



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

**Module 2: Ensuring Gender Sensitivity in Refugee Status  
Determination – procedural issues**

**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.<sup>2</sup> Moreover, this package was eloped 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 analysing 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.

This resource package was produced in 2005 by Maria Bexelius, a consultant for UNHCR. James Pope, an intern, and Jana Eidem, a consultant, both from the Europe Bureau edited and proof-read the materials. The work was guided by Kirsti Floor, the Senior Regional Adviser on Refugee Women and Children in the Europe Bureau and relevant departments and units at UNHCR Headquarters.

UNHCR, Bureau for Europe  
Geneva, October 2005

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<sup>2</sup> UNHCR Guidelines on International Protection No.1. Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HRC/GIP/02/01, 7 May 2002.

## TABLE OF CONTENTS

<b>AGENDA .....</b>	<b>5</b>
<b>INTRODUCTION TO THE WORKSHOP.....</b>	<b>6</b>
WELCOME AND INTRODUCTION TO THE WORKSHOP ON GENDER AND PROCEDURAL ISSUES .....	6
INTRODUCTION TO THE AGENDA .....	7
<b>TRAUMA, EVIDENTIARY AND CULTURAL ISSUES.....</b>	<b>8</b>
INTRODUCTION TO THE CASE STUDY EXERCISE ON TRAUMA, EVIDENTIARY AND CULTURAL ISSUES .....	8
REVIEW OF THE EXERCISE IN PLENARY .....	9
<b>GENDER SENSITIVITY AND PROCEDURAL ISSUES - AN OVERVIEW .....</b>	<b>12</b>
PRESENTATION ON GENDER SENSITIVITY AND PROCEDURAL ISSUES.....	12
<b>CREDIBILITY ISSUES .....</b>	<b>16</b>
INTRODUCTION TO THE CASE STUDY EXERCISE ON CREDIBILITY ISSUES.....	16
PLENARY REVIEW OF THE CASE STUDY EXERCISE .....	17
<b>INTERVIEWING ASYLUM SEEKERS.....</b>	<b>20</b>
INTRODUCTION TO THE ROLE PLAY EXERCISE ON INTERVIEWING ASYLUM SEEKERS .....	20
ANALYSIS OF THE ROLE PLAY IN PLENARY .....	21
<b>CONCLUSIONS AND CLOSURE OF THE WORKSHOP.....</b>	<b>26</b>
<b>APPENDIX: TRAINING MATERIALS .....</b>	<b>29</b>
TRAINING MATERIALS NEEDED UNDER EACH WORKSHOP SECTION .....	30
TRAINING MATERIALS CATEGORIZED BY TYPE OF MATERIAL AND NUMBER.....	31
BACKGROUND READINGS .....	32
ALL TRAINING MATERIALS INCLUDED IN CHRONOLOGICAL ORDER .....	35

## **Ensuring Gender-Sensitivity in Refugee Status Determination – Procedural issues**

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

**Duration:** 4 hours and 10 minutes

## **AGENDA**

### **Ensuring Gender Sensitivity in Refugee Status Determination – Procedural Issues**

#### **Introduction to the Workshop**

- 14.30-14.55 Welcome and introduction to the workshop of gender and procedural issues
- 14.55-15.00 Introduction of the agenda

#### **Trauma, Evidentiary and Cultural Issues**

- 15.00-15.40 Case study exercise on trauma, evidentiary and cultural issues:  
A woman imprisoned, raped, threatened and denied asylum
- 15.40-16.00 Review of the exercise
- 16.00-16.15 Coffee Break

#### **Gender Sensitivity and Procedural Issues – an Overview**

- 16.15-16.45 Presentation on gender sensitivity and procedural issues

#### **Credibility Issues**

- 16.45-17.15 Case study exercise on credibility issues  
- A woman facing a real risk of execution?
- 17.15-17.35 Review of the case study exercise

#### **Interviewing Asylum seekers**

- 17.35-18.00 Role play exercise on interviewing asylum seekers:  
A married couple being interviewed
- 18.00-18.15 Role-play in plenary
- 18.15-18.30 Analysis of the role-play

#### **Closure of the Workshop**

- 18.30-18.40 Conclusions and closing of workshop

## **INTRODUCTION TO THE WORKSHOP**

- 14.30-14.50 Welcome and introduction to the workshop on gender and procedural issues
- 14.50-15.00 Introduction to the agenda

## **WELCOME AND INTRODUCTION TO THE WORKSHOP ON GENDER AND PROCEDURAL ISSUES**

### **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 as well as to introduce them to the issue of gender and procedural issues, by recalling fragments of the previous workshop (e.g. trauma, evidentiary matters). If the participants did not participate in the workshop on gender and RSD, you may start this workshop by using the first set of sections from the previous workshop as well as the section on gender and sex in Module 1. When those sections are finished, you may continue with the section following this on procedural issues (i.e. Introduction to the agenda).

### **Time – How long will it take?**

It will take 20 minutes.

### **Method - How will you be doing it?**

You will make a presentation, and you may want to illustrate it by writing on a flip chart and/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 – procedural issues;
- No. 2 Workshop objectives.

### **Facilitator's notes**

You may choose to start your introduction to procedural issues by showing the PowerPoint slide no. 1 and referring to already mentioned issues during the workshop on RSD, e.g. evidentiary matters, the consequences of trauma, etc. One way of introducing the issue may be to specifically mention the male applicant in the case study about sexual orientation and discriminatory laws, policies, practices. You can mention the difficulties he may encounter in revealing the real asylum claim, as well as the credibility problems a person in his situation could face. Another way of introducing the issue could be to complement your brief comments on the previous workshop by giving an example of a case you have come across yourself and which was challenging from a procedural perspective. You could also recall what expectations the participants mentioned during the introduction of the previous workshop, in relation to procedural issues, before going further mentioning the workshop objective and introducing the agenda of the workshop.

You could briefly show PowerPoint slide no. 2 and mention the workshop objectives, which are:

- To review guidelines relevant to gender-related asylum claims, with special focus on procedural issues;
- To raise awareness of the more complex procedural issues which may arise in relation to gender-related asylum claims, and to provide some tools to handle these issues;
- To fulfil the overall purpose i.e. assisting the participants with tools to avoid common traps and to ensure a refugee status determination that corresponds to international standards.

### **INTRODUCTION TO THE AGENDA**

**Purpose - Why are you doing it?**

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

**Time – How long will it take?**

It will take 5-10 minutes.

**Method - How will you be doing it?**

You will make a short presentation, which may be illustrated by using a PowerPoint presentation. Distribute the handout.

**Equipment and type of training material needed:**

PowerPoint projector and presentation, handout.

*PowerPoint slide:*

- No. 3 Workshop agenda.

*Handout:*

- No. 1 Workshop agenda.

### **Facilitator's notes**

Show participants the agenda of the workshop, by using PowerPoint slides nos. 3.1 and 3.2. Distribute handout no.1 in order to make sure everyone has the agenda.

You may 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.

## **TRAUMA, EVIDENTIARY AND CULTURAL ISSUES**

- 15.00-15.10 Introduction to the case study exercise on trauma, evidentiary and cultural issues (to be done in groups)
- 15.10-15.40 Case study exercise:  
A woman imprisoned, raped, threatened and denied asylum
- 15.40-16.00 Review of the exercise in plenary

### **INTRODUCTION TO THE CASE STUDY EXERCISE ON TRAUMA, EVIDENTIARY AND CULTURAL ISSUES**

#### **Purpose - Why are you doing it?**

The purpose of the case study is to deepen the participants' understanding of trauma, evidentiary and cultural issues in the context of an asylum process.

#### **Time – How long will it take?**

The introduction will take 10 minutes. Thereafter, they will have 20 minutes to work on the exercise in groups and 20 minutes will be left for the review of the exercise in plenary.

#### **Method - How are you doing it?**

You will use a case study exercise as the primary method of training in order to highlight problems relating to trauma, evidentiary and cultural issues as well as the tools which can be used to avoid common traps. Divide the participants into groups of 4-5 persons, and have each group choose a group rapporteur who will present their conclusions during the review of the case study in plenary. Distribute a handout explaining the case study exercise with related questions to answer and another handout after the review. If the participants have not attended the workshop on RSD, i.e. Module 1, distribute handout nos. 2 and 3, as participants should refer to the UNHCR gender guidelines (2002) as appropriate. Use a PowerPoint presentation as appropriate.

#### **Equipment and type of training material needed:**

PowerPoint projector and presentation, handouts.

#### *PowerPoint slides:*

- No. 4 Case study exercise on trauma etc. (instructions);
- No. 5 Case related procedural issues.

#### *Handouts:*

- No. 2 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;
- No. 3 Age and gender dimensions in international refugee law.

#### *Exercises:*

- No. 1 Case study exercise on trauma, evidentiary and cultural issues;
- No. 2 UNHCR Gender Guidelines (2002) – examples of paragraphs relevant to the case study exercise on trauma, evidentiary and cultural issues.



### **Facilitator's notes**

Introduce the participants to the first case study exercise illustrating possible problems of trauma, evidentiary and cultural issues, etc. Divide them into groups of 4-5 persons (alternatively groups of 1-2 persons, without choosing a group rapporteur). Distribute the handout and ask them to read the case and to identify certain procedural issues which should be considered in order to ensure a gender sensitive approach. Ask them to identify a group rapporteur. You may want to show PowerPoint slide no. 4 while they do the case study.

If the participants have not attended the workshop on RSD, Module 1, distribute handout nos. 2 and 3, as participants should refer to the UNHCR gender guidelines (2002) as appropriate.

### **CASE STUDY EXERCISE (30 MINUTES)**

#### **REVIEW OF THE EXERCISE IN PLENARY**

### **Facilitator's notes**

Feedback in plenary by the group or by the rapporteur, including a summary of the exercise. Each group of 4-5 persons gets five minutes to present their arguments. If they had discussed the case in groups of 1-2 persons, the arguments will be put forward as part of a less group-fixed plenary discussion of the case.

The case specific issues which the participants should identify, at a minimum, relate to:

- Invalid reasons for questioning Rebecka's credibility:
  - Discrepancy between information given to the psychologist (rape etc.) and that given to the RSD worker ("only" beatings);
  - Delay to inform the authorities about the full extent of her experiences;
  - Alleged time laps in her story;
  - Insufficient knowledge about her husband's activities and therefore of her own reasons for claiming asylum.

You may then summarize the case by identifying important procedural issues to be aware of in order not to fall into the same trap as the RSD worker in the case study and in order to ensure a gender-sensitive asylum process, *inter alia*:

- **Trauma.** The effects of trauma on women subjected to sexual violence, often resulting in time lapses, inconsistencies and difficulties to chronologically and fully present a claim. The risk of re-traumatization when talking about the abuses may also make a woman fear losing control of herself in case she reveals her experiences.

- **Culture.** Experiences of sexual violence are often linked to feelings of guilt, fear, shame and difficulties in speaking about the abuses to anyone, but especially to law enforcement officials of any kind and to men. The presence of male RSD workers, interpreters or legal representatives could thus influence negatively on the information collected for the assessment of the claim.
- **Evidence.** Written documents (such as arrest warrants or medial records or gender specific country-of-origin information etc.) to support a claim is difficult to obtain in gender-related cases and should thus not be required in order to ensure a grant of refugee status; the principle of the-benefit-of-the-doubt should be recalled at all stages in the asylum process. Sometimes, it may be relevant to collect testimonies from other similarly situated women, e.g. in the country of asylum.
- **Lack of information on the asylum law and process and lack of confidence in the RSD worker, interpreter and/or legal representative.** It may happen that a woman has not been sufficiently informed about her rights during the asylum process as well as what qualifies for asylum etc. She may then think that it is unnecessary to speak in detail about her experiences of sexual violence, as she believes her claim is sufficiently strong as it is. She may also be afraid that the principle of confidentiality may not be respected.
- **Lack of knowledge of the reasons for persecution.** It may be that the woman is not at all or not much aware of her husbands or male relative's political activities and she may thus be at risk of persecution on account of political opinion, but without being able to fully explain the background of her claim.
- **Interviewing.** The questions put in an interview may be male-oriented and may therefore not encourage or enable a woman revealing important aspects of her experiences of persecution.
- **Interpreting.** The male sex of an interpreter may make a woman not reveal certain aspects of her claim e.g. sexual violence. The sex of an interpreter may also affect negatively on a man who has experienced sexual violence. However, it should be noted that although it may be extra difficult to talk about very personal and traumatic issues to law enforcement officers, as the applicant may have bad experiences of public officials in the country-of-origin, but it should be remembered that it is even difficult for many traumatised persons to talk to psychiatrists and that is why such information do often become known at a late stage of the interview. Same sex interpreter should be provided automatically for women, and both men and women should be asked whether they prefer a male or a female interpreter.

It is also notable that the mere presence of an interpreter may create an obstacle for interviewing, as the applicant may be scared that the confidentiality principle will not be respected. In such a case, telephone interpretation may be an alternative method of interpretation.

- **RSD worker, legal representative.** The same potential problem apply as above, there may be extra difficult to reveal experiences of sexual violence for a male RSD worker or lawyer. The mere presence of a man in the room may create difficulties to speak for some women.

When you refer to the issues above, you may show PowerPoint slide no. 5.

In the end you may distribute exercise no. 2.

**COFFEE BREAK (15 MIN)**

## **GENDER SENSITIVITY AND PROCEDURAL ISSUES - AN OVERVIEW**

16.15-16.45 Presentation on gender sensitivity and procedural issues

### **PRESENTATION ON GENDER SENSITIVITY AND PROCEDURAL ISSUES**

**Purpose - Why are you doing it?**

The purpose of the presentation is to give to participants an overview of the most relevant procedural aspects which should be considered in order to ensure gender-sensitive asylum procedures and to advise them upon procedural measures to take in gender-related asylum claims.

**Time – How long will it take?**

It will take you 30 minutes.

**Method - How will you be doing it?**

You will make a presentation, which you may illustrate by showing a PowerPoint presentation. Finish by distributing the handouts.

**Equipment and type of training material needed:**

PowerPoint projector and presentation, handouts.

*PowerPoint slides:*

- No. 6.1 Gender-related asylum claims – procedural issues to consider;
- No. 6.2, 6.3 and 6.4 Procedural issues...cont.

*Handouts:*

- No. 4 Gender-related asylum claims – procedural issues to consider;
- No. 5 Conducting an interview;
- No. 6 Responding to applicants with a trauma;
- No. 7 Barriers to communications.

### **Facilitator's notes**

The purpose of the presentation is to give to participants an overview of the most relevant procedural aspects which should be considered and to advise them on procedural measures to take in gender-related asylum claims.

In order to ensure that gender-related claims are properly considered throughout the RSD process, show PowerPoint slides nos. 6.1, 6.2, 6.3 and 6.4 and point out the following measures to be borne in mind:

- Separate interviews are ensured without the presence of family members;
- The RSD worker explains that every person, including a woman and a child, may have a valid claim in their own right;
- The RSD worker provides the applicant with information about the RSD process and legal advice in a manner and language s/he understands;

- The applicant is informed of the choice to have RSD workers and interpreters of the same sex as herself/himself;
- Same sex interpreters and RSD workers are provided 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;
- In cases of male applicants, it is noteworthy that usually it is less difficult for them to reveal experiences of sexual violence and trauma to female interviewers and RSD workers;
- Country of origin information relevant to gender-related claims is collected and it is ensured that the RSD worker has the adequate gender training and do preparations accordingly;
- The RSD workers and interpreters should be aware and responsive to cultural or religious sensitivities or other personal factors (gender, age, education);
- An open and reassuring environment is provided;
- Interview room is arranged to encourage discussion, promote confidentiality and lessen possibility of perceived power imbalances;
- The RSD worker introduces him/herself and the interpreter, and explains roles of each person as well as purpose of interview;
- The RSD worker explains the refugee definition to the applicant and the type of questions which will be asked, including questions relating to gender roles in the family, community and the state as well as opinions on the same;
- The RSD worker reminds the applicant of his or her rights and obligations, *inter alia* the right to confidentiality, the right to counsel, the right and obligation to give evidence, the obligation to be truthful;
- The RSD worker reassures the applicant of confidentiality (including with regard to members of own family);
- The RSD worker explains that he/she is not a trauma counsellor;

- The RSD worker remains neutral, compassionate and objective during the interview;
- The RSD worker avoids body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate;
- The RSD worker is 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);
- The RSD worker ensures minimal interruption while applicant presents her claim;
- The RSD worker employs the eligibility criteria related to gender-related persecution and ask questions in a manner which encourage women to speak out about their experiences, *inter alia*:
  - is aware and adapt questions to the fact that some women may not associate themselves with politics and they may not label as torture or ill-treatment the forms of gender-based violence they have experienced in the country of origin;
  - ensure the employment of a gender-sensitive questionnaire.
- Both open-ended and specific questions are used as appropriate;
- The RSD worker should be aware that lack of knowledge, or even contradictory answers, on the part of female family members does not mean the entire testimony should be discounted as lacking credibility;
- Second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information;
- The RSD worker should be responsive to the trauma and emotion of claimants and stop an interview where claimant is becoming emotionally distressed;
- If the RSD worker suspects 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 interviewer is available to assist her once she is ready to talk about the problem. There is no need to dwell in detail on the sexual abuse;

- Type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility: cultural differences and trauma play an important and complex role in determining behaviour;
- The RSD worker recognizes that refugee claimants who have been subject to sexual violence can exhibit a pattern of symptoms as a consequence of the trauma related to gender-based violence, such as rape or domestic violence. 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. Victims or survivors of domestic violence may be reluctant to speak about such incidents. 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;
- The RSD worker is aware 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;
- In the case of a husband and wife or other family members being interviewed, the interviewer should be careful when trying to clarify contradictory statements. In general, the interviewer should be cautious if confronting an applicant concerning statements made by another family member in order to avoid adding to the already tense and difficult situation the family may be experiencing;
- For some cases, it may be appropriate to seek objective psychological or medical evidence;
- Mechanisms for referral to psychosocial counselling and other support services should be made available where necessary;
- Availability of trained psychosocial counsellors before and after interview recommended.

Distribute handouts nos. 4, 5, 6 and 7.

Make sure to encourage them to study the handouts distributed for further guidance and to read UNHCR material and relevant literature after the training.

## **CREDIBILITY ISSUES**

- 16.45-16.55 Introduction to the case study exercise on credibility issues (to be done in groups):  
A woman facing a real risk of execution?
- 16.55-17.15 Work in groups on case study exercise
- 17.15-17.35 Review of the case study exercise in plenary

### **INTRODUCTION TO THE CASE STUDY EXERCISE ON CREDIBILITY ISSUES**

#### **Purpose - Why are you doing it?**

The purpose of this case study exercise is to deepen the understanding of credibility issues and the importance of considering the difficulties in obtaining written evidence and thus to consider the principle of the benefit-of-the-doubt as well as the possible shift of burden of proof to the RSD authorities.

#### **Time – How long will it take?**

The introduction will take 10 minutes. Thereafter the participants will have 20 minutes to work on the exercise in groups, which leaves 20 minutes for the review of the exercise in plenary.

#### **Method - How will you be doing it?**

You will use a case study exercise (to be done in groups) as the primary method of training, in order to highlight problems related to the assessment of an applicant's credibility. Divide the participants into two groups (see below) who will argue against each other during the plenary review of the exercise. Distribute different handouts to the groups, depending on whether they will argue for a grant or denial of refugee status during the plenary review. Use a PowerPoint presentation, as appropriate.

#### **Equipment and type of training material needed:**

Handouts, PowerPoint projector and presentation.

#### *PowerPoint slides:*

- No. 7 Credible or not?
- No. 8 Case study exercise on the issue of credibility – instructions.

#### *Handouts:*

- No. 8 Common burdens and standards: legal elements in assessing claims to refugee status.

#### *Exercises:*

- No. 3 Group 1. Relevant excerpts from the case – the arguments put forward by the applicant's legal representative before the UN Committee against Torture (CAT);
- No. 4 Group 2. Relevant excerpts from the case – the arguments put forward by the State party before the UN Committee against Torture (CAT);
- No. 5 UN Committee against Torture Communication no. 149/1999.

### **Facilitator's notes**

Show PowerPoint slide no. 7 during your introduction to the exercise. Divide the participants into two groups and ask one group to argue for a grant decision and the other group to argue for a denial. Both groups should discuss and identify



procedural problems (relating to the issue of credibility), when possible with reference to the UNHCR Gender Guidelines (2002). Ask them to choose a group rapporteur. You may want to show PowerPoint slide no. 8 when they work on the exercise.

Distribute exercises nos. 3 and 4.

### **WORK ON THE CASE STUDY EXERCISE (20 MIN)**

### **PLENARY REVIEW OF THE CASE STUDY EXERCISE (20 MIN)**

#### **Facilitator's notes**

Feedback in plenary. Each group gets five minutes to present their arguments, with a focus on the credibility issue. Then follows a debate for about five minutes, after which you may brief the participants on the real case they were debating and the conclusions about it made by the Committee against Torture (CAT) in Communication No. 149/1999:

Committee against Torture (CAT) in Communication No. 149/1999  
(excerpts):

Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee is further of the opinion that all available domestic remedies have been exhausted. The Committee finds that no further obstacles to the admissibility of the communication exist. Since both the State party and the author have provided observations on the merits of the communication, the Committee proceeds immediately with the considerations of those merits.

The issue before the Committee is whether the forced return of the author to the Islamic Republic of Iran would violate the obligation of Sweden under article 3 of the Convention not to expel or to return 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.

The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Iran. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be person-

ally at risk of being subjected to torture in the country to which she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

From the information submitted by the author, the Committee notes that she is the widow of a martyr and as such supported and supervised by the Bonyad-e Shahid Committee of Martyrs. It is also noted that the author claims that she was forced into a *sighe* or *mutah* marriage and to have committed and been sentenced to stoning for adultery. Although treating the recent testimony of the author's son, seeking asylum in Denmark, with utmost caution, the Committee is nevertheless of the view that the information given further corroborates the account given by the author.

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.

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 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 (bold added).**

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.

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.

Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee would wish to receive, within 90 days, information on any relevant measures taken by the State party in accordance with the Committee's present views.

### **Facilitator's notes, continued**

As a final point you may refer to the UNHCR Gender Guidelines (2002)<sup>3</sup> and the importance of bearing in mind that written documentation and detailed country of origin information supporting the case may often be absent in gender-related claims, which should not in itself be an argument for discrediting a claim and consequently for refusing refugee status.

Finish by distributing exercise no. 5. Also distribute handout no. 8 if the participants did not attend the previous workshop on RSD, Module 1.

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<sup>3</sup> 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).

## **INTERVIEWING ASYLUM SEEKERS**

17.35-17.45	Introduction to the role play exercise on interviewing asylum seekers: A married couple being interviewed
17.45-18.00	Preparations for the role play exercise
18.00-18.15	Role play in plenary
18.15-18.30	Analysis of the role play exercise in plenary

## **INTRODUCTION TO THE ROLE PLAY EXERCISE ON INTERVIEWING ASYLUM SEEKERS**

### **Purpose - Why are you doing it?**

The purpose of the role play is to enhance the participants' understanding of important gender aspects of consideration during an interview, especially issues relating to contextual settings.

### **Time – How long will it take?**

The introduction will take 10 minutes. Thereafter, there will be 15 minutes to prepare for the role play, 15 minutes to perform the role play and 25 minutes to analyze the role play in plenary.

### **Method - How are you doing it?**

You will use a role play exercise on interviewing asylum seekers as the primary method of training. Introduce the participants to the role play, identify the role players accordingly (one woman, one man, one RSD worker, one interpreter) and the remaining participants take the role of an observing audience. Each role player gets instructions and 15 minutes to prepare. The observing participants are given several questions to bear in mind while looking at the role play, which will take about 15 minutes. The whole group will then analyze and discuss the role play in plenary.

### **Equipment and type of training material needed:**

Handouts, PowerPoint projector and presentation.

#### *PowerPoint slide:*

- No. 9 Interviewing asylum seekers.

#### *Handout:*

- No. 9 Gender sensitivity and procedural issues in the context of refugee status determination and durable solutions

#### *Exercises:*

- No. 6 Role play exercise – instructions to the woman;
- No. 7 Role play exercise – instructions to the man;
- No. 8 Role play exercise – instructions to the RSD worker;
- No. 9 Role play exercise – instructions to the interpreter;
- No. 10 Role play exercise – instructions to the observing audience.

## **ROLE PLAY EXERCISE – PREPARATIONS**

### **Facilitator's notes**

Show PowerPoint slide no. 9 when you introduce the participants to the role play. Identify the role players accordingly (one woman, one man, one RSD worker, one interpreter) and the remaining participants take the role of an observing audience. Each role player gets instructions and 15 minutes to prepare. The observing participants are given several questions to bear in mind while looking at the role play. The role play will take about 15 minutes.

Distribute exercises nos. 6, 7, 8, 9 and 10.

## **ROLE PLAY IN PLENARY (15 MIN)**

### **ANALYSIS OF THE ROLE PLAY IN PLENARY (15 MIN)**

#### **Facilitator's notes**

Let the actors and observers comment on the role play. During the discussion you may wish to draw out participants' reactions to the questions which the observing participants received before the role play:

- Male/female interpreter, (RSD worker) - was it appropriate?
- Separate vs. whole-family interviews – was it appropriate?
- Seating and interview room arrangements – was it appropriate?
- Did the RSD worker introduce himself/herself, the interpreter (including his function) and explain the purpose and any ground rules for the interview?
- Who did the RSD worker address and look at when asking his/her questions?
- Did the RSD worker allow the husband to answer for his wife? How did he deal with the husband?
- Did the RSD worker deal effectively with the language and interpreter issue?
- Did the RSD worker ask to interview the woman alone and explain that this was a required procedure?
- What types of questions were asked by the RSD worker? Were they appropriate in this case and in order to find out as much as possible about the couple's experiences and fear of persecution?

- Did the RSD worker seem to know at least basic information regarding the political situation of the country of origin? And particularly the situation of women, and women activists? Was the RSD worker creating an atmosphere and an interview which optimised the possibility to get information about either the man's or the woman's possible political activities and/or the political and socio-economic context in which they lived before the flight?
- How did the RSD worker seem to deal with the possibility that one or both of the applicants could have experienced traumatic events in the country-of-origin and that they may have difficulties talking about these experiences?

When appropriate, refer to the UNHCR Gender Guidelines (2002). You may emphasize some of the following points during the role play or while summarizing the exercise<sup>4</sup>:

**Before or at an 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;
- Ensure availability of trained psychosocial counsellors before, during and after interview;
- Ensure 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 interviewers 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 interviewer 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 interviewers and interpreters of the same sex as herself/himself;
- Explain that every person, including a woman and a child, may have a valid claim in their own right;
- Ensure that there will be separate interviews - without the presence of family members.

<sup>4</sup> The list is a non-exhaustive list adapted from various documents, such as the UNHCR training document entitled Interviewing Applicants for Refugee Status, UNHCR Training module R2D4, 1995, as well as UNHCR Gender Guidelines dated 2002 and 1991 respectively, and the UK Gender Guidelines (2000).

### **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 with them very hard experiences and thus understand that it sometimes can be very hard to share the 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 will 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;

Module 2: Interviewing asylum seekers  
(15 min)

- 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 interviewer 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 gender-related claims from persons who have been subject to sexual and other forms of gender-based violence similar to other torture sur-



vivors, 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. Victims or survivors of domestic violence may be reluctant to speak about such incidents. 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;

- 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.) and 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.

Finish the section by distributing handout no. 9.

## **CONCLUSIONS AND CLOSURE OF THE WORKSHOP**

18.30-18.40 Conclusions and closure of the workshop

### **CONCLUSIONS AND CLOSURE OF THE 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:

- No. 10 Gender Sensitivity and the 1951 Refugee Definition;
- No. 11 References to UN and other international and regional documents on human rights and the issue of gender-based violence and discrimination;
- No. 12 The International Human Rights Framework: the link with refugee protection and women's rights (excerpts);
- No. 13 Discrimination against Women and Violence against Women in International Law;
- No. 14 Individuals' human rights and the laws that protect them;
- No. 15 Causes and consequences of sexual and gender-based violence (excerpts);
- No. 16 Suggested readings.

### **Facilitator's notes**

You may summarize the workshop by drawing on the importance of gender sensitivity in the asylum procedures, in order for everyone to get equal opportunities to get an accurate refugee status determination i.e. international protection. If you have done the first and the second module, you may summarize both modules.

Distribute handouts nos. 10, 11, 12, 13, 14 and 15 if the participants did not attend the Module 1 workshop.

Distribute handout no. 16 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 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, by Heaven Crawley. Jordan Publications, London (2001);
- Documents relating to UNHCR's global consultations.

**N.B. If there is enough time** and if you did not mention it when summarizing the first resource guide, you may also want to include in your summary of the workshop references to possible traps when analysing gender-related claims and which one should thus be aware of in order to be able to avoid them.

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

The following is a non-exhaustive list of examples of possible traps during RSD concerning gender-related claims:

- The risk of not recognizing 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 his/her personal details and past experiences, and as regards relevant country of origin information i.e. requiring medical certificate of rape etc.;
- The risk of requiring too many chronological details from him/her regarding his/her experiences, not taking into account possible trauma and how it may influence memory, behaviour etc.;
- The risk of depoliticizing experiences<sup>5</sup> and fear of gender-based violence and discrimination as well as the state's unwillingness or inability to offer effective and durable protection to heterosexual and lesbian, gay, bisexual and transgender (LGBT) persons;
- The risk of not recognizing or of underestimating the risks connected with women's own organised political activity or their family members' political activities;
- 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 requiring from LGBT persons that they deny and hide their sexuality in order to avoid punishment, thus denying them the right to enjoy one of their most fundamental human rights;

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<sup>5</sup> For example not to recognise that transgression of gender discriminatory social norms or laws may also be regarded as an expression of an actual or imputed political opinion.

- The risk of expecting a heterosexual or LGBT person fearing persecution, including gender-based violence and discrimination to turn to the authorities or to seek protection in another part of the country, without making an appropriate reasonability analysis based on the personal circumstances (e.g. 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 men, and the availability of state protection against gender-based violence and discrimination;
- The risk of not reflecting upon the risk of forced marriage etc., particularly in cases of homosexual asylum seekers fearing persecution related to their sexual orientation;
- The risk of expecting a claimant to turn for protection to NGOs, shelters or churches/temples 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.

**APPENDIX: TRAINING MATERIALS**

**POWERPOINT SLIDES  
HANDOUTS  
EXERCISES  
BACKGROUND READINGS**

## **TRAINING MATERIALS NEEDED UNDER EACH WORKSHOP SECTION**

### **INTRODUCTION TO THE WORKSHOP**

WELCOME AND INTRODUCTION TO THE WORKSHOP ON GENDER and PROCEDURAL ISSUES  
*PowerPoint slides nos. 1 and 2*

INTRODUCTION OF THE AGENDA  
*PowerPoint slides nos. 3.1 and 3.2*  
*Handout no. 1*

### **TRAUMA, EVIDENTIARY AND CULTURAL ISSUES**

INTRODUCTION TO THE CASE STUDY EXERCISE ON TRAUMA, EVIDENTIARY AND CULTURAL ISSUES  
– A WOMAN IMPRISONED, RAPED, THREATENED AND DENIED ASYLUM  
*PowerPoint slide nos. 4 and 5*  
*Handouts nos. 2 and 3*  
*Exercises nos. 1 and 2*

### **GENDER SENSITIVITY AND PROCEDURAL ISSUES – AN OVERVIEW**

PRESENTATION ON GENDER SENSITIVITY AND PROCEDURAL ISSUES  
*PowerPoint slides nos. 6.1, 6.2, 6.3 and 6.4*  
*Handouts Nos. 4, 5, 6, and 7*

### **CREDIBILITY ISSUES**

INTRODUCTION TO THE CASE STUDY EXERCISE ON CREDIBILITY ISSUES  
– A WOMAN FACING A REAL RISK OF EXECUTION?  
*PowerPoint slides nos. 7 and 8*  
*Handouts no. 8*  
*Exercises nos. 3, 4 and 5*

### **INTERVIEWING ASYLUM SEEKERS**

INTRODUCTION TO THE ROLE PLAY EXERCISE ON INTERVIEWING ASYLUM SEEKERS  
– A MARRIED COUPLE BEING INTERVIEWED  
*PowerPoint slide no. 9*  
*Exercises nos. 6, 7, 8, 9 and 10*

ANALYSIS OF THE ROLE PLAY  
*Handout no. 9*

### **CONCLUSIONS AND CLOSURE OF THE WORKSHOP**

CONCLUSIONS AND CLOSURE OF THE WORKSHOP  
*Handouts nos. 10, 11, 12, 13, 14, 15 and 16*

## **TRAINING MATERIALS CATEGORIZED BY TYPE OF MATERIAL AND NUMBER**

### **PowerPoint slides:**

- No. 1 Ensuring gender-sensitivity in refugee status determination – procedural issues;
- No. 2 Workshop objectives;
- No. 3.1 Workshop agenda;
- No. 3.2 Agenda cont.;
- No. 4 Case study exercise on trauma etc. – instructions;
- No. 5 Case related procedural issues;
- No. 6.1 Gender-related asylum claims – procedural issues to consider;
- No. 6.2 Procedural issues...cont;
- No. 6.3 Procedural issues...cont;
- No. 6.4 Procedural issues...cont;
- No. 7 Credible or not?
- No. 8 Case study exercise on the issue of credibility – instructions;
- No. 9 Interviewing asylum seekers.

### **Handouts:**

- No. 1 Workshop agenda;
- No. 2 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);
- No. 3 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;
- No. 4 Gender-related asylum claims – procedural issues to consider;
- No. 5 Conducting an interview;
- No. 6 Responding to applicants with a trauma;
- No. 7 Barriers to Communications Press, UNHCR (2003);
- No. 8 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, (2002);
- No. 9 Gender sensitivity and procedural issues in the context of refugee status determination and durable solutions – a checklist, by Maria Bexelius, Consultant, UNHCR (2005);
- No. 10 Gender Sensitivity and the 1951 Refugee Definition - a checklist, by Maria Bexelius, Consultant, UNHCR (2005);
- No. 11 References to UN and other international and regional documents on human rights and the issue of gender-based violence and discrimination, by Maria Bexelius, Consultant, UNHCR, (2005);
- No. 12 The International Human Rights Framework: the link with refugee protection and women's rights, (excerpts), by Rosa da Costa, Legal Consultant, UNHCR, (2002);
- No. 13 Discrimination against Women and Violence against Women in International Law, by Maria Bexelius, Consultant, UNHCR, (2005);
- No. 14 Individuals' human rights and the laws that protect them, by Maria Bexelius, Consultant, UNHCR, (2005);
- No. 15 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 (2003);
- No. 16 Suggested readings.

### **Exercises:**

- No. 1 Case study exercise on trauma, evidentiary and cultural issues;
- No. 2 UNHCR Gender Guidelines (2002) – examples of paragraphs relevant to the case study exercise on trauma, evidentiary and cultural issues;
- No. 3 Group 1. Relevant excerpts from the case – the arguments put forward by the applicant's legal representative before the UN Committee against Torture (CAT);
- No. 4 Group 2. Relevant excerpts from the case – the arguments put forward by the State party before the UN Committee against Torture (CAT);
- No. 5 UN Committee against Torture Communication no. 149/1999;
- No. 6 Role play exercise – instructions to the woman;
- No. 7 Role play exercise – instructions to the man;
- No. 8 Role play exercise – instructions to the RSD worker;
- No. 9 Role play exercise – instructions to the interpreter;
- No. 10 Role play exercise – instructions to the observing audience.

## **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](http://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](http://www.unhcr.ch).

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

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

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

Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997) Available at: [www.unhcr.ch](http://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](http://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](http://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](http://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](http://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](http://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](http://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](http://www.iccl.ie/women/refasyl/guidelines00.html)

##### **South Africa**

Suggested guidelines by NGO called the National Consortium on Refugee Affairs, Gender Guidelines for Asylum Determination (1999). Available at: [www.web.net/~ccr/safr.PDF](http://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](http://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](http://www.migrationsverket.se/english.html)

##### **UK**

Home Office (2004) Asylum Policy Instructions (APIs) ‘Gender Issues in the Asylum Claim’  
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Immigration Appellate Authority, Asylum Gender Guidelines, London 2000  
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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](http://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](http://sierra.uchastings.edu/cgrs/law/guidelines/us.pdf) US Department of State, Gender Guidelines for Overseas Refugee Processing (2000).



**ALL TRAINING MATERIALS INCLUDED IN CHRONOLOGICAL ORDER**

## INTRODUCTION TO THE WORKSHOP

All materials needed:

***PowerPoint slides:***

**No. 1** Gender and procedural issues;

**No. 2** Workshop objectives;

**No. 3.1** Workshop agenda;

**No. 3.2** Agenda cont.

***Handout:***

**No. 1** Workshop agenda.



# **Ensuring Gender-Sensitivity in Refugee Status Determination**

## **– procedural issues**

PowerPoint-slide no. 1

## Workshop objectives



- To review guidelines relevant to gender-related asylum claims, with special focus on procedural issues
- To raise awareness of the more complex procedural issues which may arise in relation to gender-related asylum claims, and to provide some tools to handle these issues

⇒ To fulfill the overall purpose i.e. assisting the participants with tools to avoid common traps and to ensure a refugee status determination that corresponds to international standards.

PowerPoint-slide no. 2

## Workshop agenda



### **Introduction to the Workshop**

- 14.30-14.55 Welcome and introduction to the workshop on gender and procedural issues
- 14.55-15.00 Introduction to the agenda

### **Trauma, Evidentiary and Cultural Issues**

- 15.00-15.40 Introduction to a case study exercise on trauma, evidentiary and cultural issues
- A woman imprisoned, raped, threatened and denied asylum
- 15.40-16.00 Review of the exercise
- 16.00-16.15 Coffee Break

### **Gender Sensitivity & Procedural Issues – an Overview**

- 16.15-16.45 Exercise and presentation on gender sensitivity and procedural issues

PowerPoint-slide no. 3.1

## Agenda cont.



### **Credibility Issues**

- 16.45-17.15 Case study exercise on credibility issues  
- A woman facing a real risk of execution?  
17.15-17.35 Review of the case study exercise

### **Interviewing Asylum-Seekers**

- 17.35-18.00 Introduction to a role play exercise on interviewing  
asylum seekers - A married couple being interviewed  
18.00-18.15 Role play  
18.15-18.30 Analysis of the role play

### **Closure of the Workshop**

- 18.30-18.40 Conclusions and closing of workshop

PowerPoint-slide no. 3.2

## **AGENDA**

### **ENSURING GENDER-SENSITIVITY IN REFUGEE STATUS DETERMINATION – PROCEDURAL ISSUES**

#### **Introduction to the Workshop**

- 14.30-14.55 Welcome and introduction to the workshop on gender and procedural issues
- 14.55-15.00 Introduction to the agenda

#### **Trauma, Evidentiary and Cultural Issues**

- 15.00-15.40 Case study exercise on trauma, evidentiary and cultural issues: A woman imprisoned, raped, threatened and denied asylum
- 15.40-16.00 Review of the exercise
- 16.00-16.15 Coffee Break

#### **Gender Sensitivity and Procedural Issues – an Overview**

- 16.15-16.45 Presentation on gender sensitivity and procedural issues

#### **Credibility Issues**

- 16.45-17.15 Case study exercise on credibility issues: A woman facing a real risk of execution?
- 17.15-17.35 Review of the case study exercise

#### **Interviewing Asylum seekers**

- 17.35-18.00 Role play exercise on interviewing asylum seekers: A married couple being interviewed
- 18.00-18.15 Role play
- 18.15-18.30 Analysis of the role play

#### **Closure of the Workshop**

- 18.30-18.40 Conclusions and closing of workshop

## TRAUMA, EVIDENTIARY AND CULTURAL ISSUES

### All training materials needed:

#### **PowerPoint slides:**

**No. 4** Case study exercise on trauma etc. – instructions;

**No. 5** Case related procedural issues.

#### **Handouts:**

**No. 2:** 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;

**No. 3** Age and gender dimensions in international refugee law.

#### **Exercises:**

**No. 1** Case study exercise on trauma, evidentiary and cultural issues;

**No. 2** UNHCR Gender Guidelines (2002) – examples of paragraphs relevant to the case study exercise on trauma, evidentiary and cultural issues.

### Case study exercise on trauma, cultural issues – instructions



- Read the case and identify relevant procedural aspects to consider in order to ensure a gender-sensitive RSD;
- Choose a group rapporteur

Refer to UNHCR Gender Guidelines (2002) as appropriate

PowerPoint-slide no. 4



## **Case related procedural issues**



- Trauma
- Culture
- Evidence
- Lack of information and lack of confidence
- Lack of knowledge of the reasons for persecution.
- Interviewing
- The sex of interpreter, RSD-worker, legal representative.

PowerPoint-slide no. 5



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**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 recognised 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.<sup>6</sup>

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<sup>6</sup> 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 Execu-

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 unrecognised. 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 been assisted by, developments in international human rights law and standards,<sup>7</sup> 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.<sup>8</sup>
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

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tive 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.

<sup>7</sup> 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.

<sup>8</sup> 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).

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.<sup>9</sup> 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,<sup>10</sup> 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 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.<sup>11</sup> 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,

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<sup>9</sup> See UNHCR's Handbook, paragraph 51.

<sup>10</sup> See below at paragraph 18.

<sup>11</sup> 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.

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 recognised 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.<sup>12</sup>
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 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 persecution<sup>13</sup>**

<sup>12</sup> See UNHCR's *Handbook*, paragraph 54.

<sup>13</sup> 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."

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.<sup>14</sup>

### **Agents of Persecution**

19. There is scope within the refugee definition to recognise 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.<sup>15</sup>

### **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 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 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.<sup>16</sup>

### **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

<sup>14</sup> Trafficking for other purposes could also amount to persecution in a particular case, depending on the circumstances.

<sup>15</sup> See UNHCR's *Handbook*, paragraph 65.

<sup>16</sup> See Summary Conclusions – Gender-Related Persecution, no.6.

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.<sup>17</sup> 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 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”.<sup>18</sup> 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.

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<sup>17</sup> See UNHCR's *Handbook*, paragraph 68.

<sup>18</sup> See UNHCR's *Handbook*, paragraph 74.

## Membership of a Particular Social Group<sup>19</sup>

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.<sup>20</sup> Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.<sup>21</sup> Equally, this definition would encompass homosexuals, transsexuals, or transvestites.
31. The size of the group has sometimes been used as a basis for refusing to recognise '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,<sup>22</sup> or that every member of the group is at risk of persecution.<sup>23</sup> 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.<sup>24</sup>

## 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 as-

<sup>19</sup> 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).

<sup>20</sup> See Summary Conclusions – Gender-Related Persecution, no.5.

<sup>21</sup> 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".

<sup>22</sup> 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).

<sup>23</sup> See Summary Conclusions – Membership of a Particular Social Group, *ibid.*, no.7.

<sup>24</sup> See Summary Conclusions - Membership of a Particular Social Group, *ibid.*, no.6.



sumed 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 recognise 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.

### **III. PROCEDURAL ISSUES<sup>25</sup>**

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.<sup>26</sup>
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.

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<sup>25</sup> 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).

<sup>26</sup> 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).

- 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,<sup>27</sup> 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.
- 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

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<sup>27</sup> 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.

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 recognise a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognise 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.

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<sup>50</sup> \*The views expressed are the personal views of the author, and are not necessarily shared by the UN

**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/txis/vtx/publ/opendoc.pdf?tbl=MEDIAandid=419c74784](http://www.unhcr.ch/cgi-bin/txis/vtx/publ/opendoc.pdf?tbl=MEDIAandid=419c74784)

# **Age and Gender Dimensions in International Refugee law Alice Edwards\***

## **Contents**

### **I. Context**

- A. The Human rights narrative
- B. Recent developments
  - 1. Gender
  - 2. Age

### **II. Age and gender in the refugee definition**

- A. Inclusion
  - 1. Non-State agents of persecution
  - 2. Assessing the well-founded nature of the fear
  - 3. Avoiding persecution
  - 4. 'Particular social group' versus the other grounds
  - 5. Internal flight possibilities
- B. Exclusion
- C. Cessation

### **III. Age and gender in asylum procedures**

### **IV. Conclusion**

### **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'.<sup>50</sup> 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.

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 Convention<sup>51</sup>, 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-à-vis men, on children<sup>52</sup> vis-à-vis adults, and on the elderly vis-à-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.<sup>53</sup>

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'.<sup>54</sup> The writer, however, finds that it is not the normative structure of

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<sup>51</sup> For further information on UNHCR's Global Consultations see the Preface and Part 1.1 of this book.

<sup>52</sup> 'Children' for the purposes of this paper are persons under the age of eighteen years, unless otherwise specified.

<sup>53</sup> 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.

<sup>54</sup> 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.

international law that has marginalized the rights of women, nor the fact that laws tend to be written in gender-neutral language.<sup>55</sup> 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. 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.<sup>56</sup> 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.<sup>57</sup> 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 Protocol<sup>58</sup>, the Declaration on the Elimination of Violence against Women 1993<sup>59</sup>, the Convention on the Rights of the Child 1989<sup>60</sup> and its Optional Protocols on the Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography,<sup>61</sup> the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995<sup>62</sup> and the follow-up 'Beijing Plus 5' Special Session of the General Assembly,<sup>63</sup> and jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda,<sup>64</sup> as well as the Statute of the International Criminal Court.<sup>65</sup>

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<sup>55</sup> Except for specific international treaties directly related to women, such as the Convention on the Elimination of Discrimination against Women 1979.

<sup>56</sup> H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001), p. 18.

<sup>57</sup> T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Dartmouth, 2000), as restated in Crawley, above n. 7, p. 19.

<sup>58</sup> 1249 UNTS 13 and UNGA resolution A/RES/54/4, 6 Oct. 1999.

<sup>59</sup> UNGA resolution 48/104, 20 Dec. 1993.

<sup>60</sup> UNGA resolution 44/25, 20 Nov. 1989 (hereinafter 'CRC').

<sup>61</sup> Both UNGA resolutions 54/263, 25 May 2000; entered into force on 12 Feb. 2002 and 18 Jan. 2002 respectively.

<sup>62</sup> 'Report of the Fourth World Conference on Women, Platform for Action', UN doc. A/CONF.177/20, 17 Oct. 1995.

<sup>63</sup> '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.

<sup>64</sup> 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.

<sup>65</sup> 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

These measures have advanced global trends towards gender inclusion and equal treatment between the sexes, and have given special attention to children.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> 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'.<sup>69</sup> 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'

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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).

<sup>66</sup>There is still a large void in relation to the rights of some other groups, such as the elderly and persons with disabilities.

<sup>67</sup> UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 9.

<sup>68</sup> See, also, P. Goldbert and B. Passade Cissé, 'Gender Issues in Asylum Law after Matter of R.A.', Immigration Briefings, Feb. 2000, p. 1.

<sup>69</sup> 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.



whether or not to do so.<sup>70</sup> 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 members'.<sup>71</sup> 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',<sup>72</sup> and urging that refugee status determination officials be given training regarding the claims of women asylum seekers.<sup>73</sup> 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'.<sup>74</sup> In October 1995, and again in 1996, 1997, and 1999,<sup>75</sup> 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.<sup>76</sup>

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 challenge<sup>77</sup>.

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.<sup>78</sup> 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.<sup>79</sup> These decisions have paralleled developments in

<sup>70</sup> Executive Committee, Conclusion No. 39 (XXXVI), 1985, on refugee women and international protection, para. k.

<sup>71</sup> Executive Committee, Conclusion No. 64 (XLI), 1990, on refugee women and international protection, para. a(iii).

<sup>72</sup> UNHCR, 'Guidelines on the Protection of Refugee Women', Geneva, 1991, para. 4.

<sup>73</sup> *Ibid.*, para. 75.

<sup>74</sup> Executive Committee, Conclusion No. 73 (XLIV), 1993.

<sup>75</sup> See Executive Committee, Conclusions No. 79 (XLVII), 1996, para. o; No. 81 (XLVIII), 1997, para. t; and No. 87 (L), 1999, para. n, respectively.

<sup>76</sup> Executive Committee, Conclusion No. 77 (XLVI), 1995, para. g.

<sup>77</sup> 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.

<sup>78</sup> 'UNHCR Symposium on Gender-Based Persecution, Geneva, 22-23 Feb. 1996', 9 *International Journal of Refugee Law*, special issue, Autumn 1997.

<sup>79</sup> See e.g., *Olympia Lazo-Majano v. Immigration and Naturalization Service*, USCourt of Appeals (9th

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.<sup>80</sup> Similarly, judgments of the international tribunals for the former Yugoslavia and Rwanda confirming enslavement, rape, and torture as crimes against humanity<sup>81</sup> and genocide<sup>82</sup> 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’.<sup>83</sup>

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”<sup>84</sup> has been accepted in numerous jurisdictions.<sup>85</sup> 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,<sup>86</sup> being subjected to

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Circuit), 813 F.2d 1432, 9 June 1987 (El Salvadorean woman raped by sergeant of Salvadorean armed forces, political opinion); *Matter of D.V.*, US Board 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); *Raque! Mart n de Mej ya 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/](http://www.uchastings.edu/cgrs/).

<sup>80</sup> *Aydin v. Turkey*, European Court of Human Rights, Case No. 57/1996/676/866, 25 Sept. 1997.

<sup>81</sup> *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.

<sup>82</sup> *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-96-4-T, 2 Sept. 1998.

<sup>83</sup> 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 in. delity .ee 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).

<sup>84</sup> Executive Committee, Conclusion No. 39, above n. 21.

<sup>85</sup> 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](http://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 r efugi es* (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.

<sup>86</sup> *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000.

treatment contrary to Article 3 of the European Convention on Human Rights,<sup>87</sup> 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 in a number of jurisdictions.<sup>88</sup> 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.<sup>89</sup> A further recent example of gender-related persecution concerns victims of trafficking, who have in some cases also been granted refugee status.<sup>90</sup>

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.<sup>91</sup> 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',<sup>92</sup> although the Executive Committee continued to express its concern about the 'less than full application of international refugee instruments by some States Parties'.<sup>93</sup> In 1998, Norway introduced guidelines on determining refugee status<sup>94</sup> and, two years later, the United Kingdom intro-

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<sup>87</sup> European Convention on the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

<sup>88</sup> See 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).

<sup>89</sup> E. V. Martinez-Orozco, 'Report on Female Genital Mutilation', A5-0285/2001, European Parliament, 17 July 2001, p. 13/32.

<sup>90</sup> See 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 traf.cked 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 traf.cked into prostitution overruled and returned for reconsideration).

<sup>91</sup> See 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).

<sup>92</sup> UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 6. See also, paper by R. Haines, Part 5.1 of this book.

<sup>93</sup> Executive Committee, Conclusion No. 89 (LI), 2000.

<sup>94</sup> Royal Ministry of Justice and the Police, 'Guidelines for Determining Refugee Status in Norway', 15 Jan. 1998.

duced guidelines on gender-sensitive approaches to refugee law and procedures.<sup>95</sup> 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.<sup>96</sup> At the time of writing this paper, 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.<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> 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'.<sup>100</sup> Guatemala refers to sexual violence and other gender-based persecution.<sup>101</sup> 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.<sup>102</sup> 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'.<sup>103</sup> A correct interpretation of the refugee definition does not, however, require that another ground be added.<sup>104</sup> 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.<sup>105</sup> Within

<sup>95</sup> UK Immigration Appellate Authority, 'Asylum Gender Guidelines', Nov. 2000.

<sup>96</sup> Migration 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 which Persecution Based on Given Sexual Orientation is Cited as a Ground', 28 Jan. 2002.

<sup>97</sup> Statement by the Swedish delegate to the final '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.

<sup>98</sup> 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.

<sup>99</sup> 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.

<sup>100</sup> 1998 Asylum Act, Art. 3(2).

<sup>101</sup> Government Accord No. 383-2001, Guatemala, 14 Sept. 2001, Art. 11(d).

<sup>102</sup> Immigration Law, section 60, signed into law by Federal President, June 2002.

<sup>103</sup> Order of the Austrian Ministry of Interior, No. 97.101/10/SL III/95.

<sup>104</sup> 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.

<sup>105</sup> 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.

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 threats of harm.<sup>106</sup> 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,<sup>107</sup> family or domestic violence,<sup>108</sup> infanticide, forced or under-age marriage,<sup>109</sup> female genital mutilation,<sup>110</sup> forced labour, forced prostitution, child pornography, trafficking,<sup>111</sup> and children born outside of strict family planning rules.<sup>112</sup> 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

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<sup>106</sup> UNHCR, 'RefugeeWomen', above n. 56, Parts V and VI.

<sup>107</sup> 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'.

<sup>108</sup> 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).

<sup>109</sup> See *ReW. (Z.D.)*, CRDD No. 3, No. U92-06668, 19 Feb. 1993.

<sup>110</sup> See, by way of comparison, the cases mentioned above n. 39.

<sup>111</sup> See, by way of comparison, the cases mentioned above n. 41.

<sup>112</sup> 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.

systems, although they are reasonably comprehensive in so far as they promote the 'best interests' of the child<sup>113</sup> and identify specific forms of protection issues facing children, including 'physical violence, sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention'.<sup>114</sup> 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',<sup>115</sup> 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.<sup>116</sup> More recently, Finland has adopted guidelines for interviewing (separated) minors.<sup>117</sup> UNHCR has also developed guidelines on unaccompanied children.<sup>118</sup> 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.<sup>119</sup>

## 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*<sup>120</sup> 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.<sup>121</sup> 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,<sup>122</sup> nor the 1984 Cartagena Declaration on Refugees,<sup>123</sup> contains a requirement that the persecutor be the State. In most

<sup>113</sup> See CRC, Art. 3(1).

<sup>114</sup> 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.

<sup>115</sup> Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. i.

<sup>116</sup> 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.

<sup>117</sup> Directorate of Immigration Finland, 'Guidelines for Interviewing (Separated) Minors', March 2002.

<sup>118</sup> 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.

<sup>119</sup> 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.

<sup>120</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992).

<sup>121</sup> *Ibid.*, para. 65.

<sup>122</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 Sept. 1969, 1001 UNTS 45.

<sup>123</sup> Adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico, and Panama, in Cartagena, 19–22 Nov. 1984.

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 harm (the so-called protection view).<sup>124</sup> 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.<sup>125</sup> In contrast, civil law jurisdictions are more divided and tend to require some level of accountability of the State.<sup>126</sup> 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.<sup>127</sup>

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.<sup>128</sup> Most recently, the High Court of Australia in *Khawar* reconfirmed 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'.<sup>129</sup> 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'.<sup>130</sup>

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'.<sup>131</sup> 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.

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<sup>124</sup> 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.

<sup>125</sup> 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).

<sup>126</sup> See, V. T. 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. Malin, 'Non-State Agents of Persecution and the Inability of the State to Protect', 15(3) *Georgetown Immigration Law Journal*, Spring 2001, pp. 415–31.

<sup>127</sup> See the *Adan*, *Horvath* and *Ward* cases, above n. 75.

<sup>128</sup> See the cases listed above n. 34.

<sup>129</sup> *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.

<sup>130</sup> *Khawar*, above n. 34, at para. 30.

<sup>131</sup> 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.

There is no reason why a victim of trafficking,<sup>132</sup> who fears returning home due to the real possibility of being re-trafficked, targeted for reprisals, or threatened with death, should 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.<sup>133</sup>

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'.<sup>134</sup>

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'.<sup>135</sup> 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.<sup>136</sup>

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*,<sup>137</sup> 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

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<sup>132</sup> 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, 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.

<sup>133</sup> 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.

<sup>134</sup> Decision No. 99/20/0497-6, above n. 41 (author's translation).

<sup>135</sup> See, *Dzhygun*, above, n. 41, para. 34.

<sup>136</sup> *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](http://www.uchastings.edu/cgrs/law/ij/364.pdf).

<sup>137</sup> *Shah and Islam*, above n. 34.



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 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.<sup>138</sup>

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.<sup>139</sup>

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]hey may participate directly, as when a child is sold, married, forced into hazardous work or subjected to child abuse or female genital mutilation', or they may 'acquiesce in the abuse, whether through voluntary consent or fear'.<sup>140</sup> 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

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<sup>138</sup> 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.

<sup>139</sup> 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.

<sup>140</sup> Bhabha and Young, above n. 20, pp. 107–8.

standard in order to rebut this presumption.<sup>141</sup> A Canadian case, with age and gender dimensions, demonstrates the difficulties in this regard.<sup>142</sup>

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.<sup>143</sup> 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.<sup>144</sup> 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 im-

<sup>141</sup> See e.g., *Attorney General of Canada v. Ward*, above n. 75.

<sup>142</sup> *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)*, CRDD No. 94, 2001 (France); *D.I.P. (Re)*, CRDD No. 288, 1996 (USA); *G. (B.B.) (Re)*, CRDD No. 397, 1994 (Beirut). In several of these cases, the issue of child abduction was raised, including in relation to persecution and possible exclusion. In *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.

<sup>143</sup> *U.C.R. (Re)*, CRDD No. 94, 2001.

<sup>144</sup> It is arguable that there should even be a higher standard on democratic States to ensure needed protection.

minent. 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.

## 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.'<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup>

## 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.<sup>148</sup> 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'.<sup>149</sup>

<sup>145</sup> Bhabha and Young, above n. 20, p. 104.

<sup>146</sup> Ibid.

<sup>147</sup> These considerations could also apply to the disabled.

<sup>148</sup> 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).

<sup>149</sup> 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, and<sup>149</sup> Bhabha and Young, above n. 20, p. 104.

<sup>149</sup> Ibid.

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,<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> 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

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<sup>149</sup> These considerations could also apply to the disabled.

<sup>149</sup> 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).

<sup>149</sup> 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).

<sup>150</sup> *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.

<sup>151</sup> *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, FCA, above n. 42, paras. 18–35.

<sup>152</sup> *Ibid.*, para. 24.

<sup>153</sup> Case No. IV/IE06244/81, above n. 100.

serious and when they are part of a carefully calculated effort to achieve a political end.<sup>154</sup>

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 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"'.<sup>155</sup>

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?<sup>156</sup> 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?<sup>157</sup>

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'.<sup>158</sup> 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'.<sup>159</sup>

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

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<sup>154</sup> 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.

<sup>155</sup> Crawley, *Refugees and Gender*, above n. 7, p. 21.

<sup>156</sup> 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.'

<sup>157</sup> UNHCRVienna 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.

<sup>158</sup> A. Grahl Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff, Leyden, 1972), p. 220.

<sup>159</sup> 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.

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 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.<sup>160</sup> 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,<sup>161</sup> 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'.<sup>162</sup> 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.<sup>163</sup> The expansion of the refugee definition from the one contained in UNHCR's Statute,<sup>164</sup> 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

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<sup>160</sup> See *Dykorv. 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.

<sup>161</sup> See, Decision No. T-91-04459, *Jorge Alberto Inaudi*, CRDD, 4 April 1992.

<sup>162</sup> See above n. 36.

<sup>163</sup> For an overview, see the paper by Aleinikoff, Part 4.1 of this book.

<sup>164</sup> Statute of the Office of the High Commissioner for Refugees 1950, A/RES /428 (V), 14 Dec. 1950, para. 6(ii).

having 'no basis in fact or reason, as the other grounds are not bound by this question of size'.<sup>165</sup> 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 category, with women being a clear subset defined by innate and immutable characteristics, and who are frequently treated differently to men.'<sup>166</sup>

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,<sup>167</sup> 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' approach<sup>168</sup> 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.<sup>169</sup>

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'.<sup>170</sup> 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*.<sup>171</sup>

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.<sup>172</sup>

## 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

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<sup>165</sup> 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.

<sup>166</sup> 'Summary Conclusions on Gender-Related Persecution', above n. 55, para. 5.

<sup>167</sup> 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.

<sup>168</sup> 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.

<sup>169</sup> See ELENA, 'Research Paper on Sexual Orientation', above n. 42.

<sup>170</sup> See the paper by Aleinikoff, Part 4.1 of this book.

<sup>171</sup> *Khawar* case, above n. 34, para. 33.

<sup>172</sup> *Ibid.*, para. 35.

'presumed' not to be relevant.<sup>173</sup> This is a correct presumption. It is not required that the asylum seeker prove that he or she will be persecuted throughout the country.<sup>174</sup> However, this 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',<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> Hathaway and Foster note that 'cases involving child applicants have stressed the importance of access to education and basic economic subsistence'.<sup>178</sup> 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.<sup>179</sup>

<sup>173</sup> 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.

<sup>174</sup> UNHCR, *Handbook*, above n. 71, para. 91.

<sup>175</sup> Summary Conclusions on IPA/IRA/IFA, above n. 124, para. 2.

<sup>176</sup> E.g. Australia, Austria, Canada, Germany (in some cases), Sweden, the UK, and the USA.

<sup>177</sup> 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.

<sup>178</sup> 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.

<sup>179</sup> *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



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 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.<sup>180</sup> 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*<sup>181</sup> 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.<sup>182</sup> 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'.<sup>183</sup>

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.

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this book.

<sup>180</sup> See Hathaway and Foster, *ibid.*

<sup>181</sup> 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/](http://www.unicef.org/graca/).

<sup>182</sup> G. Machel, *The Impact of War on Children* (Hurst & Co., London, 2001).

<sup>183</sup> See the paper by G. Gilbert, 'Current issues in the application of the exclusion clauses', in Part 7.1 of this book.

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 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,<sup>184</sup> or as away to support their families economically. Child soldiers are used for forced sexual services, as combatants, messengers, porters, or cooks.<sup>185</sup> 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'.<sup>186</sup> 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.<sup>187</sup> 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'.<sup>188</sup> Given the potentially serious consequences of return, the general cessation clauses

<sup>184</sup> Machel, above n. 133, pp. 8–9.

<sup>185</sup> *Ibid.*, p. 7.

<sup>186</sup> 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.

<sup>187</sup> 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.

<sup>188</sup> UNHCR, *Handbook*, above n. 71, para. 136.

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'.<sup>189</sup>

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.<sup>190</sup>

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'.<sup>191</sup> 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

<sup>189</sup> See, UNHCR and UNHCHR, 'Daunting Prospects – Minority Women: Obstacles to their Return and Integration', Sarajevo, Bosnia and Herzegovina, April 2000, p. 16.

<sup>190</sup> Ibid.

<sup>191</sup> UNHCR, 'Guidelines on Gender-Related Persecution', above n. 4, para. 36(iv).

abuse, female genital mutilation, “honour killings”, forced marriage, etc.)’.<sup>192</sup> 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 country 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.<sup>193</sup> 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.<sup>194</sup> This would include at a minimum:

- Unaccompanied and separated children seeking asylum should not be refused access to the territory.<sup>195</sup>
- 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.<sup>196</sup>
- 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.<sup>197</sup>

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<sup>192</sup> Ibid., para. 36(vii).

<sup>193</sup> *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.

<sup>194</sup> CRC, Art. 22.

<sup>195</sup> UNHCR, ‘Guidelines on Unaccompanied Children Seeking Asylum’, 1997, above n. 69, Executive Summary.

<sup>196</sup> 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.

The manner in which a child's rights may be violated may be different from those of adults.<sup>198</sup> 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 asylum seeker, [and] narrow construal of the 'membership of a particular social group' to exclude broad demographic characteristics such as age.<sup>199</sup>

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.<sup>200</sup>

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

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<sup>197</sup> UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, para. 8.6.

<sup>198</sup> *Ibid.*, para. 8.7.

<sup>199</sup> Bhabha and Young, above n. 20, p. 98.

<sup>200</sup> Directorate of Immigration, Finland, 'Guidelines for Interviewing (Separated) Minors', above n. 68.

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 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.

## **TRAUMA, EVIDENTIARY AND CULTURAL ISSUES**

### **THE CASE**

Rebecca is a woman who fled from a country which had been in political unrest for the past few years. Her husband was arrested, suspected of collaborating with the former regime. Two weeks after his arrest, military officers came to her house, beating her, threatening her and trying to pressure her to reveal information (which she didn't have). A few days later they came again and this time they came to arrest her.

At the police station they interrogated her, asking about her husband's activities and threatening to kill her. They were beating her, screaming at her, and flogging her. At night several men came to her cell and raped her, one after the other. She was detained for several weeks, during which she was raped from one to several times a day. She did not know what to expect, as they never told her what would happen. They threatened to kill her, saying that she would meet the same destiny as her husband. Finally, she managed to escape with the help of her uncle who had bribed one of the police men.

She fled abroad and applied for asylum. She told the male RSD officers that she had been beaten in detention, but she felt too ashamed to talk about the rapes she had experienced. Once she intended to touch upon it as the RSD worker asked how she was treated in detention, but she started to cry, which resulted in a break after which nobody asked her again. However, her mental health deteriorated and when she finally came to the psychologist she spoke more openly about her experiences of rape and previous degrading treatment. The psychologist wrote a letter to give the RSD officer a more comprehensive picture of the applicant's claim before the decision would be made. Finally her asylum application was rejected. She was not found credible, partly because there was a discrepancy between the information she had given to the psychologist and that she had given directly to the RSD officers and because there were time laps. Furthermore, in the decision it was explicitly stated that her credibility was also put into question because she did not immediately reveal everything about the abuses to the asylum authorities and because she had not adequately answered the questions about her husband's political activity, which she did not know much about.

### **Instructions:**

Identify procedural issues of relevance for a gender-sensitive asylum procedure.

**UNHCR GENDER GUIDELINES (2002) – EXAMPLES OF PARAGRAPHS RELEVANT TO THE CASE STUDY ON TRAUMA, EVIDENTIARY AND CULTURAL ISSUES<sup>201</sup>**

The following paragraphs in the UNHCR Gender Guidelines (2002) are of specific relevance to this case:

- 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.
- 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.
- Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves,<sup>202</sup> 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.
- 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.
- 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

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<sup>201</sup> Paragraphs cited from 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

<sup>202</sup> 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.



interviewer should allow the claimant to present his/her claim with minimal interruption.

- 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.).
- 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.
- 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.
- 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.
- Mechanisms for referral to psycho-social counselling and other support services should be made available where necessary. Best practice rec-

ommends that trained psycho-social counsellors be available to assist the claimant before and after the interview.

- No documentary proof as such is required in order for the authorities to recognise 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 may 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.

## GENDER SENSITIVITY AND PROCEDURAL ISSUES – AN OVERVIEW

### All training materials needed:

#### **PowerPoint slides:**

- No. 6.1 Gender-related asylum claims – procedural issues to consider;
- No. 6.2 Procedural issues;
- No. 6.3 Procedural issues...cont;
- No. 6.4 Procedural issues...cont.

#### **Handouts:**

- No. 4 Gender-related asylum claims – procedural issues to consider;
- No. 5 Conducting the interview;
- No. 6 Responding to applicants with a trauma;
- No. 7 Barriers to communications.

## Gender-related asylum claims

### - procedural issues to consider



- Ensure separate interviews -without the presence of family members;
- Explain that every person, may have a valid claim in their own right;
- Provide the applicant with information about the RSD process and legal advice in a manner and language s/he understand;
- Inform the applicant of the choice to have RSD-workers and interpreters of the same sex as herself/himself;
- And provide same sex interpreters and RSD-workers are automatically for women claimants;
- Collect country-of-origin information relevant to women's claims;
- Make sure the interview room is arranged to encourage discussion, promote confidentiality and lessen possibility of perceived power imbalances;
- Introduce yourself and the interpreter, and explain the roles of each person as well as the purpose of the interview;

PowerPoint-slide no. 6.1

## Cont.



- Explain the refugee definition to the applicant and the type of questions which will be asked, 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 rights and obligations, inter alia the right to confidentiality
- Remain neutral, compassionate and objective during the interview;
- Avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate;
- In the case of a husband and wife or other family members being interviewed, be careful when trying to clarify contradictory statements;
- Ensure the employment of a gender-sensitive questionnaire;
- Use both 'open-ended' and specific questions as appropriate;

PowerPoint-slide no. 6.2

## Cont.



- Employ the eligibility criteria related to gender-related persecution and ask questions in a manner which encourage women to speak out about their experiences;
- Be aware of gender differences in communication, especially regarding non-verbal communication;
- Ensure minimal interruption while applicant presents his/her claim;
- Be aware that lack of knowledge, or even contradictory answers, on the part of female family members does not mean the entire testimony should be discounted as lacking credibility;
- Second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information;
- Be responsive to the trauma and emotion of claimants and stop an interview where claimant is becoming emotionally distressed;

PowerPoint-slide no.6.3

## Cont.



- Type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility:
- 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, ask discreet and indirect questions and never force him/her to tell about the experiences.
- Recognize that women refugee claimants who have been subject to sexual violence can exhibit a pattern of symptoms as a consequence of the trauma related to gender-based violence, such as rape or domestic violence.
- Be aware 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;
- Be aware that for some cases, it may be appropriate to seek objective psychological or medical evidence;
- Availability of trained psychosocial counsellors before and after interview is recommended.

PowerPoint slide no. 6.4

### **GENDER-RELATED CLAIMS – PROCEDURAL ISSUES TO CONSIDER<sup>203</sup>**

- Separate interviews are ensured -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;
- RSD worker provides the applicant with information about the RSD process and legal advice in a manner and language s/he understand;
- The applicant is informed of the choice to have RSD worker and interpreter of the same sex as herself/himself;
- And same sex interpreters and RSD workers are provided 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 interviewer 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;
- Country of origin information relevant to women's claims is collected and it is ensured that the interviewer has the adequate gender training and does preparations accordingly;
- 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;
- RSD worker and interpreter should be aware and responsive to cultural or religious sensitivities or other personal factors (gender, age, education);
- An open and reassuring environment is provided;

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<sup>203</sup> This handout 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. This handout 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.

- Interview room is arranged to encourage discussion, promote confidentiality and lessen the possibility of perceived power imbalances;
- RSD worker introduces him/herself and the interpreter, and explains roles of each person as well as purpose of interview;
- RSD worker explains the refugee definition to the applicant and the type of questions which will be asked, including questions relating to gender roles in the family, community and the state as well as opinions on the same;
- RSD worker reminds the applicant of his or her rights and obligations, *inter alia* the right to confidentiality, the right to counsel, the right and obligation to give evidence, the obligation to be truthful;
- RSD worker reassures the applicant of confidentiality (including with regard to members of their own family);
- RSD worker explains that he/she is not a trauma counsellor;
- RSD worker remains neutral, compassionate and objective during the interview;
- RSD worker avoids body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate;
- RSD worker is 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);
- RSD worker ensures minimal interruption while applicant presents her claim;
- RSD worker employs the eligibility criteria related to gender-related persecution and asks questions in a manner which encourages women to speak out about their experiences, *inter alia*:
  - is aware of and adapts questions to the fact that some women may not associate themselves with politics and they may not label as torture or ill-treatment the forms of gender-based violence they have experienced in the country of origin;
  - ensures the employment of a gender-sensitive questionnaire.
- Both open-ended and specific questions are used as appropriate;
- RSD worker should be aware that lack of knowledge, or even contradictory answers, on the part of female family members does not mean the entire testimony should be discounted as lacking credibility;

- Second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information;
- RSD worker should be responsive to the trauma and emotion of claimants and stop an interview where claimant is becoming emotionally distressed;
- If RSD worker suspects 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 interviewer is available to assist her once she is ready to talk about the problem. There is no need to dwell in detail on the sexual abuse;
- Type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility: cultural differences and trauma play an important and complex role in determining behaviour;
- RSD worker recognizes that women refugee claimants who have been subject to sexual violence can exhibit a pattern of symptoms as a consequence of the trauma related to gender-based violence, such as rape or domestic violence. 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 suffered domestic violence may be reluctant to speak about such incidents. 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;
- RSD worker is aware 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;
- In the case of a husband and wife or other family members being interviewed, the interviewer should be careful when trying to clarify contradictory statements. In general, the interviewer should be cautious if confronting an applicant concerning statements made by another family member in order to avoid adding to the already tense and difficult situation the family may be experiencing;
- For some cases, it may be appropriate to seek objective psychological or medical evidence;
- Mechanisms for referral to psychosocial counselling and other support services should be made available where necessary;
- Availability of trained psychosocial counsellors before and after the interview is recommended.



## CONDUCTING THE INTERVIEW<sup>204</sup>

The purpose of the interview is to uncover the facts and to provide a picture of events that is as complete and as objective as possible. As an RSD worker, there are two pitfalls to avoid: appearing judgmental or aloof or being overly sympathetic.

### 1. OPENING THE INTERVIEW

The way you open the interview will set the tone for the rest of the proceedings. The message you must convey to the applicant from the outset is that you are there to hear his or her story in a totally neutral way and that as a representative of your organization you are concerned and respectful of his or her distress, but you work within a legal framework which imposes certain specific conditions when it comes to eligibility for refugee status.

#### Putting the applicant at ease

Take care to show courtesy and respect by:

- smiling and shaking hands (or some other appropriate gesture of greeting);
- using the applicant's family name (having already made sure that you know how to pronounce it correctly);
- introducing yourself;
- if the interview is not on time, apologizing for the delay;
- asking if the applicant is prepared to be interviewed.

#### Introducing the interpreter

- Introduce the interpreter;
- Explain his or her role;
- Check that the applicant and the interpreter understand one other. (Invite the applicant to talk informally for a few moments with the interpreter, then ask if he or she is satisfied that they understand each other);
- In the case of women applicants, at this stage every effort should already have been made to use a female interpreter and RSD worker. This is especially important for claims that may involve aspects of sexual and other forms of gender-based violence;
- In the case of children applicants, age sensitivity is important and you should for example arrange to have a trusted adult accompany the child during the interview.

#### Reviewing basic personal information

You should already have read the applicant's basic data or registration form. However, you may find it necessary to go over certain points to make sure that the information you have is accurate and complete.

#### Asking about the applicant mental and physical health and identifying needs

Ask the applicant how s/he feels presently (e.g. try to find out whether s/he has slept well, eaten, feel nervous, afraid etc.), but also how s/he has generally felt since she arrived in the country and applied for asylum. Try to find out what medical, legal, social and other forms of assistance s/he may have received already and what needs (e.g. psychosocial) she might have during and after the interview.

#### Informing the applicant about your experiences and the possibility to take breaks

Inform the applicant that you meet a lot of asylum seekers and thus understand that it sometimes can be very hard to share the 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.

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<sup>204</sup> This handout is compiled by Maria Bexelius, Consultant, UNHCR, 2005. It is largely reproduced from the training document "Interviewing applicants for refugee status, UNHCR Training module R2D4, 1995.

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.

### **Providing some background explanations**

Before commencing the interview the applicant must be provided with certain information. This can be done by giving written information to the applicant during an earlier contact with your office, or by providing it orally before starting the interview. In either case, the following information should be explained to the applicant:

- the applicable refugee definition;
- the procedures followed with respect to the determination of refugee status.

It is particularly important for the applicant to understand that the following questions must be established:

- Does the applicant fear harm amounting to persecution?
- Is this fear well-founded?
- If the persecutor is a non-state actor, is the state unwilling or unable to provide effective or durable protection?
- Is the persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or for reasons defined in the OAU Convention or Cartagena Declaration definition of a refugee?

S/he must understand that persecution from both state and non-state actors, such as the family, husband, or armed political groups, can form the basis of a claim qualifying for refugee status.

Explain that this is why many of the questions that will be asked during the interview will concern:

- the conditions that exist in the country of origin, and more especially in the region where the applicant comes from;
- what kind of difficulties the applicant, members of his or her family, or similarly situated persons have experienced in the past;
- what difficulties might be expected if he or she were to return to that country and why these difficulties will arise;
- her experiences, thoughts, and feelings as to gender-roles in the family, society and the state.

Mention that some answers to questions may appear very self-evident for the applicant, and explain that you will still have to ask some of those questions in order to understand the point of view of the applicant and to avoid unnecessary misunderstandings. Also mention that you might even ask questions which not only appear self-evident to the applicant, but also to you;

Before proceeding, make sure that the applicant has understood the purpose of the interview, and of the questions you will be asking.

### **Reminding the applicant of his or her rights and obligations**

Having by now explained your role as interviewer, it is important to outline the applicant's own rights and obligations. These mainly include:

- The right to confidentiality. Reassure the applicant that none of the information he or she will reveal to you will be shared with the authorities of the country of origin, or with any other third party without the applicant's express consent. You should reassure the applicant that both you and the interpreter will respect the confidentiality of the interview and are under oath to do so. This reassurance is indispensable in order that the applicant may feel that it is safe to talk openly about past experiences and events;
- The right to counsel. [...] Where national legislation provides for the participation of legal and/or other counsel to assist an applicant in presenting his or her claim, it is essential to allow such counsel to participate in the interview. The presence of a legal representative or other counsel who is familiar with the refugee criteria and local jurisprudence and the applicant's claim, is helpful not only to the applicant but also to the interviewer;
- The right and obligation to give evidence. The granting of refugee status depends upon the facts provided by the applicant. Only he or she can provide these facts. As an interviewer you have a vital role to play in helping and encouraging the applicant to bring to light the relevant details of

his or her past experience and to present them convincingly. In order to substantiate the claim, and thereby assist the applicant, the interviewer may need to obtain supporting documentation such as newspaper articles, witness accounts or human rights reports. It is the duty of the interviewer to assist the applicant by drawing his or her attention to the importance of providing all available evidence in support of his or her claim to refugee status. However, the interview is for the applicant. Although the person conducting the interview should be in control, you should recall that the interview process is an opportunity for the applicant to present his or her claim. One way to help you and the applicant identify the main aspects of the claim is to have the applicant submit a short written statement. This statement can then be used as a preparatory tool before the substantive interview begins;

- The obligation to be truthful. Tell the applicant that giving an honest, open testimony is in his or her best interest. The applicant may have been told by others that the chances for recognition are greater if the story is told in a certain way. As an interviewer you must be aware of such realities. It is your job to impress upon the applicant that the case must be based on true experiences and not on false information.

### **Explaining the process**

Tell the applicant how long you expect the interview to last, whether you plan any breaks, and how the questions will be asked. Having explained the preceding steps 1 through 5, you should ask the applicant whether anything remains unclear and requires further explanation. Once everything has been well understood the interview can proceed.

## **2. CLOSING THE INTERVIEW**

When it comes to closing the interview, this brief checklist can help tie up loose ends:

- Have you asked the applicant if he or she has anything to add?
- Have you advised the applicant of what will happen following the interview? 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).
- Have you 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?
- Have you thanked the interpreter and given the applicant the opportunity to do likewise?

## **3. THE MAIN PART OF THE INTERVIEW**

The purpose of the various steps suggested above is to establish a degree of confidence on the part of the applicant. Your task throughout the interview will be to build on this confidence, remaining vigilant for any signs of incomprehension or tension that may arise and seeking to dispel them at once. To maintain confidence is a crucial for your possibility to obtain as much information as possible from the applicant, and consequently for your possibility to make a correct risk assessment. There are both verbal and non-verbal issues to consider in the course of making an interview.

### **NON-VERBAL ISSUES**

#### **Eye contact**

With the exception of certain cultures, where eye contact can have another meaning, maintaining a steady and friendly visual expression and keeping eye contact with the applicant suggests that you are paying careful attention to what is being said. Avoid reading papers while the applicant is speaking. If you need to check on a document, wait until there is a pause. Eye contact should be with the applicant, not with the interpreter. Ask your questions directly to the asylum seeker and not through the interpreter.

### **Body posture**

Like eye contact, the physical position you adopt can communicate your interest in what the applicant is saying. Be natural, attentive and relaxed. Keep your movements and facial expressions as neutral as possible. This will encourage the applicant to communicate. Don't slouch or move about in your chair, put your feet on the interviewing table, look out of the window. Do not make any gestures (such as shaking your head or rolling your eyes towards the ceiling) that suggest that you do not agree with or believe the story being told.

## **VERBAL ISSUES**

### **Asking questions in a friendly manner and not too quickly**

Ask your questions in a friendly manner and not too quickly. Allow the asylum seeker adequate time to present his or her story as freely as possible. Although you may have a large number of cases to review, avoid pushing an applicant to come more quickly to the main point of the testimony as he or she may be about to reveal an important and relevant detail.

### **Using a questionnaire or question checklist with flexibility**

Questions should lead on naturally rather than be drawn from a list you have prepared in advance. An interview questionnaire or question checklist will alert you to the essential elements which should be covered during the interview, including gender-sensitive issues. However, do not confine yourself to a pre-set format or list of questions as this will unduly restrict the flow and scope of the interview.

### **Modulating the voice and pacing the questions to suit the characteristics of the applicant**

Everyone has a way of speaking which varies according to such factors as speed, tone and rhythm. In order to put the applicant more at ease, and thereby encourage him or her to communicate, you should try to modulate your voice and pace your questions to suit the particular characteristics of the applicant.

### **Being prepared to ask follow-up questions**

Throughout the interview you should be prepared to follow-up with questions on all relevant issues which are raised by the applicant. No reply or issue should be left in doubt when you finish the interview. This requires that you remain alert and intellectually active during the interview process.

#### **Example**

A claimant has testified that she was arrested while attempting to distribute leaflets and was detained for three months. In order to clarify this statement you could follow-up with questions such as:

- Why were you detained?
- How were you treated while in detention?
- Were you ever charged with an offence?
- Did you have any contact with your family while in detention?
- Can you describe the place where you were being detained?

Following-up with these questions will provide an opportunity to obtain additional relevant information from the applicant. Such questions will also show that you are concerned and interested in learning about what happened.

### **Being attentive during silences**

Allow the applicant time to think, especially after a general or open question (see below). Avoid the temptation to break the silence by adding a restricted question which may elicit a quick response, but may also prevent the applicant from revealing the full importance a specific event had for him or her.

#### **Example**

**Interviewer:** What happened to you after the military seized power?  
Silence

**Interviewer:** Were you ever interrogated or arrested?

A preferable approach, if the silence is too long, is to re-formulate the general question.

**Interviewer:** What happened to you after the military seized power?  
Silence

**Interviewer:** You mentioned earlier that your troubles began when the military overthrew the government. Could you tell me about some of the difficulties you experienced?

Silence from the interviewer (provided it suggests that he or she is interested and awaiting the rest of the story) may encourage the applicant to talk. It gives time to consider a question carefully and can help the applicant recall past events. Considerable non-verbal communication also occurs during such pauses, to which you must be attentive.

Avoid introducing a new question before the applicant has finished replying to the previous question. Give encouragement even if there are hesitations or silences. Nod and quietly prompt with phrases such as "...and then?" and "I understand..." or repeat a few key words from the previous response.

#### Example

**Applicant:** When I heard they were looking for me I didn't know what to do. I was afraid to go back to my house or to my job... (pause)

**Interviewer:** You were frightened...

**Applicant:** Every day people disappear... Sometimes their bodies are found and sometimes they just disappear... (pause)

**Interviewer:** I understand...

**Applicant:** I went to my friend's house. When I told him what had happened, he said that it was very dangerous for me to stay in the city. That is when I decided to leave.

**Interviewer:** And then what did you do...

By using this approach the applicant is reassured that the interviewer is listening carefully. The interviewer is perceived as encouraging, but remains neutral without taking a position either for or against the applicant's story. In this way the applicant is more likely to want to communicate further information.

#### Using open questions

An open question is one that asks for general information and cannot be answered by yes or no. It is used to gather information on personal opinions and reactions, and is therefore most appropriate at the beginning of an interview. By using open questions, the interviewer provides the applicant the opportunity to relate events in his or her own way.

#### Examples

- What made you decide to leave your country?
- How did your life change after the war?
- Please describe any difficulties you have had with the authorities in your country?
- What happened when the Government changed?
- What kind of problems may you have if you are sent back to your country and what could, in your opinion, be the reasons for why this would occur to you?
- When did the problems with your husband/father/family begin, what kind of things happened, what feelings did you have, what thoughts came to your mind and how did you respond to the problems?

Open questions can help give the interviewer to get a greater understanding of the background to the applicant's problems and unwillingness to return to his or her country of origin. Open questions are also used to encourage the applicant to talk more openly on an important topic.

#### Example

**Applicant:** I didn't want to get into trouble with the authorities so I stopped going to the meetings. But it made no difference. I knew they were still going to get me.

**Interviewer:** Could you help me understand why you felt that way?

This type of question is likely to elicit more important information.

Open questions can be time-consuming. If the applicant is nervous, emotionally upset, or has misunderstood the type of information you are seeking he or she may become confused and talk at length about irrelevant details. If this occurs the interviewer must gain control of the interview by politely intervening and changing the line of questioning. When asking open questions you must also take into account the education level and cultural background of the applicant in order to assess whether he or she is capable of providing clear and relevant information in response to your questions.

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; it is the responsibility of the RSD worker to conduct the interview in a manner which cover these issues and enable the applicant to talk as freely as possible about his/her experiences, including experiences of gender-based violence and discrimination as well as of non-conventional forms of political activities.

### Using closed questions

A closed question calls for a short response, usually yes, no, or a simple statement of fact. Try to avoid closed questions unless you make follow-up questions to get clarifications. Closed questions serve to fill in information that is not clear from the applicant's story, particularly when there are contradictory details.

#### Examples

- Where were you detained? How were you treated in prison?
- What did the prison authorities do to you?
- How big was your cell?
- Were you alone in the cell?
- You said that you hid with your brother but on your basic data form you have indicated that your only brother lives abroad. How many brothers do you have?
- When did you leave your country and when did you arrive here?
- Who paid for your voyage?
- Did you have a visa to enter this country?

### Alternating between open and closed questions

Alternating between open and closed questions will help to reduce tension as the applicant will be able to express him or herself more freely during the interview. It will also help avoid making the applicant feel that you are deliberately pursuing confusing or contradictory points. Keep your questions short and uncomplicated. Don't ask a string of questions that will leave the applicant feeling confused. Don't interrogate as in a cross-examination, or use a harsh tone of voice when asking your questions. Don't treat discrepancies or omissions as if they are automatically indicative of an applicant lack of credibility; be aware that you may have misunderstood the applicant or s/he may have omitted information because of her difficulties to speak with anyone, and especially a law enforcement personnel, about traumatising experiences she has gone through in the past.

#### Example

An RSD worker says: "When you applied for your visa, you said you had a good job and could only take a two-week holiday. You did not mention any problems with the authorities or with your husband. At the airport, you said you had no relatives in this country but your brother is also a refugee applicant, isn't he? Now you tell me you will be persecuted if you are sent back home. You lied to get your visa and you lied at the airport. Why should I believe you now?"

Such type of questions should not be asked. Considering the prevailing difficulties to obtain visas if a person is at risk of human rights violations, and the fact that many countries would reject a visa application to a person who has a well-founded fear of persecution, the statements made in a visa application should generally not be held against the applicant.

#### Example

- An applicant states that she was detained for the last six months of 2002 but her passport was issued in October of that year.

Do not automatically take this as indicative of her lacking in credibility. This discrepancy may be due to a confusion of dates, or to the fact that the passport was obtained by a relative or friend (perhaps using a bribe).

**Example**

- An applicant testifies that her brother was arrested for taking part in a student strike and is still in detention. Her basic data form indicates that the applicant's only brother is living in the United States.

Do not automatically take this as indicative of her lacking in credibility. The use of the word "brother" may have a specific cultural meaning. Alternatively, the interpreter might simply have forgotten to add the second brother's name to the form.

**Example**

- An applicant claims to have taken refuge at a friend's house for fear of being arrested. However, he also declares that he continued to go to work each day at the same job.

In order to understand how he could continue to go to work, ask a neutral question such as: Weren't you frightened of being arrested at work or followed to your hiding place? This will encourage the applicant to provide additional explanations. It may well be that he consciously took the risk of going to his work place since he could not afford to leave the country at that time, and his main concern was to remain as long as possible for the safety of his family.

**Example**

- An applicant, fearing her abusive husband and relatives, claims that she was hiding at a friend's house for two months before the travel was arranged through the assistance of the friend and a supportive relative.

Do not take for granted that this means that she could be safe if returned and that she could live at her friend's or supportive relative's house. Remember that she must be sure to get effective and durable protection. Instead of questioning her credibility, encourage her to tell you about the thoughts and feelings she had at that time regarding her situation and what life options she had to choose between at that time.

**Example**

- An applicant, fearing her abusive father and relatives, claims that she did neither turn to any women organisations or other NGOs for help, nor did she report the threats and abuses to the police.

Do not take this information as indicative that she would probably get state protection and that she may even get support from NGOs. Remember that a reasonability analysis must be made with regard to the availability of state protection and she may have reason to believe that that authorities would not assist her in case submitted a report. Also remember that women organisations and other NGOs can never replace the responsibility of the state to give effective and durable protection from human rights abuses. Instead of questioning her credibility, encourage her to tell you about the thoughts and feelings she had at that time concerning her situation, fear and what options for the future she considered herself having at that point of time.

**Example**

- An applicant states he received the first death threat in March, and then received them every two or three weeks. In May someone tried to run him over with a truck, yet he only left the country the following February.

In order to better understand his experiences, you may ask him "You must have been very frightened. What did you think about your alternative ways of escaping death? When did you decide that the best alternative was to leave the country?" A question such as this will invite additional information. On the other hand, a direct question such as "Why did you take so long before deciding to leave?" may well create a guarded, defensive reaction and deprive you of the explanations you are seeking.

There may be situations when the RSD worker needs to pose confronting questions as a means of clarifying that are confusing or appear contradictory. Confronting is a complex skill requiring tact, patience and the ability to convince the applicant of the need to look objectively at his or her testimony and dispel any unclear points or contradictions. Avoid at all costs adopting a critical or judgmental attitude since this will destroy the atmosphere of confidence you have tried so patiently to establish.

If you are faced with contradictory or unclear statements allow the applicant the opportunity to provide an explanation. One technique you could use is to put the blame on yourself and say for example: "I'm sorry, I may have misunderstood you, can we check that part of your story together as I do not want to make any mistakes". In this way you can avoid making the applicant feel uneasy or nervous.

Another method is to try to reformulate your questions. You should recall that due to cultural differences, the translation provided, health problems, or lack of attention, the applicant may have misunderstood what was being asked, In such a case, the applicant may more readily understand your questions if they are reformulated or asked in another way.

Throughout the interview, avoid phrasing your questions in a judgmental way. This will intimidate the applicant and block or distort communication. Be positive in your approach. Use phrases such as "Could you explain... ?" or "You seem to be saying...".

If after going over a part of the story the inconsistencies remain, do not push the applicant to provide an explanation. If you cannot confirm or obtain satisfactory explanations at that stage of the interview, drop it, you can always return to that point at a later time. Remember that second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. Be alert as there may be something that the applicant does not want, or is unable, to tell you, such as traumatic experiences of torture, including sexual or other forms of gender-based violence.

Remember that the type and level of emotion displayed during the recounting of the applicant's experiences should not affect a 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.

#### **Being responsive to trauma**

Be responsive to the trauma and emotion of applicant and stop an interview where he/she is becoming emotionally distressed. Mechanisms for referral to psychosocial counselling and other support services should be made available where necessary.

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.



## **INTERVIEWING APPLICANTS WHO HAVE SUFFERED TRAUMA<sup>205</sup>**

- Experiences of torture and sexual abuse are not readily reported;
- The intense feelings of powerlessness, shame and guilt and the acute disruption of life, in which the beliefs of a person about the meaning of life are lost, compel people to hide them;
- The coping process is characterised by an alternating pattern of re-experience and denial of the traumatic events, with all associated psychological responses;
- A traumatised person (especially a survivor of torture, including sexual and other forms of gender-based violence) has often difficulties to explain their asylum claim in a coherent, chronological, detailed way and a non-trained RSD worker might thus wrongly question the applicant's credibility and/or eligibility for refugee status;
- In many cases, ex-detainees, victims of torture including various forms of gender-based violence, are usually very reluctant to speak about their experiences. It is of great importance to recognise that the empathetic way of conducting an interview will to a great extent determine the quality of the disclosure of violent acts.

### **Detecting Traumatised Persons**

Be especially attentive for signs of possible trauma in the following categories of persons:

- individuals who present the physical stigma of torture, e.g. women who have suffered rape. The presence of such stigma is indicative of the nature and extent of torture;
- soldiers and ex-soldiers;
- known POWs or detainees;
- inhabitants of town or village subjected to organised violence;
- members of a specifically persecuted group (ethnic, religious, political, etc.).

### **Trauma Symptoms**

In general the consequences of the trauma of extreme violence can be very diverse. They can be looked at as being part of several categories:

- Recurrent Memory Phenomena (flashbacks, nightmares, intrusive thoughts);
- Hyper-arousal (sleeping problems, irritability, aggressiveness, concentration problems);
- Somatic Symptoms (fatigue, gastrointestinal complaints, cardiac symptoms, headaches, diffuse aches and pains, muscular and joint problems, sexual dysfunction);
- Anxiety reactions (panic attacks, generalised anxiety affecting physical, sexual, mental and social functioning);
- Sadness/Grief (depressed mood, loss of interest in previously pleasurable activities, loss of appetite, suicidal thoughts);

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<sup>205</sup> This handout is compiled by Maria Bexelius, Consultant, UNHCR, 2005. It is largely based upon UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence (1998), and it is also inspired by the UNHCR Gender Guidelines (2002), and UK Gender Guidelines (2000).

- Avoidance of situations which remind the victim of traumatic experiences (including talking about it);
- Phobias;
- Emotional numbness (disconnected from family, friends and loved ones, self-medication, etc.);
- Body numbness (frigidity, not feeling one's own body, feeling body changes, feeling like outside one's own body, feeling possessed).

### **How do I Respond to a Person Suffering from Trauma?**

Simply acknowledging and inquiring about the realities of a refugee's experience has therapeutic value.

- Be prepared;
- Brief the interpreter, if you know in advance about particularly sensitive information;
- Explain your function and that of the interpreter so that they know what to expect from you and during the interview;
- Remain calm and neutral, but be an empathetic listener and show sensitivity;
- remain professional and in control at all times.

#### **Also**

- Acknowledge how difficult it may be to speak about certain events;
- Acknowledge the pain, wounds or other suffering they may share with you- DO NOT SIMPLY IGNORE these revelations;
- Reassure them, tell them to take their time;
- Offer them a break, a glass of water, a tissue;
- To extent possible, do not interrupt them when they are telling their story; it may have taken a lot of courage to get to this point, and they may not be able to regain it and resume their account;
- If they show signs of distress, ask them how they feel, if they would like to take a break or even proceed again the next day;
- 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);
- Let them know you are not a psychologist;
- Refer them to someone who can provide them with psychosocial, medical assistance and other support services. If possible give them the specific name of a person that they can ask for (it is less impersonal);
- For some cases, it may be appropriate to seek objective psychological or medical evidence;
- Be familiar with practical protection measures for preventing and responding to sexual violence (including recognising symptoms of PTSD and other signs);
- Have the applicant see a trained psychosocial counsellor before and after the interview;
- Seek immediate assistance for the person if you believe they may pose a danger to themselves or to others.

#### **Further readings:**

- The UNHCR Guidelines on Sexual Violence Against Refugees (1995)
- UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence (1998)
- UNHCR Guidelines on Gender-Related Persecution (2002)
- WHO Guidelines for medico-legal care for victims of sexual violence (2003)
- WHO ethical and safety recommendations for interviewing trafficked women (2003)
- UK Gender Guidelines (2000)

## **BARRIERS TO COMMUNICATION<sup>206</sup>**

Interviewing applicants for refugee status has another dimension than interviewing in other contexts since so much is at stake. A successful outcome can mean a new start and fresh hope for the applicant and his or her family, while a negative result may spell despair and danger. This knowledge places a heavy responsibility upon the RSD worker. Good communication during the interview is key in order to make a correct risk assessment. It is thus essential that s/he has knowledge of common barriers to communication and has tools which can be used to overcome these.

### **The effects of trauma**

- A person who has undergone a physical or mental shock may be particularly reluctant to re-live the emotions by relating events from which he or she has suffered, as this may be the case when something reminds him/her of the events. The unwillingness to talk may or may not be conscious. In more extreme cases, past experiences have been suppressed from the conscious mind. It is not unusual for an applicant to break down and become incapable of coherent expression, or be able to remember only certain events from his or her past;
- Forgetfulness affects us all and is one of the major obstacles in remembering events. For persons seeking asylum, dates, locations, distances, events, and even significant personal experiences can be forgotten or blurred due to mental shock or lapse of time;
- Omissions, inconsistencies or inaccuracies on the part of the applicant do not necessarily mean dishonesty, but are a common and frequently seen characteristic in persons who have experienced traumatic events, e.g. survivors of torture and ill-treatment, including sexual and other forms of gender-based violence. The chronological order of events may be particularly difficult to reconstruct. Often the applicant remembers the events that affected him or her most in emotional or physical terms while retaining little of the time sequence.

### **Fear to share information**

An asylum seeker, having left his or her country through fear of persecution, is likely to carry this anguish with him or herself for some time. It may manifest itself in a number of ways, such as:

- fear of persons in authority (particularly those in uniform);
- fear of putting relatives or friends in danger in the country-of-origin;
- fear of the interview process;
- fear of the consequences if the application is rejected;
- fear of the interpreter or RSD worker breaching the confidentiality agreement;
- fear of the perpetrator(s) who threatened the applicant while requiring silence.

### **Loss of self-esteem**

The applicant may seek to withhold information which he or she believes will lower the respect of others towards him or herself. In this context, gender, cultural and societal expectations are factors to be considered. For example, a man may find it hard to admit to having experienced fear or to having been obliged to leave his wife and children unprotected. A woman who has been subjected to sexual violence may feel such shame and guilt that she cannot think of telling her family, friends or unknown persons about her suffering. A woman who has left her children may also be reluctant to talk about that immediately.

### **Culture shock**

Persons who move from one culture to another, especially if this implies a move from a less developed to a more developed environment, may experience bewilderment and anxiety. This in turn can affect their ability to make a clear and coherent statement. The asylum seeker may speak in a confused and unconvincing manner not because he or she is lying,

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<sup>206</sup> This handout is compiled by Maria Bexelius, Consultant, UNHCR, 2005. It is largely reproduced from the training document "Interviewing applicants for refugee status, UNHCR Training module R2D4, (1995).

but because of the insecurity and anxiety caused by the difficulties of life in a new social and cultural environment. Unfamiliarity with the style of question-and-answer interview may be another factor which inhibits communication.

### **Disparities of notions and concepts**

Quite common words can carry different meanings from one culture to another and be a source of misunderstanding. This problem can have serious repercussions for an asylum seeker.

#### **Example**

A Turkish asylum seeker, applying for refugee status in Switzerland, stated that he had escaped arrest by hiding in the *mountains* near his home town. The application was rejected. Among the reasons given was the fact that the town was situated amid *hills*. For the Swiss interviewer there were no mountains in the region and thus the applicant was considered to be not credible. However, in Turkish, the term "mountain" also applies to hilly regions. Other common words that can give rise to misunderstanding include *brother* and *cousin*. For many Africans, for example, these words are not limited to close relatives but extend to all members of the tribe. Notions of *time*, of *truth* and *falsehood* can also vary from culture to culture and give rise to misunderstandings that put the asylum seekers' credibility in doubt. Women may not label as *torture* or *persecution* their experiences of gender-based violence, including rape, and they may claim that they have not been involved in any *political* activities just because they do not themselves consider non-conventional forms of politics being political. Consequently, the risk of persecution may be underestimated.

### **What can you do to overcome these barriers?**

- Be aware of your responsibilities at all times. Never forget that an unfair decision can have serious consequences for the applicant;
- Ensure that you receive adequate training focusing on torture, including sexual and other forms of gender-based violence, and possible social, psychological, legal and other consequences thereof in order to make a correct risk assessment and respond adequately on the needs of an applicant who is traumatised;
- Provide particular attention for those refugee claimants who may be victims of torture or sexual violence or, due to their age or disability, require special care when being interviewed;
- Be aware that an applicant may have a mental or emotional disturbance which impedes a normal examination of his or her case. If it is considered that an applicant may have such a condition you should seek medical advice concerning the health of the applicant;
- If you detect symptoms of trauma, try to avoid adding to the trauma by doing the following:
  - make sure the room does not resemble a court room;
  - avoid having persons in uniform;
  - if the applicant is agitated or nervous try to pose your questions in a relaxed manner;
  - reassure the applicant that you are trying to help and can best do so if your questions are answered directly and truthfully;
  - inform the applicant of the possibility to take pauses, to continue in his/her own tempo and to meet with a trauma counsellor during and after the interview.
- In order to support the information received during the interview, use whatever documentary evidence is available (documents received from the applicant, newspaper and human rights reports, medical reports, etc.);
- Reassure the applicant that any information provided will be kept strictly confidential. Clarify the role of the interpreter and inform the applicant that the interpreter is under oath to maintain the confidentiality of the interview proceedings;
- Always remain neutral. Refrain from posing questions that appear judgmental such as, for example: How could you leave the country without your family? or How could you leave your children with a stranger?;
- A number of additional factors which can affect the applicant-interviewer, and applicant-interpreter, relationships are as follows: compatibility of age, gender, social class, education, race, beliefs, political and social values or disabilities. Throughout the interview you should be aware of these factors and how they may affect or complicate communication with the applicant. You should also brief the interpreter concerning these issues;
- If it is not possible to continue and finish the interview, schedule an appointment for a new interview.

## CREDIBILITY ISSUES

### All training materials needed:

#### ***PowerPoint slides:***

No. 7 Credible or not?

No. 8 Case study exercise on the issue of credibility – instructions.

#### ***Handout:***


No. 8 Common burdens and standards: legal elements in assessing claims to refugee status.

#### ***Exercises:***

No. 3 Group 1. Relevant excerpts from the case – the arguments put forward by the applicant's legal representative before the UN Committee against Torture (CAT);

No. 4 Group 2. Relevant excerpts from the case – the arguments put forward by the State party before the UN Committee against Torture (CAT);

No. 5 UN Committee against Torture Communication no. 149/1999.



**Credible or not?**

**The assessment of credibility**

PowerPoint-slide no. 7

## **Case study exercise**

### **- instructions**



- Discuss the case and identify possible procedural problems (relating to the issue of credibility)
- Prepare to argue in favour of a grant/denial of refugee status (focusing on the credibility issue)
- Choose a group rapporteur.

PowerPoint-slide no. 8

**COMMON BURDENS AND STANDARDS:  
LEGAL ELEMENTS IN ASSESSING CLAIMS TO REFUGEE STATUS**

by Brian Gorlick

The article is included in the [Legal and Protection Policy Research Series](#)  
"New Issues in Refugee Research", UNHCR, Working Paper No. 68, October 2002

The article is available on the UNHCR website: [www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RESEARCH&id=3db7c5a94&page=research](http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RESEARCH&id=3db7c5a94&page=research)

## 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 mechanisms<sup>207</sup>. 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 standards<sup>208</sup>, first and foremost, and by

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\* Regional Protection Officer, UNHCR Regional Office for the Baltic and Nordic Countries, Stockholm. The views expressed in this article are those of the author and do not necessarily reflect those of the United Nations or UNHCR.

<sup>207</sup> 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.

<sup>208</sup> 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](http://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 Union<sup>209</sup>.

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 recognised 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 recognised by some courts<sup>210</sup> 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 law<sup>211</sup>.

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.

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

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*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)

<sup>209</sup> 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 and 14)

<sup>210</sup> 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)

<sup>211</sup> 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.

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".<sup>212</sup>

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 persecuted<sup>213</sup>, 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 recognise 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 recognised.<sup>214</sup>

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 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".<sup>215</sup> The following discussion will look more closely at what is meant by evidentiary terms used in refugee law.

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<sup>212</sup> 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.

<sup>213</sup> 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.

<sup>214</sup> Hathaway above.

<sup>215</sup> *Ibid.*

## 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 intimate 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 co-operate 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.<sup>216</sup> Seeking and referring to such information 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

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<sup>216</sup> 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: [www.unhcr.ch/refworld/refworld.htm](http://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.

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.<sup>217</sup>

The Resolution on Minimum Guarantees for Asylum Procedures<sup>218</sup> 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”.<sup>219</sup>

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<sup>217</sup> ‘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 REF WORLD CD-ROM.

<sup>218</sup> 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.

<sup>219</sup> ‘UNHCR Overview’, above.

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.<sup>220</sup> 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.

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.<sup>221</sup> 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

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<sup>220</sup> 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 summarised 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](http://www.irb.gc.ca)

<sup>221</sup> See 'Separated Children in Europe Programme: Statement of Good Practice', (2<sup>nd</sup> ed, 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](http://www.irb.gc.ca).

to recall certain events; and capacity to communicate intelligibly or in a form capable of being rendered intelligible.<sup>222</sup> 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)<sup>223</sup>

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.<sup>224</sup>

### 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

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<sup>222</sup> 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)

<sup>223</sup> 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.

<sup>224</sup> 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 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.

[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 recognised. 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 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.<sup>225</sup>

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<sup>225</sup> 'UNHCR Overview', at 34-35.

In the UK House of Lords decision of Sivakumaran<sup>226</sup>, 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 probabilities<sup>227</sup>. The test for well-foundedness was further clarified by the Canadian Federal Court of Appeal in the case of Ponniah<sup>228</sup>, where Mr Justice Desjardins stated that:

'Good grounds' or 'reasonable chance' (of persecution) is defined in Adjei<sup>229</sup> 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.

The US Supreme Court has also articulated the test of well-foundedness in the leading case of *INS v Cardoza-Fonseca*<sup>230</sup>, 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<sup>231</sup>. (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

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<sup>226</sup> *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 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."

<sup>227</sup> 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 recognised in most jurisdictions involved in individual refugee determination.*" (emphasis added), in Goodwin-Gill, G.S., *The Refugee in International Law* (1996), at 39.

<sup>228</sup> *Ponniah, Manoharan v MEI* (Federal Court of Appeal, No. A-345-89), Heald, Hugessen, Desjardins, 16 May 1991, reported in 13 Imm. Law Reports (2<sup>nd</sup>) 241 (FCA), at 245.

<sup>229</sup> *Joseph Adjei v Minister of Employment and Immigration* (1989), 57 Dominion Law Reports (DLR) (4<sup>th</sup>) 153.

<sup>230</sup> 467 U.S. 407 (1987); also see *INS v Stevic* 467 US (1984)

<sup>231</sup> *Ibid* (*Cardoza-Fonseca*), at 453, per Stevens J.



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".<sup>232</sup>

By comparison, the Nordic countries appear to place a relatively high standard of proof on the applicant. It must be recognised 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%.<sup>233</sup> 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.<sup>234</sup>

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 veracity 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.<sup>235</sup> The flexibility which the decision-maker must

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<sup>232</sup> 'UNHCR Overview' above at 35.

<sup>233</sup> *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](http://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).

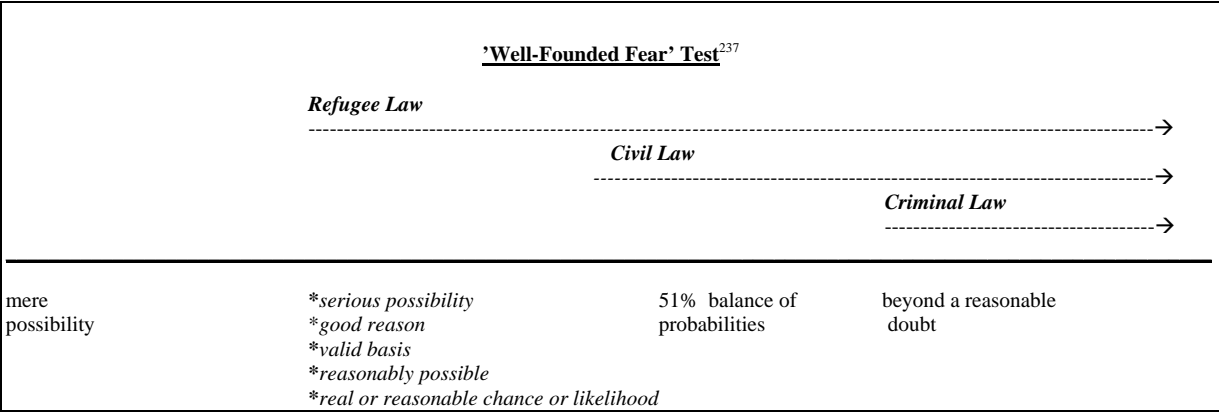
<sup>234</sup> The Deputy Director-General of the Swedish Aliens Appeals Board has written that: "Common law countries seem to apply a standard [of proof] below the concept "balance of probabilities", while countries like Sweden applies a standard that is above the "balance of probabilities". I believe, 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.

<sup>235</sup> 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:

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 persecution<sup>236</sup>. The following illustration portrays these different standards:



**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 docu-

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“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.  
<sup>236</sup> 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)

<sup>237</sup> 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.

mentation; the professed inability of the applicant to name the transit countries through which he or she has travelled.<sup>238</sup>

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.<sup>239</sup> 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.

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

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<sup>238</sup> 'UNHCR Overview', above at 35.

<sup>239</sup> 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.

against Torture<sup>240</sup> 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.<sup>241</sup> 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 Convention<sup>242</sup> than under article 33 of the 1951 Refugee Convention<sup>243</sup>, the decision of the Committee in the case of an Iranian asylum seeking woman is particularly instructive<sup>244</sup>.

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 seek-

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<sup>240</sup> 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.

<sup>241</sup> 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.

<sup>242</sup> 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)

<sup>243</sup> 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.

<sup>244</sup> 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](http://www.unhchr.ch)

ing 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 subjected 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 communication<sup>245</sup>. 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

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<sup>245</sup> 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](http://europa.eu.int/eur-lex))

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 UNHCR<sup>246</sup>. 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 torture<sup>247</sup>. In 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.

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<sup>246</sup> 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 and 61/98 of 28 August 1998, at para 1.9, on file with the author).

<sup>247</sup> 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:

“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 and 16.4)

**CASE STUDY EXERCISE – CREDIBILITY – GROUP 1**  
**“HER LEGAL REPRESENTATIVE”**

Sima is 45 years old. She has never been politically active in her home country. In 1981, her husband, who was a high-ranking officer in the State Air Force, was killed during training in circumstances that remain unclear; it has never been possible to determine whether his death was an accident. According to the applicant, she and her husband belonged to secular-minded families opposed to the regime of the mullahs.

In 1991, the Government declared the applicant's late husband a martyr. The applicant states that martyrdom is an issue of utmost importance for the religious people in her home country. All families of martyrs are supported and supervised by a foundation, the Committee of Martyrs, which constitutes a powerful authority in the society. Thus, while the applicant and her two sons' material living conditions and status rose considerably, she had to submit to the rigid rules of Islamic society even more conscientiously than before. One of the aims of the Committee of Martyrs was to convince the martyrs' widows to remarry, which the applicant refused to do.

At the end of 1996 one of the high-ranking leaders of the Committee, finally forced the applicant to marry him by threatening to harm her and her children, the younger of whom is handicapped. The religious person was a powerful man with the law on his side. The applicant claims that she was forced into a so-called sighe or mutah marriage, which is a short-term marriage, in the present case stipulated for a period of one and a half years, and is recognized legally only by some religious people. The applicant was not expected to live with her sighe husband, but to be at his disposal for sexual services whenever required.

In 1997, the applicant met and fell in love with a Christian man. The two met in secret, since Muslim women are not allowed to have relationships with Christians. One night, when the applicant could not find a taxi, the man drove her home in his car. At a roadblock they were stopped by the religious police who searched the car. When it became clear that the man was Christian and the applicant a martyr's widow, both were taken into custody at a police station in the X district of the capital city. According to the applicant, she has not seen the man since, but claims that since her arrival in Country of asylum she has learned that he confessed under torture to adultery and was imprisoned and sentenced to death by stoning.

The applicant says that she was harshly questioned by the Zeinab sisters, the female equivalents of the Religious police who investigate women suspected of "un-Islamic behaviour", and was informed that her case had been transmitted to the Revolutionary Court. When it was discovered that the applicant was not only a martyr's widow but also the sighe wife of a powerful ayatollah, the Religious police contacted him. The applicant was taken to the ayatollah's home where she was severely beaten by him for five or six hours. After two days the applicant was al-

lowed to leave and the ayatollah used his influence to stop the case from being sent to the Revolutionary Court.

The applicant states that prior to these events she had, after certain difficulties obtained a visa to visit her sister-in-law in another country. The trip was to take place the day after she left the home of the ayatollah. According to the information submitted, the applicant had planned to continue from the country of asylum to Canada where she and her lover hoped to be able to emigrate since he had family there, including a son. She left her home country with her younger son on a valid passport and the visa previously obtained, without difficulty.

The applicant and her son arrived in country of asylum on 23 December 1997 and applied for asylum on 29 December 1997. The Immigration Board rejected the applicant 's asylum claim on 13 July 1998. On 29 October 1999, the Aliens Appeal Board dismissed her appeal.

The applicant submits that since her departure from her home country, she has been sentenced to death by stoning for adultery. Her sister-in-law in the country of asylum has been contacted by the ayatollah who told her that the applicant had been convicted. She was also told that the authorities had found films and photographs of the couple in the Christian man's apartment, which had been used as evidence.

The applicant draws the attention of the Committee to a report from the Embassy in her home country which states that chapter I of the hudud law "deals with adultery, including whoring, and incest, satisfactory evidence of which is a confession repeated four times or testimony by four righteous men with the alternative of three men and two women, all of whom must be eyewitnesses. Capital punishment follows in cases of incest and other specified cases, e.g. when the adulterer is a non-Muslim and the abused a Muslim woman. Stoning is called for when the adulterer is married". The report further underlines that even if these strict rules of evidence are not met, the applicant can still be sentenced to death under the criminal law, where the rules of evidence are more flexible.

The applicant further draws the attention of the Committee to documentation submitted to the immigration authorities to support her claim, including a certificate testifying to her status as the wife of a martyr. She also includes a medical certificate from X Hospital indicating that she suffers from anxiety, insomnia, suicidal thoughts and a strong fear for her personal safety if she were returned to her home country. The certificate states that the applicant has symptoms of post-traumatic stress syndrome combined with clinical depression.

The applicant claims that there exist substantial grounds to believe that she would be subjected to torture if she were returned to her country-of-origin. Her forced return would therefore constitute a violation by country of asylum of article 3 of the Convention. Furthermore, the applicant submits that there is a consistent pattern of gross human rights violations in the country-of-origin, circumstances that should be taken into account when deciding on expulsion.



**CASE STUDY EXERCISE – CREDIBILITY – GROUP 2**  
**“RSD WORKER/THE STATE”**

The State party is aware of human rights violations taking place in X, including extrajudicial and summary executions, disappearances, as well as widespread use of torture and other degrading treatment.

As regards its assessment of whether or not the author would be personally at risk of being subjected to torture if returned to X, the State party draws the attention of the Committee to the fact that several of the provisions of the Y Aliens Act reflect the same principle as the one laid down in article 3, paragraph 1 of the Convention. The State party recalls the jurisprudence of the Committee according to which, for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. The State party further refers to the Committee's general comment on the implementation of article 3 of the Convention which states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, although the risk does not have to meet the test of being highly probable.

The State party recalls that the author of the present communication has not belonged to any political organization and has not been politically active in her home country. The author asserts that she has been sentenced to stoning by a Revolutionary Court in X, a judgement which she maintains would be enforced if she were to be sent back there. The State party states that it relies on the evaluation of the facts and evidence and the assessment of the author's credibility made by the Y Immigration Board and the Aliens Appeal Board upon their examination of the author's claim.

In its decision of 13 July 1998, the Y Immigration Board noted that apart from giving the names of her sighe husband and her Christian friend, the author had in several respects failed to submit verifiable information such as telephone numbers, addresses and names of her Christian friend's family members. The Immigration Board found it unlikely that the author claimed to have no knowledge of her Christian friend's exact home address and noted in this context that the author did not even want to submit her own home address in X

4.7. The Immigration Board further noted that the author during the initial inquiry had stated that a Pasdaran friend had given her photographs of people in the prison who had been tortured, which she had requested "out of curiosity" and which she gave to her Christian friend although she "didn't know" what he wanted them for. The Immigration Board judged that the information provided by the author in relation to this incident lacked credibility and seemed tailored so as not to reveal verifiable details.

Finally, the Immigration Board questioned the credibility of the author's account of her marriage to the ayatollah, her relationship with the Christian man and the problems that had emerged as a result of it.

In its decision of 29 October 1999, the Aliens Appeal Board agreed with the assessment of the Immigration Board. The Board further referred to the travaux préparatoires of the 1989 Aliens Act which state that the assessment of an asylum-seeker's claim should be based on the applicant's statements if his/her assertions of persecution seem plausible and the actual facts cannot be elucidated. The Board noted that the author had chosen to base her application for asylum on her own statements only and that she had not submitted any written evidence in support of her claim, despite the fact that she had been told of the importance of doing so.

In addition to the decisions of the Immigration Board and the Aliens Appeal Board, the State party refers to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, according to which "the applicant should: (i) tell the truth and assist the examiner to the full in establishing the facts of his case, [and] (ii) make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence". According to the UNHCR Handbook, the applicant should be given the benefit of the doubt, but only when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility.

In the present case, the State party first reminds the Committee that the author has refused to provide verifiable information and that her reasons for doing so, i.e. that she was forbidden by her friend to do so and that new tenants are now occupying her apartment in Tehran, are not plausible.

Second, the State party maintains that it seems unlikely that the author, solely out of curiosity, would want to have photographs of tortured people in her possession. It seems even more unlikely that she would hand over such photographs to someone she had known only for a few months. Further, the State party notes that although the author claims that the authorities in Iran are in possession of a film showing her last meeting with her friend, no additional information has been provided by the author on this issue.

A third reason for doubting the author's credibility is that the author has not submitted any judgement or other evidence to support her claim that she has been sentenced for adultery by a Revolutionary Court. In addition, the author has not given any explanation as to why her sister-in-law was not able to obtain a copy of the Revolutionary Court's judgement when she visited Iran. Further, the State party notes that according to information available to it, the Revolutionary Courts in X have jurisdiction over political and religious crimes, but not over crimes such as adultery. Hudud crimes, i.e. crimes against God, including adultery, are dealt with by ordinary courts.

The State party further draws to the attention of the Committee that the author left the capital city without any problems only a few days after the incident which allegedly led to her detention, which would indicate that she was of no interest to the X authorities at the moment of her departure. In addition, the author has claimed that she handed over her passport to her brother-in-law upon arrival in Y. However, the State party notes that her passport number is indicated on her asylum application which she submitted six days later. The explanation for this given by the author's counsel during the national asylum procedure, i.e. that the num-

ber might have been available from an earlier visit in Y by the author in 1996, is unlikely. There is nothing in the author's file that indicates that documents concerning her earlier visit to Y were available during the asylum application procedure.

The State party also draws the Committee's attention to the fact that the author has not cited any medical report in support of her statement that she was severely beaten by her "temporary husband" only a few days before her arrival in Y. In addition, according to information received by the State party, the head of the Bonyad-e Shahid was, until April 1999, H M R but he does not hold the title of ayatollah.

4.16. Finally, the State party adds that when the author's sister-in-law applied for asylum in Y in 1987, she stated that her brother, the author's late husband, had died in a flying accident in 1981 caused by a technical fault. Ten years later, the author's brother-in-law and his family also applied for asylum and claimed that the author's husband had been killed for being critical of the regime and that he and his family would therefore be in danger of persecution if returned to X. The brother-in-law and his family were returned to X in November 1999 and the State party submits that it has not received any information indicating that they have been mistreated.

On the basis of the above, the State party maintains that the author's credibility can be questioned, that she has not presented any evidence in support of her claim and that she should therefore not be given the benefit of the doubt. In conclusion, the State party considers that the enforcement of the expulsion order to Iran would, under the present circumstances, not constitute a violation of article 3 of the Convention.

UNITED  
NATIONS

CAT



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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***Communication No 149/1999 : Sweden. 15/02/2001.  
CAT/C/25/D/149/1999. (Jurisprudence)***

Convention Abbreviation: CAT  
Committee Against Torture

Twenty-fifth session

13 - 24 November 2000

ANNEX

Views of the Committee Against Torture under article 22 of the  
Convention against Torture and Other Cruel,  
Inhuman or Degrading Treatment or Punishment

- Twenty-fifth session -

Communication No 149/1999

Submitted by: A. S. (name withheld) (represented by counsel]

Alleged victim: The author

State party: Sweden

Date of communication: 6 November 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 24 November 2000,

Having concluded its consideration of communication No. 149/1999, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 22, paragraph 7, of the Convention.

1.1. The author of the communication is A. S., an Iranian citizen currently residing with her son in Sweden, where she is seeking refugee status. The author and her son arrived in Sweden on 23 December 1997 and applied for asylum on 29 December 1997. Ms. S. claims that she would risk torture and execution upon return to the Islamic Republic of Iran and that her forced return to that country would therefore constitute a violation by Sweden of article 3 of the Convention. The author is represented by counsel.

1.2. In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted communication No. 149/1999 to the State party on 12 November 1999. Pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, the State party was requested not to expel the author to Iran pending the consideration of her case by the Committee. In a submission dated 12 January 2000 the State party informed the Committee that the author would not be expelled to her country of origin while her communication was under consideration by the Committee.

### **The facts as presented by the author**

2.1. The author submits that she has never been politically active in Iran. In 1981, her husband, who was a high-ranking officer in the Iranian Air Force, was killed during training in circumstances that remain unclear; it has never been possible to determine whether his death was an accident. According to the author, she and her husband belonged to secular-minded families opposed to the regime of the mullahs.

2.2. In 1991, the Government of the Islamic Republic of Iran declared the author's late husband a martyr. The author states that martyrdom is an issue of utmost importance for the Shia Muslims in Iran. All families of martyrs are supported and supervised by a foundation, the Bonyad-e Shahid, the Committee of Martyrs, which constitutes a powerful authority in Iranian society. Thus, while the author and her two sons' material living conditions and status rose considerably, she had to submit to the rigid rules of Islamic society even more conscientiously than before. One of the aims of Bonyad-e Shahid was to convince the martyrs' widows to remarry, which the author refused to do.

2.3. At the end of 1996 one of the leaders of the Bonyad-e Shahid, the high-ranking Ayatollah Rahimian, finally forced the author to marry him by threatening to harm her and her children, the younger of whom is handicapped. The Ayatollah was a powerful man with the law on his side. The author claims that she was forced into a so-called sighe or mutah marriage, which is a short-term marriage, in the present case stipulated for a

period of one and a half years, and is recognized legally only by Shia Muslims. The author was not expected to live with her sighe husband, but to be at his disposal for sexual services whenever required.

2.4. In 1997, the author met and fell in love with a Christian man. The two met in secret, since Muslim women are not allowed to have relationships with Christians. One night, when the author could not find a taxi, the man drove her home in his car. At a roadblock they were stopped by the Pasdaran (Iranian Revolutionary Guards), who searched the car. When it became clear that the man was Christian and the author a martyr's widow, both were taken into custody at Ozghol police station in the Lavison district of Tehran. According to the author, she has not seen the man since, but claims that since her arrival in Sweden she has learned that he confessed under torture to adultery and was imprisoned and sentenced to death by stoning.

2.5. The author says that she was harshly questioned by the Zeinab sisters, the female equivalents of the Pasdaran who investigate women suspected of "un-Islamic behaviour", and was informed that her case had been transmitted to the Revolutionary Court. When it was discovered that the author was not only a martyr's widow but also the sighe wife of a powerful ayatollah, the Pasdaran contacted him. The author was taken to the ayatollah's home where she was severely beaten by him for five or six hours. After two days the author was allowed to leave and the ayatollah used his influence to stop the case being sent to the Revolutionary Court.

2.6. The author states that prior to these events she had, after certain difficulties obtained a visa to visit her sister-in-law in Sweden. The trip was to take place the day after she left the home of the ayatollah. According to the information submitted, the author had planned to continue from Sweden to Canada where she and her lover hoped to be able to emigrate since he had family there, including a son. She left Iran with her younger son on a valid passport and the visa previously obtained, without difficulty.

2.7. The author and her son arrived in Sweden on 23 December 1997 and applied for asylum on 29 December 1997. The Swedish Immigration Board rejected the author's asylum claim on 13 July 1998. On 29 October 1999, the Aliens Appeal Board dismissed her appeal.

2.8. The author submits that since her departure from Iran she has been sentenced to death by stoning for adultery. Her sister-in-law in Sweden has been contacted by the ayatollah who told her that the author had been convicted. She was also told that the authorities had found films and photographs of the couple in the Christian man's apartment, which had been used as evidence.

2.9. The author draws the attention of the Committee to a report from the Swedish Embassy in Iran which states that chapter I of the Iranian hudud law "deals with adultery, including whoring, and incest, satisfactory evidence of which is a confession repeated four times or testimony by four righteous men with the alternative of three men and two women, all of whom must be eyewitnesses. Capital punishment follows in cases of incest and other specified cases, e.g. when the adulterer is a non-Muslim and the abused a Muslim woman. Stoning is called for when the adulterer is married". The report further underlines that even if these strict rules of evi-

dence are not met, the author can still be sentenced to death under the criminal law, where the rules of evidence are more flexible.

2.10. The author further draws the attention of the Committee to documentation submitted to the Swedish immigration authorities to support her claim, including a certificate testifying to her status as the wife of a martyr. She also includes a medical certificate from Kungälv's Psychiatric Hospital indicating that she suffers from anxiety, insomnia, suicidal thoughts and a strong fear for her personal safety if she were returned to Iran. The certificate states that the author has symptoms of post-traumatic stress syndrome combined with clinical depression.

### **The complaint**

3.1. The author claims that there exist substantial grounds to believe that she would be subjected to torture if she were returned to Iran. Her forced return would therefore constitute a violation by Sweden of article 3 of the Convention. Furthermore, the author submits that there is a consistent pattern of gross human rights violations in Iran, circumstances that should be taken into account when deciding on expulsion.

### **The State party's observations on admissibility and merits**

4.1. In its submission of 24 January 2000, the State party submits that it is not aware of the present matter having been or being the object of any other procedure of international investigation or settlement. As to the admissibility of the communication, the State party further explains that according to the Swedish Aliens Act, the author may at any time lodge a new application for a residence permit with the Aliens Appeal Board, based on new factual circumstances which have not previously been examined. Finally, the State party contends that the communication is inadmissible as incompatible with the provisions of the Convention, and lacking the necessary substantiation.

4.2. As to the merits of the communication, the State party explains that when determining whether article 3 of the Convention applies, the following considerations are relevant; (a) the general situation of human rights in the receiving country, although the existence of a consistent pattern of gross, flagrant or mass violations of human rights is not in itself determinative; and (b) the personal risk of the individual concerned of being subjected to torture in the country to which he/she would be returned.

4.3. The State party is aware of human rights violations taking place in Iran, including extrajudicial and summary executions, disappearances, as well as widespread use of torture and other degrading treatment.

4.4. As regards its assessment of whether or not the author would be personally at risk of being subjected to torture if returned to Iran, the State party draws the attention of the Committee to the fact that several of the provisions of the Swedish Aliens Act reflect the same principle as the one laid down in article 3, paragraph 1 of the Convention. The State party recalls the jurisprudence of the Committee according to which, for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. The State party further refers to the Committee's general comment on the implementation of article 3 of the Convention which states that the

risk of torture must be assessed on grounds that go beyond mere theory or suspicion, although the risk does not have to meet the test of being highly probable.

4.5. The State party recalls that the author of the present communication has not belonged to any political organization and has not been politically active in her home country. The author asserts that she has been sentenced to stoning by a Revolutionary Court in Iran, a judgement which she maintains would be enforced if she were to be sent back there. The State party states that it relies on the evaluation of the facts and evidence and the assessment of the author's credibility made by the Swedish Immigration Board and the Aliens Appeal Board upon their examination of the author's claim.

4.6. In its decision of 13 July 1998, the Swedish Immigration Board noted that apart from giving the names of her sighe husband and her Christian friend, the author had in several respects failed to submit verifiable information such as telephone numbers, addresses and names of her Christian friend's family members. The Immigration Board found it unlikely that the author claimed to have no knowledge of her Christian friend's exact home address and noted in this context that the author did not even want to submit her own home address in Iran.

4.7. The Immigration Board further noted that the author during the initial inquiry had stated that a Pasdaran friend had given her photographs of people in the Evin prison who had been tortured, which she had requested "out of curiosity" and which she gave to her Christian friend although she "didn't know" what he wanted them for. The Immigration Board judged that the information provided by the author in relation to this incident lacked credibility and seemed tailored so as not to reveal verifiable details.

4.8. Finally, the Immigration Board questioned the credibility of the author's account of her marriage to the ayatollah, her relationship with the Christian man and the problems that had emerged as a result of it.

4.9. In its decision of 29 October 1999, the Aliens Appeal Board agreed with the assessment of the Immigration Board. The Board further referred to the travaux préparatoires of the 1989 Aliens Act which state that the assessment of an asylum-seeker's claim should be based on the applicant's statements if his/her assertions of persecution seem plausible and the actual facts cannot be elucidated. The Board noted that the author had chosen to base her application for asylum on her own statements only and that she had not submitted any written evidence in support of her claim, despite the fact that she had been told of the importance of doing so.

4.10. In addition to the decisions of the Immigration Board and the Aliens Appeal Board, the State party refers to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, according to which "the applicant should: (i) (t)ell the truth and assist the examiner to the full in establishing the facts of his case, [and] (ii) (m)ake an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence". According to the UNHCR Handbook, the applicant should be given the benefit of the doubt, but only when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility.



4.11. In the present case, the State party first reminds the Committee that the author has refused to provide verifiable information and that her reasons for doing so, i.e. that she was forbidden by her friend to do so and that new tenants are now occupying her apartment in Tehran, are not plausible.

4.12. Second, the State party maintains that it seems unlikely that the author, solely out of curiosity, would want to have photographs of tortured people in her possession. It seems even more unlikely that she would hand over such photographs to someone she had known only for a few months. Further, the State party notes that although the author claims that the authorities in Iran are in possession of a film showing her last meeting with her friend, no additional information has been provided by the author on this issue.

4.13. A third reason for doubting the author's credibility is that the author has not submitted any judgement or other evidence to support her claim that she has been sentenced for adultery by a Revolutionary Court. In addition, the author has not given any explanation as to why her sister-in-law was not able to obtain a copy of the Revolutionary Court's judgement when she visited Iran. Further, the State party notes that according to information available to it, the Revolutionary Courts in Iran have jurisdiction over political and religious crimes, but not over crimes such as adultery. Hudud crimes, i.e. crimes against God, including adultery, are dealt with by ordinary courts.

4.14. The State party further draws to the attention of the Committee that the author left Tehran without any problems only a few days after the incident which allegedly led to her detention, which would indicate that she was of no interest to the Iranian authorities at the moment of her departure. In addition, the author has claimed that she handed over her passport to her brother-in-law upon arrival in Sweden. However, the State party notes that her passport number is indicated on her asylum application which she submitted six days later. The explanation for this given by the author's counsel during the national asylum procedure, i.e. that the number might have been available from an earlier visit in Sweden by the author in 1996, is unlikely. There is nothing in the author's file that indicates that documents concerning her earlier visit to Sweden were available during the asylum application procedure.

4.15. The State party also draws the Committee's attention to the fact that the author has not cited any medical report in support of her statement that she was severely beaten by Ayatollah Rahimian only a few days before her arrival in Sweden. In addition, according to information received by the State party, the head of the Bonyad-e Shahid was, until April 1999, Hojatoleslam Mohammad Rahimian, but he does not hold the title of ayatollah.

4.16. Finally, the State party adds that when the author's sister-in-law applied for asylum in Sweden in 1987, she stated that her brother, the author's late husband, had died in a flying accident in 1981 caused by a technical fault. Ten years later, the author's brother-in-law and his family also applied for asylum and claimed that the author's husband had been killed for being critical of the regime and that he and his family would therefore be in danger of persecution if returned to Iran. The brother-in-law and his family were returned to Iran in November 1999 and the State

party submits that it has not received any information indicating that they have been mistreated.

4.17. On the basis of the above, the State party maintains that the author's credibility can be questioned, that she has not presented any evidence in support of her claim and that she should therefore not be given the benefit of the doubt. In conclusion, the State party considers that the enforcement of the expulsion order to Iran would, under the present circumstances, not constitute a violation of article 3 of the Convention.

### **Counsel's comments**

5.1. In her submissions dated 4 February and 6 March 2000, counsel disputes the arguments of the State party regarding the failure of the author to submit written evidence. Counsel states that the author has provided the only written evidence she could possibly obtain, i.e. her identity papers and documentation showing that she is the widow of a martyr. Counsel states that the ayatollah conducted the sighe or mutah wedding himself with no witnesses or written contract. As to her failure to provide the immigration authorities with a written court verdict, counsel submits that the author only has second-hand information about the verdict, as it was passed after her departure from Iran. She cannot, therefore, submit a written verdict. Counsel further disputes that the author's sister-in-law should have been able to obtain a copy of the verdict while visiting Iran. She further states that the author's sister-in-law long ago ended all contacts with the author because she strongly resents the fact that the author has had a relationship with any man after the death of her husband.

5.2. Counsel acknowledges that crimes such as adultery are handled by ordinary courts. However, she draws the attention of the Committee to the fact that the jurisdictional rules are not as strict in Iran as for example in the State party and that the prosecuting judge can choose the court. In addition, for a martyr's widow to ride alone with a Christian man in his car would probably fall under the heading of "un-islamic behaviour" and as such come under the jurisdiction of the Revolutionary Court. Even if this were not the case, counsel reminds the Committee that the author has only been informed that she has been sentenced to death by stoning by a court. Not being a lawyer, and in view of what she was told during her interrogation by the Zeinab sisters, the author assumes that the sentence was handed down by the Revolutionary Court and this assumption should not be taken as a reason for questioning the general veracity of her claim.

5.3. Counsel states that the author has given credible explanations for not being able or not wishing to provide the Swedish authorities with certain addresses and telephone numbers. Firstly, she had promised for the sake of security not to give her lover's telephone number to anyone and does not wish to break her promise even at the request of the immigration authorities. The Christian man always contacted the author on her mobile phone which he had given her for that purpose alone. The author left the mobile phone in Iran when she departed and as she never called her number herself or gave it to anyone, she cannot remember it. Further, counsel states that the address which is indicated on the author's visa application used to be her home address, but the author has repeatedly explained that new tenants are now living there and that she does not want to subject them to any difficulties caused by inquiries from the Swedish authorities.

Finally, counsel stresses that the author has given detailed information about the neighbourhood, Aghdasiye, where her lover lived and that she has repeatedly underlined that she never knew the exact address since she always went to her secret meetings first by taxi to Meydon-e-Nobonyad where she was picked up by a car that brought her to the Christian man's home. Finally, all the author ever knew about the Christian man's relatives was that he had one sister and one brother living in United Kingdom and a son from a previous marriage living in Canada. She never met them and never asked their names.

5.4. Counsel underlines that the fact that the Swedish authorities do not find the author's explanations credible is a result of speculation based on the supposition that all people behave and think according to Swedish or Western standards. The authorities do not take into account the prevailing cautiousness in Iran with respect to giving personal information, particularly to public officials.

5.5. With reference to the photographs of victims of torture which the author claims to have handed over to her lover, counsel submits that this fact in no way diminishes the author's credibility. The couple were engaged in a serious relationship and intended to marry and there was no reason for the author not to pass on such photos to a man in whom she had total confidence. Further, counsel underlines that the author has never argued that her handling of the photographs in question supports or has anything to do with her asylum claim.

5.6. Counsel notes that the State party observes that the author has not cited any medical certificate attesting to injuries resulting from the beatings she was subjected to by her sighe husband. Counsel reminds the Committee that the author left Iran the following day and that her main preoccupation was to arrive safely in Sweden. Counsel further states that most Iranian women are used to violence by men and they do not or cannot expect the legal system to protect them, despite the positive changes which have recently taken place in Iran in this respect. As an example, counsel states that an Iranian woman wishing to report a rape must be examined by the courts' own doctors as certificates by general doctors are not accepted by courts.

5.7. With reference to the fact that the author's passport number was given in her asylum application although she had claimed to have disposed of her passport upon arrival in Sweden, counsel states that there is no indication on the asylum application that the author's passport has been seized by the Immigration Board officer, which is the rule in order to secure enforcement of possible expulsion; this fact seems to support the author's version of events. In addition, the author has maintained that when filing her application she merely had to state her name, all other necessary details having appeared on a computer screen. This information has been corroborated by the Immigration Board registration officer who received the author's asylum application and who told counsel that, in recent years, a person granted a tourist visa is registered in a computer database, containing all available information, including passport numbers. The author had been granted a tourist visa for Sweden twice in recent years, so her account was absolutely correct.

5.8. Counsel notes that the State party has confirmed that the author's sighe husband was the head of the Bonyad-e Shahid, which should support

the author's claim; he was generally referred to as "Ayatollah", even though his title was Hojatolleslam. Counsel reminds the Committee that there are only some 10 real ayatollahs in Iran. The great majority of mullahs are of the rank of hojatolleslam. However, mullahs who have gained power, particularly political power, are often referred to as Ayatollah out of courtesy, an illustrative example being Ayatollah Khamenei whose office demanded the rank of an ayatollah but who was in fact only hojatolleslam when he was appointed.

5.9. With reference to the State party's argument that the author left Iran without difficulty, counsel points out that this is consistent with the author's version of the events leading to her flight. She has maintained that at the time of her departure she was not yet of interest to the Iranian authorities since her sighe husband had suppressed the Pasdaran report to the Revolutionary Court.

5.10. Finally, counsel states that what the author's dead husband's relatives have stated about the circumstances surrounding his death has no impact on the author's case or her credibility. It should be noted that the author herself has never stated that her husband was assassinated by the regime, but only that she had doubts about the circumstances pertaining to his death.

5.11. In support of counsel's arguments she submits a medical certificate dated 22 November 1999 from a senior psychiatrist at Sahlgrenska Hospital, where the author was taken after an attempted suicide. The attempt was made after the Swedish police had taken her and her son from a reception centre for asylum seekers to a detention centre to ensure the execution of her expulsion. The diagnosis made was deep depression combined with contemplation of suicide.

5.12. Counsel further encloses a letter dated 27 December 1999 from the leading Swedish expert on Islam, Professor Jan Hjärpe, who confirms the author's account concerning the institution of sighe or mutah marriages and the legal sanctions provided for in cases of adultery.

5.13. Counsel draws the attention of the Committee to the fact that the immigration authorities in examining the author's case have not considered the situation of women in Iran, existing legislation and its application, or the values of the Iranian society. Counsel states that the argumentation of the authorities, based almost exclusively on the author's failure to submit certain verifiable information, seems to be a pretext for refusing the author's application. In conclusion, counsel submits that according to the information provided by the author, there exist substantial grounds to believe that the author would be subjected to torture if returned to Iran and that the author has provided reasonable explanations for why she has not been able to or not wished to furnish certain details.

#### **Additional comments submitted by the State party**

6.1. In its submission dated 2 May 2000, the State party contends that the Swedish Immigration Board and the Aliens Appeal Board have ensured a thorough investigation of the author's case. It reminds the Committee that

during the asylum procedure, the author has been repeatedly reminded of the importance of submitting verifiable information, but that she has chosen not to do so. The State party does not find the explanations given hereto convincing, reiterates that the burden of proof in principle rests with the author and maintains that the author's credibility can be questioned.

6.2. Finally, the State party draws the attention of the Committee to the fact that the author first alleged that she had been sentenced to death for adultery during an initial interview held with her in May 1998. The State party submits that the author thus has had ample time to present a written judgement or other evidence to support that claim.

**Additional information from the State party and counsel, requested by the Committee**

7.1. Having taken note of the submissions made by both the author and the State party regarding the merits of the case, the Committee, on 19 and 20 June 2000, requested further information from the two parties.

*Submissions by counsel*

7.2. In her submission of 1 September 2000, counsel confirms previous information given regarding: (a) the nature of sighe or mutah marriages and the fact that witnesses are not necessary, nor registration before a judge if the partners themselves are capable of conducting the ceremony correctly; (b) the activities of Bonyad-e Shahid, affirming that martyrs' widows are presented, in listings and photo albums, for temporary marriages to its employees and directors. Counsel supports the information given with letters from, inter alia, the Association of Iranian Political Prisoners in Exile (AIPP), the Support Committee for Women in Iran and Professor Said Mahmoodi, Professor of International Law at the University of Stockholm.

7.3. With regard to the alleged death sentence against the author, counsel submits that despite attempts by AIPP, it has not been possible to find any evidence that the author's Christian lover had been imprisoned and that they both have been sentenced to death by stoning for adultery. AIPP, as well as other sources, maintain that such information is not possible to get if the prison, the court or the case numbers is not known.

7.4. Counsel submits letters and information given by experts in Islamic law confirming that a sighe wife is bound by the rules regarding adultery and that she is prohibited from having a sexual relationship with any man other than her sighe husband. Adultery with a Christian man bears the sanction of stoning to death. Counsel further submits that the law in theory requires either four righteous witnesses or a confession to the sexual act for stoning to be ordered, but that the author's sighe husband, being a powerful man in society, would not have difficulties finding persons willing to testify. According to international human rights organizations, the eye-witness condition is rarely respected and stoning for adultery is still frequently practised in Iran, despite recent reforms in the country.

7.5. Reference and further clarifications were made with regard to telephone calls received by the author's sister-in-law (see para. 2.8). The author's previous lawyer had told Swedish authorities that the sister-in-law in Sweden had been contacted by Hojatolleslam Rahimian who told her that the author had been found guilty. Counsel has since been in contact with

the sister-in-law directly and states that the correct version of events was that the sister-in-law, shortly after the author's arrival in Sweden, was contacted by a man in rage who did not give his name but wanted to know the author's whereabouts in Sweden. The man was aggressive and knew all the details of the author's past and said that she had no right to leave Iran. The sister-in-law further states that she never attempted to verify the existence of a court judgement when she visited Iran.

7.6. With reference to the Committee's request for additional information, counsel states that the author's older son, born in 1980, tried to seek asylum in Sweden from Denmark in March 2000. In accordance with the Dublin Convention, after a short interview, he was sent back to Denmark where he is still waiting to be interrogated by Danish immigration authorities. Since his case had not yet been examined by the Danish authorities, counsel requested Amnesty International to interview him.

7.7. The records of the interview confirm statements made by the author regarding her sighe marriage and of her being called to the Bonyad-e Shahid office several times a week. The son also states that when his mother left she had told him that he had to leave school and hide with close relatives of hers in Baghistan. He received private teaching to become a veterinary surgeon and subsequently enrolled in University. On 25 January 2000 he was summoned to the university information office by the intelligence service, Harasar, from where two men took him to the Bonyad-e Shahid office in Tehran where he was detained, interrogated, threatened and beaten. He claims that the interrogators wanted to know his mother's whereabouts and that they threatened to keep him and beat him until his mother came "crawling on all fours" and then they would "carry out her sentence". The author's son claims that it was during the interrogation that he fully realized his mother's situation, although he had not spoken to her since she left the country.

7.8. In conclusion, counsel maintains that although it has not been possible to obtain direct written evidence, for the reasons given above, the chain of circumstantial evidence is of such a nature that there can be no reason to doubt the author's credibility. Reference is further made to a recent judgement of the European Court of Human Rights dated 11 July 2000, regarding an Iranian woman asylum-seeker who allegedly had committed adultery and who feared death by stoning, whipping or flogging if returned. As in the case of the author no written evidence existed in the form of a court judgement, but the Court stated that it "is not persuaded that the situation in the applicant's country of origin has evolved to the extent that adulterous behaviour is no longer considered a reprehensible affront to Islamic law. It has taken judicial notice of recent surveys of the current situation in Iran and notes that punishment of adultery by stoning still remains on the statute book and may be resorted to by authorities. (1) The Court ruled that to expel the applicant would be a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

#### *Submissions by the State party*

7.9. The State party made additional submissions on 19 September and 19 October 2000. With reference to the Committee's request for additional information, the State party reiterates its view that the burden is on the author to present an arguable case. It maintains that the author has not

given any evidence in support of her claim and therefore there are serious reasons to doubt the veracity of those claims.

7.10. With regard to the author's alleged sighe marriage, the State party confirms that the law in Iran allows for such temporary forms of marriage. It further argues that although sighe marriages are not recorded on identification documents, such contracts should, according to reliable sources, contain a precise statement of the time-period involved and be registered by a competent authority. In practice, a religious authority may approve the marriage and issue a certificate. Given that the author claims that her sighe or mutah marriage was conducted by Hojatolleslam Rahimian himself and that no contract was signed, the State party has doubts as to whether the author entered into a legally valid marriage.

7.11. The State party points out that counsel in her last submissions to the Committee has included certificates and other information which have not previously been presented to the Swedish immigration authorities. As the new information seems to be invoked in order to prove the existence of sighe marriages in Iran, the State party emphasizes that it does not question this fact, nor the existence of the Bonyad-e Shahid, but, inter alia, the author's credibility in respect of her personal claims of having entered in such a marriage. The author's credibility is further diminished by the inconsistent information given relating to phone calls received by the author's sister-in-law.

7.12. In addition, even if the Committee does accept that the author has entered into such a marriage, the State party asserts that this in itself would not constitute substantial grounds for believing that the author would be in danger of being tortured or killed if returned to Iran.

7.13. It is further submitted that according to the Swedish Embassy in Tehran, it is not possible for the Embassy to inquire whether a competent family court, rather than the Revolutionary Court, has issued a judgement regarding the author. However, the author should, according to the Embassy, by proxy be able to obtain a copy of the judgement if it exists, or at least obtain the name of the court and the case number. The State party further submits that only a married person can be convicted of adultery; it therefore seems unlikely that the author's lover would have been sentenced to death as claimed.

7.14. In addition, the State party claims that neither reports from the United States Department of State nor from Amnesty International confirm the assertion by counsel that stoning is frequently practised in Iran.

7.15. With regard to the judgement by the European Court referred to by counsel, the State party points out that in that case the applicant had been granted refugee status by UNHCR and the European Court had relied on UNHCR's conclusions as to the credibility of the applicant and the veracity of her account. In the present case, two competent national authorities have scrutinized the author's case and found it not to be credible.

7.16. Finally, with regard to the information given by the author's son, currently residing in Denmark where he is seeking asylum, the State party underlines that this information is new and has not been presented to the national authorities. According to the State party, information submitted at a very late stage of the proceedings should be treated with the greatest

caution. It further emphasizes a number of contradictory points in the newly submitted evidence: (a) during the son's interrogation by the Swedish Board of Immigration no mention was made of any court judgement or death sentence, information which, in the State party's view, would have been relevant in the circumstances; (b) the son gave contradictory answers to the question of whether he possessed a passport. The State party also finds it unlikely that the author was not aware of, and has never invoked, the harassment to which her son was allegedly subjected after her departure from Iran.

### **Issues and proceedings before the Committee**

8.1. Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee is further of the opinion that all available domestic remedies have been exhausted. The Committee finds that no further obstacles to the admissibility of the communication exist. Since both the State party and the author have provided observations on the merits of the communication, the Committee proceeds immediately with the considerations of those merits.

8.2. The issue before the Committee is whether the forced return of the author to the Islamic Republic of Iran would violate the obligation of Sweden under article 3 of the Convention not to expel or to return 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.

8.3. The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Iran. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

8.4. From the information submitted by the author, the Committee notes that she is the widow of a martyr and as such supported and supervised by the Bonyad-e Shahid Committee of Martyrs. It is also noted that the author claims that she was forced into a sighe or mutah marriage and to have committed and been sentenced to stoning for adultery. Although treating the recent testimony of the author's son, seeking asylum in Denmark, with



utmost caution, the Committee is nevertheless of the view that the information given further corroborates the account given by the author.

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.

8.6. 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 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.

10. Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee would wish to receive, within 90 days, information on any relevant measures taken by the State party in accordance with the Committee's present views.

## Notes

1. Jabari v. Turkey (para. 40), European Court of Human Rights, 11 July 2000.

**Office of the United Nations High Commissioner for Human Rights  
Geneva, Switzerland**

The decision can be found at the following website:

[www.unhcr.ch/tbs/doc.nsf/MasterFrameView/3c43aa8300384387c1256ab1002fea71?Op=OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/3c43aa8300384387c1256ab1002fea71?Op=OpenDocument)

## INTERVIEWING ASYLUM SEEKERS

### All training materials needed:

**PowerPoint slide:**

**No. 9** Interviewing asylum seekers.

**Handout:**

**No. 9** Gender sensitivity and procedural issues in the context of refugee status determination and durable solutions.

**Exercises:**

**No. 6** Role play exercise – instructions to the woman;

**No. 7** Role play exercise – instructions to the man;

**No. 8** Role play exercise – instructions to the RSD worker;

**No. 9** Role play exercise – instructions to the interpreter;

**No. 10** Role play exercise – instructions to the observing audience.

## Interviewing asylum seekers



A role play exercise

- a married couple being interviewed

PowerPoint-slide no. 9

**GENDER SENSITIVITY AND PROCEDURAL ISSUES IN THE CONTEXT OF  
REFUGEE STATUS DETERMINATION AND DURABLE SOLUTIONS  
- A CHECKLIST<sup>248</sup>**

**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 recognise 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;
- ❑ Ensure availability of trained psychosocial counsellors before, during and after interview;
- ❑ Ensure that questionnaires are gender-sensitive;

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<sup>248</sup> 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 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 origin), 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 or 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 or 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 torture or ill-treatment, including sexual and other forms of gender-based 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 his/her story in his/her own way and in hi/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.

## **INTERVIEWING ASYLUM SEEKERS - A MARRIED COUPLE BEING INTERVIEWED**

### **INSTRUCTIONS TO THE WOMAN (WIFE)**

#### **About the interview**

You do not speak the language of the RSD worker and are the dependant claimant in this file. You should not speak to the interviewer unless you are directly addressed. In your culture, it is common practice for the man to speak for the whole family, and you are naturally a quiet person. Your husband will present your family's case. If, however, the interviewer would like to ask you some questions directly, you can answer. While there is an interpreter present, you feel more comfortable having your husband interpret for you. If the interviewer suggests interviewing you alone, you should agree.

#### **About your situation**

You are educated and were working as a journalist and part-time university teacher in your country of origin. You wrote several articles on the infringement of women's rights in your home country before you left. Due to the articles you wrote, you were dismissed from work. Since then, you have not been able to find another job, and have also faced threatening letters and phone calls from persons opposed to your articles. You suspect, given the tip from a friend, that your husband (who worked as a medical scientist in the same university as you) may have lost his job due to your articles also (although the official reason was lack of funding for his project). However, you have never discussed this with him. Given that he lost his job before your troubles began (even though you had already published the articles), he does not suspect there is any connection between these events. You are afraid that if he knows, it will only create more problems and it may even come to violence with the university authorities.



## **INTERVIEWING ASYLUM SEEKERS - A MARRIED COUPLE BEING INTERVIEWED**

### **INSTRUCTIONS TO THE MAN (HUSBAND)**

#### **About the interview**

You are the principal asylum seeker and take the lead in responding to the interviewer's questions, on behalf of yourself and your wife. You speak the language of the interviewer but not well and you have particular difficulty with his accent. But you feel that it would be better to speak to him directly than through an interpreter. You try therefore, to avoid using the male interpreter who is present.

#### **About your situation**

You left your country because you and your wife could not find any work (she is a journalist and part-time university professor), and because you disagree with the political regime. You see no future for yourself or your family in the country of origin. While you disagree strongly with the current political regime, you have not been active in political affairs and have never been threatened in any way. You used to work at a university as a medical scientist (the same university where your wife taught part-time) but were dismissed over a year ago because the project you were working on lacked funds.

**INTERVIEWING ASYLUM SEEKERS - A MARRIED COUPLE BEING INTERVIEWED**

**INSTRUCTIONS TO THE RSD WORKER**

The husband and wife asylum seekers have arrived from a neighbouring country. In the file, the legal clerk has noted: "This appears to be a case of economic migration but requires further questioning."

*Exercise no. 9*

**INTERVIEWING ASYLUM SEEKERS - A MARRIED COUPLE BEING INTERVIEWED**

**INSTRUCTIONS TO THE INTERPRETER (MALE)**

You try to be helpful during the interview, but both claimants seem to prefer not to use you.

## **INTERVIEWING ASYLUM SEEKERS - A MARRIED COUPLE BEING INTERVIEWED**

### **INSTRUCTIONS TO THE OBSERVERS**

Reflect on the following questions while observing the role play:

- Male/female interpreter, (RSD worker) - was it appropriate?
- Separate vs. whole-family interviews – was it appropriate?
- Seating and interview room arrangements – was it appropriate?
- Did the RSD worker introduce himself/herself, the interpreter (including his function) and explain the purpose and any ground rules for the interview?
- Who did the RSD worker address and look at when asking his questions?
- Did the RSD worker allow the husband to answer for his wife? How did he deal with the husband?
- Did the RSD worker deal effectively with the language and interpreter issue?
- Did the RSD worker ask to interview the woman alone and explain that this was a required procedure?
- What types of questions were asked by the RSD worker? Were they appropriate in this case and in order to find out as much as possible about their experiences and fear of persecution?
- Did the RSD worker seem to know at least basic information regarding the political situation of the country of origin? And particularly the situation of women, and women activists? Was the RSD worker creating an atmosphere and an interview which optimised the possibility to get information about either the man's or the woman's possible political activities and/or the political and socio-economic context in which they lived before the flight?
- How did the RSD worker seem to deal with the possibility that one or both of the applicants had experienced traumatic events in the country-of-origin and that they may have difficulties talking about them?

When appropriate, refer to the UNHCR Gender Guidelines (2002).

## CONCLUSIONS AND CLOSURE OF THE WORKSHOP

### All training materials needed:

#### Handouts:

- No. 10** Gender Sensitivity and the 1951 Refugee Definition;
- No. 11** References to UN and other international and regional documents on human rights and the issue of gender-based violence and discrimination;
- No. 12** The International Human Rights Framework: the link with refugee protection and women's rights, (excerpts);
- No. 13** Discrimination against Women and Violence against Women in International Law;
- No. 14** Individuals' human rights and the laws that protect them;
- No. 15** Causes and consequences of sexual and gender-based violence, (excerpts);
- No. 16** Suggested readings.

**(N.B. Only distribute No. 10, 11, 12, 13, 14, 15, 16 if the participants have not participated in the previous workshop, Module 1).**

## **GENDER SENSITIVITY AND THE 1951 REFUGEE DEFINITION - A CHECKLIST<sup>249</sup>**

### **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 religious opinions 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:
  - Has the State Party ratified all the international human rights instruments including the Convention on the Elimination of All Forms of Discrimination against Women?

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<sup>249</sup> 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.

- 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 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?
- ❑ 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 account:<sup>250</sup>
    - 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.
  - ❑ 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.

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<sup>250</sup> These three points to consider has been presented by Heaven Crawley in *Refugees and Gender: Law and Process*, Jordan Publications, London (2001).

## **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 actor 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 actors (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.

### **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 than 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.

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- ❑ 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.

## **REFERENCES TO UN AND OTHER INTERNATIONAL AND REGIONAL DOCUMENTS ON HUMAN RIGHTS AND THE ISSUE OF GENDER-BASED VIOLENCE AND DISCRIMINATION<sup>251</sup>**

### **UNITED NATIONS AND REGIONAL DOCUMENTS – An overview<sup>252</sup>**

#### **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)
  
- 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)

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<sup>251</sup> This list has been compiled by Maria Bexelius, Consultant, UNHCR, 2005.

<sup>252</sup> Please note that this is not an exhaustive list. More relevant documents may be found at [www.un.org](http://www.un.org).

- 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, (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, p. 27-35 (1997)

#### **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, (2002)
- Security Council Resolution 1325 (2000) on Women, Peace and Security', U.N. Doc. S/RES/1325 (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, (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', (1998)

#### **UN Secretary General**

Women and International Migration: World survey on the role of women in development. Report of the UN Secretary General, A/59/287/Add.1, (2004)

#### **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 (2005)
- 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, (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, (1995)
- United Nations International Conference on Population and Development (ICPD), Cairo, Egypt, Cairo Program of Action, (1994)
- 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, (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, (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)
- 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)

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<sup>255</sup> 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);

## THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK: THE LINK WITH REFUGEE PROTECTION AND WOMEN'S RIGHTS

by Rosa da Costa, Legal Consultant, UNHCR, 2002

(Excerpt)<sup>255</sup>

### 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 recognises 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.<sup>256</sup>

#### 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.

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.

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<sup>256</sup>. 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.



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, recognised 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.<sup>257</sup>

## **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 UNHCR<sup>258</sup>, 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:

[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 in-

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<sup>257</sup>. 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).

<sup>258</sup> 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.

struments 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.<sup>259</sup> Other UNHCR policy papers, such as the UNHCR Guidelines on Gender-Related Persecution<sup>260</sup>, 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.<sup>261</sup>
- (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 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

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<sup>259</sup> 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.

<sup>260</sup> 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.

<sup>261</sup> This is so even if not all human rights violations or instances of discrimination and gender-based violence amount to persecution.

(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 recognised 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.<sup>262</sup>

### **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.<sup>263</sup>

### **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.<sup>264</sup>

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

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<sup>262</sup> Preamble, Convention on the Elimination of all Forms of Discrimination against Women, General Assembly Resolution A/RES/34/180, 18 December 1979.

<sup>263</sup> CEDAW, Art. 1.

<sup>264</sup> The Committee on the Elimination of all forms of Discrimination against Women, General recommendation No 19, (11<sup>th</sup> 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.<sup>265</sup>

### **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.<sup>266</sup>

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.<sup>267</sup>

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.<sup>268</sup>

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<sup>265</sup> 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.

<sup>266</sup> DEVAW Art. 1.

<sup>267</sup> *Ibid.*, Art. 2

<sup>268</sup> 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 THEM<sup>269</sup>

### **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:<sup>270</sup>

### ... 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**

<sup>269</sup> This section which is compiled by Maria Bexelius, Consultant, 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.

<sup>270</sup> 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 their 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 their 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/opensoc.pdf](http://www.unhcr.ch/cgi-bin/texis/vtx/protect/+bwwBmeMUIECnwwwxFqzvx8vw68m6hFqA72ZR0gRfZNTFqrpGdBnqBzFqmRbZAFqA72ZR0gRfZNDzmxwww1FqmRbZ/opensoc.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.

## **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](http://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](http://www.unhcr.ch)

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

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

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

Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997) Available at: [www.unhcr.ch](http://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](http://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](http://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](http://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](http://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](http://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](http://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](http://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](http://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](http://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](http://www.migrationsverket.se/english.html)

#### **UK**

Home Office (2004) *Asylum Policy Instructions (APIs) 'Gender Issues in the Asylum Claim'*  
Available at: [www.ind.homeoffice.gov.uk/default.asp?PageId=4790](http://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](http://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](http://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](http://sierra.uchastings.edu/cgrs/law/guidelines/us.pdf) US Department of State, *Gender Guidelines for Overseas Refugee Processing (2000)*.