly";
- ❑ Use non-confrontational open and/or indirect questions in order to establish the applicant's reasons for fleeing and to obtain indications about whether gender-related harm has occurred;
- ❑ Remember that the applicant might not always know what information is relevant to his/her claim and that he/she does not herself have to phrase her experiences and fear in correspondence with the elements of the refugee definition;
- ❑ Be responsive to the trauma and emotion of applicant and stop an interview where he/she is becoming emotionally distressed;
- ❑ If you suspect that the applicant has been a victim of sexual violence, or if the applicant is unable or unwilling to discuss certain events relating to such an incident, s/he asks discreet and indirect questions. Give the applicant time to tell her story in her own way and in her own words. The applicant is never forced to communicate, but is assured that the RSD worker is available to assist her once she is ready to talk about the problem;
- ❑ Remember that it is unnecessary to establish the precise details of the act of rape or sexual assault itself; focus could be placed on surrounding circumstances and events;
- ❑ Remember that refugee claimants who have been subjected to sexual and other forms of gender-based violence often exhibit a pattern of symptoms as a consequence of the trauma. The symptoms exhibited may include a loss of self-confidence and self-esteem, difficulty concentrating, feelings of loss of control, fear, and memory loss or distortion of facts. Women who have experienced sexual violence may also feel shame and guilt as a consequence of the stigma and she may fear social ostracism or other forms of punishment if it becomes known what she has been subjected to. Women who have suffered sexual or other forms of gender-based violence may, similar to other torture survivors, for example

be reluctant to speak about such incidents, especially to state officials. In some cases, it may be appropriate to consider whether claimants should be allowed to provide their testimony in writing so as to avoid having to recount traumatic events in front of strangers;

- ❑ Remember that second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. Mechanisms for referral to psychosocial counselling and other support services should be made available where necessary;
- ❑ Remember that the type and level of emotion displayed during the recounting of the applicant's experiences should not affect the credibility: cultural differences and trauma play an important and complex role in determining behaviour;
- ❑ Remember that for some cases, it may be appropriate to seek objective psychological or medical evidence;
- ❑ Ensure availability of trained psychosocial counsellors before and after interview, when necessary.

At the end of the interview

- ❑ Make sure that you have asked the applicant if he or she has anything to add;
- ❑ Make sure that you have advised the applicant of what will happen following the interview;
- ❑ Remember that it is important to be as specific as you can concerning:
 - when the decision can be expected;
 - what will happen if the application is successful (concerning documentation, family reunification, the right to work, etc.);
 - what will happen if the response is negative (explain the right and procedure to appeal).
- ❑ Make sure that you have reassured the applicant that, whatever the circumstances of the case, you will include all the relevant information in the interview report that will accompany the request for recognition of refugee status;
- ❑ Make sure you have thanked the interpreter and given the applicant the opportunity to do likewise;
- ❑ Make sure you have asked the applicant how he/she feels both at the moment and in general as you must assess whether there is a need for psychological counselling etc.

3. DURABLE SOLUTIONS

Resettlement (see also separate checklist)

- ❑ Ensure equal access to information on resettlement;
- ❑ Ensure gender-sensitive approaches throughout the process of assessing whether there exists a resettlement need (see above under RSD procedures);
- ❑ Ensure accelerated resettlement procedures for women-at-risk.

Voluntary repatriation

- ❑ Ensure equal access of women and men to information concerning repatriation;
- ❑ Ensure participation of women and men in decision-making related to voluntary repatriation;
- ❑ Organize return with consideration of gender-specific needs;
- ❑ Ensure gender-balanced reintegration assistance.

Local integration

- ❑ Ensure that appropriate legal and social mechanisms are established for local integration in a gender sensitive manner;
- ❑ Work with NGOs on gender specific-activities;
- ❑ Support participation of refugees (including women and children's groups) in community-based activities.
- ❑ Ensure equal access to citizenship and naturalisation and individualised documentation.

SUGGESTED READINGS

UNHCR documents of special relevance for gender-sensitive RSD

Procedural Standards for Refugee Status Determination under UNHCR's Mandate – Available in various languages from the Department of International Protection, UNHCR, Geneva.

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/ IP/ 4/ Eng/ REV. 1 Reedited, Geneva, January 1992, UNHCR 1979. Available at: www.unhcr.ch

Sexual and gender-based violence against refugees, returnees, internally displaced persons - Guidelines for prevention and response, UNHCR May 2003. Available at: www.unhcr.ch

Global Consultations on International Protection/General: Agenda for Protection, UNHCR, June 2002. Available at: www.unhcr.ch

Summary Conclusions – Gender-Related Persecution, UNHCR Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, nos. 1 and 3. Available at: www.unhcr.ch

Global Consultation on International Protection/Third Track: Refugee Women (April 2002). Available at: www.unhcr.ch

Global Consultations on International Protection/Third Track: The Search for Protection-Based Solutions; Protection of Refugee Women and Children, Chairman's Summary (22-24 May 2002). Available at: www.unhcr.ch

Global Consultations on International Protection/Third Track: Refugee Children (April 2002.) Available at: www.unhcr.ch

Articles and summary conclusions from the UNHCR's global consultations, appearing in the book: "Refugee Protection in International Law: UNHCR's global consultations on international protection" / Feller, E. (ed.); Türk, V. (ed.); Nicholson, F. - Cambridge (United Kingdom); New York (NY); Geneva: Cambridge University Press; UNHCR, 2003. Available at: www.unhcr.ch

Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (April 2004) Available at: www.unhcr.ch

Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (September 2003) Available at: www.unhcr.ch

Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (July 2003) Available at: www.unhcr.ch

Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses) (October 2003) Available at: www.unhcr.ch

Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (May 2002) Available at: www.unhcr.ch

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 (May 2002) Available at: www.unhcr.ch

Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997) Available at: www.unhcr.ch

Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe, by Heaven Crawley and Trine Lester, UNHCR EPAU/2004/05, May 2004 Available at: www.unhcr.ch

UNHCR training materials of special relevance for gender-sensitive RSD

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 2: Gender Concepts and Strategies, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook – Chapter 3: Women’s Human rights, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 4: Sexual and Gender-Based Violence, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 5: Refugee Status Determination, December 2002.

UNHCR Gender Training Kit on Refugee Protection and Resource Handbook - Chapter 6: Interviewing and Interpreting, December 2002.

Literature/academic research:

Crawley Heaven, *Refugees and Gender: Law and Process*, Jordan Publications, London 2001.
Available at: (to order): www.jordanpublishing.co.uk/Publications/catDetails.aspx?productID=289

Spijkerboer, Thomas. *Gender and Refugee Status*, Kluwer Academic Publishers, 2001.
Available at: (to order): www.powells.com/cgi-bin/biblio?inkey=17-0754620344-0

Gender Guidelines in various countries

Australia

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CASE STUDY #1: DOMESTIC VIOLENCE DISCRIMINATORY LAWS, POLICES, PRACTICES AND SOCIAL NORMS

THE CASE

The applicant, Sonia, is a 40-year old woman belonging to an ethnic minority in country X, who has been subjected to control, isolation, threats of violence and killing, intimidation, beatings and rape by her husband for a period of more than ten years. The abuses began some time after their wedding and escalated as time went on. When she protested, he responded, as he often did, "you are my woman, you do what I say". He always criticised her, beat her when he thought she was not a good wife, when she did not behave as he expected her to e.g. wore the wrong dress, did not cook fast or good enough, spoke to someone he did not want her to speak to, defended herself against accusations of adultery or daily wrongdoings in the kitchen or elsewhere. He requested sex irrespective of her wishes and he often slapped her, bumped her head against the floor and called her a whore in relation to the rape. It did not matter if she cried, screamed or was silent; he wouldn't stop. Although Sonia tried to run away, her husband always found her and the abuse continued and even escalated; he beat and kicked her unconscious after she tried to escape; whipped her with an electrical cord; broke windows and a mirror with her head; pistol-whipped her and threatened to deface her, cut off her arms and legs, and leave her in a wheelchair if she ever tried to leave him; and warned her that he would be able to find her wherever she was. When she asked for his motivation, he would reply: "I can do it if I want to". He said he was "going to hunt her down and kill her if she comes back to X". Her attempts to secure protection were futile. Sonia's pleas to the police did not gain her protection. On three occasions, the police issued summonses for her husband to appear, but he ignored them, and the police did not take further action. Twice, she called the police, but they never responded. When she appeared before a judge, the judge told her that he would not interfere in domestic disputes. Her husband told her that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials. Sonia knew of no shelters or other organizations in X that could protect her.

Finally she managed to transgress the border and she applied for asylum. She fears further domestic violence and to be killed by her husband. Her opinion is that she had no chance to get state protection, because of her being a woman per se in a country where violence and discrimination against women continue with impunity and the state laws, policies and practice as well as the prevailing social norms are discriminating against women, because of her belonging to an ethnic minority and because of her husband's connections to law enforcement officials. She is severely traumatised after more than ten years of physical, sexual and psychological violence, and constant death threats.

Human rights reports covering the years during which Sonia was abused describe a State that fails to protect women who suffer abuse at the hands of their husbands and has an official policy of discrimination against women. During the relevant time period, there was *de jure* gender discrimination reflected in the civil code, which recognized the "male as the married couple's legal representative. These laws were accompanied with a social norm discriminating against women. Recent country reports confirm that domestic violence in X remains pervasive and, despite positive legal changes and some other efforts to address this problem, in year X "violence against women, including domestic violence, remained common among all social classes." A study estimated that for every reported case of domestic violence, there are 10 more that are not reported." Reports issued in year X indicated that, "in many cases the police do not respond to calls for help . . . [and]

officers who do arrive often chastise female victims for behaviours that provokes their husbands' ire."³⁹⁸

Questions to answer:

1. Does the harm feared amount to persecution?
2. Is the fear well-founded?
3. If the persecutor is not an agent of the state, is the state able and willing to offer protection?
4. Is the fear of persecution linked to a convention ground?

CASE STUDY #2: SEXUAL ORIENTATION DISCRIMINATORY LAWS, POLICIES, PRACTICES AND SOCIAL NORMS

THE CASE

The applicant, Farhad, is a 25 year old man from country X who left his home country and claimed asylum on false grounds, bringing false documentary evidence. His refugee claim has been declined on credibility grounds, cataloguing a number of inconsistencies and implausibilities in his account as well as suspected false documents handed in to support the claim.

In yet another claim Farhad has claimed that he fears persecution, in the form of death penalty and corporal punishment by the state or social ostracism and harassment by the society, for reasons of his homosexuality. He explains his earlier failure to advance his sexual orientation claim on two grounds. First, he did not know that a refugee claim could be based on sexual orientation and second, he felt too embarrassed to talk about sexual matters (particularly given that at the first instance hearing the refugee status officer and interpreter were both female) and did not know whether he would be treated fairly should he express his sexual feelings. However, after instructing his new solicitor (who speaks Farsi) following the first instance decline and after an attempted suicide in June 2003, he realised the necessity to disclose his homosexuality. He now claims that in his early teens he became aware of his homosexuality and from intermediate school he had emotional and sexual relationships with other boys. He had casual sexual relations with other men he would meet through his employers, other acquaintances or at a public park. He said that all his relationships were conducted furtively, the overriding imperative being to conceal everything from the parents of the other men, from his own mother and from the public at large. On two or three occasions the appellant attempted suicide because of his deep unhappiness. Addressing the point that subsequent to his expulsion from school in 1998, because of his homosexuality, he had not been detained, arrested or otherwise ill-treated because of his homosexuality, the appellant spoke of the effect on him of the potential punishment of a hundred lashes and execution. He says that if he returned he could not hide his sexual orientation. He explains that for him homosexuality was not a matter only of sex, but of having loving relationships of the kind enjoyed by men and women. He can hardly endure thinking how life would be if he would have to return.

The Penal Code of Farhad's home country prescribes the severest of penalties for homosexuality (death). That penalty is not a historical footnote or relic on the state statute books. It is a very real penalty which is imposed from time to time, as is the "lesser" penalty of being flogged. There is strong theological and societal disapproval of homosexuality. To avoid criminal penalties (including lashings and potentially, the death penalty), extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals in his country must be "discreet". They are denied a meaningful "private" life. For most, sexual orientation must be carefully hidden under the camouflage of feigned heterosexuality.

Questions to answer:

1. Does the harm feared amount to persecution?
2. Is the fear well-founded?
3. If the persecutor is not an agent of the state, is the state able and willing to offer protection?
4. Is the fear of persecution linked to a convention ground?