

**UNHCR POSITION PAPER**  
**GENDER-RELATED PERSECUTION**

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I. Background

At the outset, it would be important to define what we mean by “gender-related claims”. This would require us to understand, as a first step, how “gender” and “sex” are defined. Gender refers to the relationship between women and men based on socially-defined roles that are assigned to one sex or another, while sex is a biological category. The distinction is an important one for refugee protection because not every aspect of the differences between women and men is related to their biology.

“Gender-related persecution” is the commonly used term in international refugee law, but it denotes quite a varied set of possible claims. For example, such claims have typically encompassed acts of sexual violence, family violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and homosexuality. These claims may be quite different from each other in that they mix forms of persecution with persecution reasons. What is common amongst them, however, is the fact that gender is a relevant factor in the determination of the claims. Such a framework would allow for an understanding that persecution is not necessarily or only caused by the victim’s sex as the ultimate factor, but by the perpetrator’s ideology, dictating that people deviating from their attributed gender role shall be persecuted. For example, women who fear persecution because they transgress social mores in general are not persecuted because they are women; they are persecuted because they refuse to be “proper” women.

Gender-related claims have to be understood in this context. The refugee definition in the 1951 Convention relating to the Status of Refugees has to be interpreted with such an understanding -- in a gender sensitive way -- in order for it to be properly interpreted. In the same way that country of origin information in general is of paramount importance for adjudication of “typical” refugee claims, the socially-defined roles in a particular culture/country also have to be understood to ensure proper refugee protection, and proper interpretation of the refugee definition.

This approach has been endorsed by a number of international bodies, not least by the Executive Committee of the High Commissioner’s Programme. In its most recent Conclusions of October 1999, 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.”

Canada, the United States, and Australia have also particularly endorsed this approach and have established guidelines in this regard for their adjudicators.

## II. A Gender-Sensitive Approach to Interpreting and Applying the Refugee Definition:

The 1951 Convention relating to the Status of Refugees defines a refugee in part as someone who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of origin of [her] nationality and is unable, or owing to such fear, is unwilling to avail [herself] of the protection of that country.

All the elements of the refugee definition have to be fulfilled for a person to be recognized as a refugee – a well-founded fear of persecution, and because of one or a combination of the five grounds. While gender is not specifically referenced in the definition, it should be accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. In order to improve the quality of refugee status determination, and to protect refugee women, it is of paramount importance to refrain from approaching refugee claims by women along the lines of the more traditional, and familiar, situation of refugee men.

### Persecution

Key to understanding when a particular harm amounts to persecution is the determination of what human rights, separately or together, might be considered fundamental to an acceptable existence and, at the same time, of what threat constitutes a serious threat. Before going into a discussion on the interpretation of persecution, it would be important to again emphasize that the finding of persecution alone does not find for a refugee. The 1951 Convention uses the words “for reasons of” in defining a refugee in Article I, and “on account of” in establishing the right to non-refoulement in article 33. Both language require some relationship between the persecutory harm and one or more of the five grounds.

#### A. Sexual Violence as a Means of Persecution:

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

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

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

a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

c) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

International human rights principles support the characterization of sexual violence against women as a violation of human rights.<sup>1</sup> There is no doubt that rape and other forms of sexual assaults are acts which inflict severe pain and suffering -- both mental and physical -- and which have been used as a form of persecution. Such treatment clearly comes within the bounds of torture as defined by the Convention against Torture. Sexual violence amounts to a violation of the prohibition against cruel, inhuman or degrading treatment, the right to security of person and in some instances the right to life, as contained in a variety of international human rights instruments.

The fact that the violence does not emanate directly from the authorities should be no obstacle to recognizing rape and other forms of sexual violence as a form of persecution. UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* states clearly in its paragraph 65 that “Where... offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer protection.” In addition, international instruments clearly establish State responsibility in safeguarding against such human rights violations. Under the Declaration on the Elimination of Violence Against Women, States are required to exercise due diligence to prevent, investigate and punish acts of violence against women perpetrated by the State or by private persons. Failure by the State to exercise that diligence, and to provide a secure environment for women, incurs State responsibility.<sup>2</sup>

#### B. Punishment for Transgression from a Law or Policy as Persecution:

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

<sup>2</sup> Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women similarly requires States 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”.

Persecution must be distinguished from punishment for a common law offence. However, the distinction may occasionally be obscured. There may be situations where the penalty for non-compliance with a policy or law is disproportionately severe. Such excessive punishment may amount to persecution within the meaning of the definition. [as an example, and to clarify, severe punishment faced by women who transgress social mores/laws in a society could amount to persecution –ie. Stoning adulterous women to death]

In determining whether the harm feared from transgression of certain laws could be interpreted as persecution, there may be a tendency to turn to an analysis of whether the law is one of general applicability. It is important to note, however, that even if a law is one of general applicability, circumstances of the punishment or treatment of an individual cannot be so severe as to be completely disproportionate to the objective of the law.

The prosecution of individuals because of their homosexuality is one area in which punishment for digressing from laws or social norms could amount to persecution. In a number of countries, homosexuals are subject to severe criminal penalties and/or extreme public hostility and discrimination because of their sexual orientation. When such punishment is excessive, it may amount to persecution.

#### C. A Law, Policy or Practice as Persecution:

Assessing the law in and of itself has proven to be equally important to drawing the distinction between prosecution and persecution in gender-related claims. This is especially so given the fact that relevant laws and practices may emanate from traditional and cultural norms not necessarily in conformity with international standards. When compared to international human rights standards, the laws or practices in and of themselves may well be proven to be persecutory.

UNHCR's *Handbook* in its paragraph 59 clarifies that "in order to determine whether prosecution amounts to persecution, it will be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards." It goes on to say in paragraph 60 that in evaluating the laws of another country, "recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded."

The practice of forced female genital mutilation (FGM), may be pronounced in certain circumstances as persecutory practice per se. Although the practice is illegal, it is often condoned, or sanctioned by States.

A number of international instruments and declarations have proclaimed FGM as a form of sexual violence against women and girls. The Declaration on the Elimination of Violence against Women defines violence against women to encompass "... female genital mutilation and other traditional practices harmful to women..." Prohibition of "cruel,

inhuman or degrading treatment” is also ensured, inter alia, in the International Covenant on Civil and Political Rights, and Article 12 of the International Covenant on Economic, Social and Cultural Rights provides for the right to the highest standard attainable of physical and mental health.<sup>3</sup>

Although a practice at the hands of private actors, it is important to re-emphasize that this is no obstacle to its recognition as persecution, where the authorities are unable, or unwilling, to provide protection for women and girls who seek to evade the practice. State responsibility in this context is incurred, not least through the Declaration on the Elimination of Violence against Women which stipulates that States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. Similarly, Article 24(3) of the Convention on the Rights of the Child requires States to take all effective and appropriate measures to abolish traditional practices that endanger the health of children.

D. Method of implementation of a Legitimate Law as Persecution:

It may be necessary at times to draw a distinction between the law and the methods used to enforce it. While certain laws may not be inherently persecutory, the methods used to enforce them may be declared as being so.

For example, it is widely accepted that family planning constitutes a proper response to population pressures that, insofar as the non-discriminatory aim of family planning policies is to promote social welfare and the advancement of society, they cannot, in general and by themselves, be considered as persecutory in nature. Countries with significant population problems are entitled to determine the most appropriate policy response. However, implementation of such policies cannot lead to consequences of a substantially prejudicial nature for the persons concerned.

Forced abortion and sterilization normally constitute cruel, inhuman or degrading treatment or punishment, in violation of recognized human rights principles embodied inter alia in the UN Covenant on Civil and Political Rights and in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such practices, despite the fact that they may be implemented in the context of a legitimate law, should be recognized as serious human rights violations and considered persecution within the refugee definition.

E. Discrimination Amounting to Persecution – Denial of Justice:

Discrimination per se is not enough to establish a case for refugee status. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. As the UNHCR Handbook makes clear in paragraph 54, “persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to

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<sup>3</sup> FGM causes severe pain as well as physical harm, and has proven medically to cause serious health consequences to women and girls.

persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his/her right to earn his/her livelihood, his/her right to practice his/her religion, or his/her access to normally available educational facilities.” Various acts of discrimination, thus, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution.

Discrimination as it relates to protection by State authorities, or standing before the law, is of special relevance in gender related claims. A case for discrimination amounting to persecution could be found, and the relationship between persecution and State protection could thus usefully be analyzed. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious harm, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Domestic violence cases could, for example, be analyzed in this context. If a man randomly beats a woman, he would be prosecuted in that society. However, if he beats his wife in that society, he may know – based on known practice and/or institutional set up - that he can do it with impunity; there would not be any protection for her as she is seen as “his subject” and her rights in practice are thus limited in that society. The persecution in that context could be discrimination by the State in extending protection, amounting to persecution in that it allows for the harm to be inflicted. The lack of protection would relate to the State’s practice/belief that married women have a different standing in society and before the law, and that in line with societal gender norms, protection for such women against harm at the hands of their husbands would be denied because of the government’s objective to have a male dominated family/society. The particular social group in question in this context could be pronounced as “married women in X society”.<sup>4</sup>

### **Because of a Refugee Ground**

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

#### **A. Race and Nationality:**

Racism knows no gender, however, persecution on this ground may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, whilst the women may be viewed as propagating the ethnic identity and persecuted in a different way, such as through sexual violence.

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<sup>4</sup> Lord Hoffman in the decision of Shah and Islam drew the analogy to a Jewish businessman attacked by an Aryan competitor in Nazi Germany. The competitor can act with impunity because of the shopkeeper’s race/religion; similarly, the abusive husband knows he can act with impunity because of the wife’s gender and their relationship.

B. Religion and Political Opinion:

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

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

C. Membership of a Particular Social Group:

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

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

- The 1951 Convention does not entitle a person to asylum whenever she fears persecution if returned to his/her own country. Had the Convention so intended, it could and would have said so. Instead, refugee status was confined to those who have a well-founded fear of persecution on one of a number of specific grounds set out in Article 1A(2). To give the phrase “membership of a particular social group” too broad an interpretation would conflict with this objective;
- The concept of “particular social group” must apply to social groups which exist independently of persecution;
- In order to determine whether persecution is the sole distinguishing factor, it is necessary to examine the State’s broader policies, legislative provisions, factual circumstances and how people similarly situated are treated by law and society. This makes relevant country of origin information that much more important in assessing such claims.
- The distinct characteristics setting the group apart as a “particular social group” could be innate, or ones from which although dissociation may be possible, it would result in renunciation of basic human rights;
- behaviour can become a reflection of who a person is.

- There is no requirement of voluntary association in the sense that members of the group must have met or have other close association. Internal cohesion thus is not a requirement.
- Rather, the issue of “voluntary association” may be interpreted in the context of a determination of whether by leaving the group, the claimant can eliminate the risk of persecution. It is in this context that “voluntary association” could be protected if it becomes a question of abdicating human dignity and fundamental human rights.
- Members of a social group must have associative qualities that go to the members’ identity. In other words, the association must go to what a person is rather than to what she or he does.
- While the meaning of the expression “membership of a particular social group” is a question of law, whether an asylum-seeker is a member of a particular social group is a question of fact.

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

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

### III. Refugee Status Determination Procedures:

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

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

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



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

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