

# 5.1 Gender-related persecution

RODGER HAINES QC\*

## Contents

I. Introduction	<i>page</i> 320
II. The interpretation of Article 1A(2)	323
A. Universal access to the refugee protection regime	324
B. The focus of the inquiry is on the specific characteristics and circumstances of the claimant	325
C. Sex and gender are integral elements of the refugee inquiry	325
D. The importance of the 1967 Protocol	326
E. Sex and gender are already included in the 1951 Convention	326
III. Understanding the meaning of ‘persecution’	327
A. Persecution = serious harm + the failure of State protection	329
B. Serious harm	330
C. Discrimination	331
D. The failure of State protection	332
E. The standard of State protection	332
F. Cultural relativism	333
G. Domestic violence	334
H. Gender-based discrimination enforced through law	335
I. War, civil war, and civil unrest	335
J. Internal protection	336
IV. Understanding the meaning of ‘well-founded’	338
V. Understanding the meaning of ‘for reasons of’	339
VI. The five Convention grounds	342
A. Race	342
B. Religion	343

\* This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on gender-related persecution organized as part of the Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention Relating to the Status of Refugees.

C. Nationality	344
D. Membership of a particular social group	344
E. Political opinion	346
VII. Procedural issues	349
VIII. Conclusion	350

## I. Introduction

The principle of non-discrimination has been correctly described as fundamental to the concept of human rights.<sup>1</sup> It is specifically affirmed, for example, in the Preamble to the United Nations Charter,<sup>2</sup> the Universal Declaration of Human Rights, 1948,<sup>3</sup> the International Covenant on Civil and Political Rights, 1966,<sup>4</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.<sup>5</sup> The principle of equality and the prohibition of discrimination has been reaffirmed and strengthened in a multitude of international human rights treaties. Observance, however, has been far from exemplary and this is no less true in the case of the Convention Relating to the Status of Refugees, 1951.<sup>6</sup> In particular, it has not always been recognized that women and the girl-child enjoy the equal protection of the 1951 Convention.

From at least 1985, however, a concerted effort has been made by the Office of the United Nations High Commissioner for Refugees (UNHCR) to correct this inequity. The Executive Committee of the High Commissioner's Programme has similarly called upon States to recognize that refugee women who are victims of violence and persecution are in need of protection under the 1951 Convention.<sup>7</sup> Thus, in October 1995, the Executive Committee:

1 P. Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford, 1990), p. 75. See also, M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl am Rhein, Germany, and Arlington, VA, USA, 1993), pp. 458 and 460: 'Along with liberty, equality is the most important principle imbuing and inspiring the concept of human rights'; 'The principle of equality and the prohibition of discrimination runs like a red thread through the [International Covenant on Civil and Political Rights].'

2 The UN Charter, 1945, also includes sex among the prohibited grounds of discrimination alongside race, language, and religion, Art. 1(3).

3 Universal Declaration of Human Rights, UNGA Res. 217 A (III), 10 Dec. 1948 (hereinafter 'Universal Declaration'), Arts. 2 and 7.

4 International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, 6 ILM 368, 1967 (hereinafter 'ICCPR'), Arts. 2(1), 3, and 26.

5 Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13, Arts. 1–5.

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

7 See e.g., Executive Committee, Conclusion No. 39 (XXXVI) 1985, Refugee Women and International Protection, paras. b and k, which welcomed the recommendations regarding the situation of refugee and displaced women adopted by the World Conference to Review and Appraise the

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>8</sup>

The result has been an increasingly comprehensive set of guidelines and position papers on gender-related persecution issued by UNHCR and others.<sup>9</sup> At the same time, the analysis and understanding of sex and gender in the refugee context has advanced substantially in the case law,<sup>10</sup> in State practice,<sup>11</sup> and in academic

8 Executive Committee, Conclusion No. 77 (XLVI) 1995, General Conclusion on International Protection, para. g, UN doc. A/AC.96/878, IIIA.1. See generally, UNHCR, Division of International Protection, 'Gender-Related Persecution: An Analysis of Recent Trends', *International Journal of Refugee Law*, special issue, 1997, pp. 79–113. See also, 'Report of the Fourth World Conference on Women, Platform for Action', UN doc. A/CONF.177/20, 17 Oct. 1995, Annex II, particularly para. 136 which acknowledges that women 'may . . . be forced to flee as a result of a well-founded fear of persecution for reasons enumerated in the 1951 Convention . . . including persecution through sexual violence or other gender-related persecution'.

9 These include UNHCR, 'Guidelines on the Protection of Refugee Women', July 1991; UNHCR, 'Sexual Violence Against Refugees: Guidelines on Prevention and Response', 1995; the Symposium on Gender-Based Persecution held in Geneva, 22–23 Feb. 1996 (reported in *International Journal of Refugee Law*, special issue, 1997, pp. 1–251), and UNHCR, 'Gender-Related Persecution', UNHCR Position Paper, Jan. 2000 (hereinafter 'UNHCR, 2000 Position Paper on Gender-Related Persecution').

10 See e.g., *In Re Kasinga*, US Board of Immigration Appeals (BIA), Interim Decision No. 3278, 1996, [1996] I. & N. Decisions 357; *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144; [1999] 2 AC 629, and 11 *International Journal of Refugee Law*, 1999, pp. 496–527 (hereinafter '*Islam and Shah*'); *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, (2002) 187 ALR 574, and [2000] HCA 14, 11 April 2002; Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority (NZ RSAA), [2000] NZAR 545; [2000] INLR 608. These decisions are discussed *inter alia* in D. E. Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question?', 15 *Georgetown Immigration Law Journal*, 2001, p. 391.

11 See e.g., Immigration and Naturalization Service (INS), 'Gender Guidelines: Considerations for Asylum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women', 26 May 1995 (USA); Department of Immigration and Multicultural Affairs, 'Guidelines on Gender Issues for Decision Makers', July 1996 (Australia); Immigration and Refugee Board, 'Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution', 25 Nov. 1996 (Canada); Immigration and Naturalization Service, 'Work Instruction No. 148 (Netherlands): Women in the Asylum Procedure', 1997 (Netherlands); and Immigration Appellate Authority (IAA), 'Asylum Gender Guidelines', Nov. 2000 (UK) (hereinafter 'IAA, Asylum Gender Guidelines'). For recent developments in the USA, see 'INS Issues Proposed Rule on Gender and Domestic Violence-Based Asylum Claims', 77 *Interpreter Releases* 1737, 18 Dec. 2000. The Refugee Act 1996 (Ireland), section 1(1), defines 'membership of a particular social group' so as to include membership of a group of persons whose defining characteristic is their belonging to the female or the male sex. The Swedish legislature inserted a specific provision in the Aliens Act in 1997 that

writing.<sup>12</sup> This relates not least to a greater appreciation of the differences between sex, as an indicator of biological difference, and gender, as the relationship between women and men based on socially-defined roles that are assigned to one sex or another.<sup>13</sup>

These developments have run parallel to, and have been assisted by, developments in international human rights law and in international humanitarian law – including in particular the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>14</sup> The Rome Statute of the International Criminal Court has also been significant in explicitly recognizing sexual violence as able to constitute a crime against humanity and a war crime.<sup>15</sup> As in other aspects of the refugee definition, State practice in relation to sex and gender issues in the refugee context varies but overall demonstrates convergence on the principle of a gender-inclusive and gender-sensitive interpretation of the 1951 Convention.<sup>16</sup>

Experience has shown that a gender-inclusive and gender-sensitive interpretation of the 1951 Convention does not lead inexorably to the consequence that all female asylum seekers are automatically entitled to refugee status.<sup>17</sup> The asylum

people persecuted on account of their gender are entitled to a humanitarian residence permit. A 1998 amendment to the Swiss Asylum Act stipulates that gender-specific flight motives must be taken into account and the agreement constituting the basis for the new German Government in 1998 also contains specific rules with regard to gender persecution: see T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, 2000), p. 3. The Austrian Federal Asylum Office is currently in the process of elaborating guidelines on the treatment of particularly vulnerable asylum seekers, including separated children, traumatized asylum seekers and cases of gender based persecution.

12 For two recent and notable examples, see Spijkerboer, *Gender and Refugee Status*, above n. 11, and H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001). For a discussion of US law, see D. E. Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, 1999), pp. 252–66, 365–76, and 388–93; and P. Goldberg, ‘Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context’, 66 *Brooklyn Law Review*, 2000, p. 309.

13 For a more detailed discussion of this particular issue, see the subheading ‘Sex and gender an integral element of refugee enquiry’ below. Crawley, *Refugees and Gender*, above n. 12, p. 6; Refugee Women’s Legal Group (RWLG), ‘Gender Guidelines for the Determination of Asylum Claims in the UK’, July 1998, para. 1.8; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 1.

14 For further details, see the subheading ‘War, civil war, and civil unrest’ below; and E. Møse, ‘The Criminality Perspective’, 15 *Georgetown Immigration Law Journal*, 2001, p. 463.

15 Rome Statute of the International Criminal Court, UN doc. A/CONF.183/9, 17 July 1998, Arts. 7 and 8. Art. 6 also includes in its definition of genocide ‘imposing measures intended to prevent births within the group’.

16 See, e.g., A. Leiss and R. Boesjes, *Female Asylum-Seekers: A Comparative Study Concerning Policy and Jurisprudence in the Netherlands, Germany, France, the United Kingdom, also Dealing Summarily with Belgium and Canada* (Dutch Refugee Council, Amsterdam, April 1994), p. 94; J. Bissland and K. Lawand, ‘Report of the UNHCR Symposium on Gender-Based Persecution’, *International Journal of Refugee Law*, special issue, 1997, pp. 13 and 28.

17 C. Bernier, ‘The IRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution’, *International Journal of Refugee Law*, special issue, 1997, pp. 167 and 168. Canada, which has

seeker must still establish that the fear of persecution is well founded, that the nature of the harm anticipated rises to the level of serious harm, that there would be a failure of State protection if he or she were returned, and that the well-founded fear of being persecuted is for reasons of race, religion, nationality, membership of a particular social group, or political opinion. The refugee status inquiry is always individual; it is always particularized.

The purpose of this paper is to propose a way of interpreting the refugee definition in a gender-sensitive manner. Section II briefly examines general issues relating to the interpretation of Article 1A(2) of the 1951 Convention, which precribes an inquiry into whether the refugee claimant is a person who:

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

The subsequent sections III–V analyze the different elements of the words ‘persecution’, ‘well-founded’ and ‘for reasons of’ contained in the refugee definition. They show that the different elements of this definition all need to be met for a person to be recognized as a refugee. While gender is not specifically referred to in the definition, it can influence or even dictate the type of persecution or harm suffered and the reasons for this treatment. Section VI examines the five different Convention grounds qualifying for refugee status from a gender perspective. Finally, section VII briefly identifies a few of the most significant procedural issues which may arise and which require a gender-sensitive response. While the primary focus of this analysis is on the particular situation of women and girls, it is of course true that men and boys can also face gender-related persecution.

## II. The interpretation of Article 1A(2)

Neither the refugee definition nor the 1951 Convention in general refers to sex or gender.<sup>18</sup> This omission is, however, without significance. The ordinary meaning of Article 1A(2) of the 1951 Convention in its context and in the light of the object and purpose of the Convention requires the conclusion that the Convention protects both women and men and that it must therefore be given a

one of the longest experiences with guidelines on women refugee claimants has not detected any noticeable effect on the number of gender-related claims in Canada. The experience of the USA has been similar. See D. E. Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, Washington DC, 1999), p. 254, n. 405.

<sup>18</sup> The non-discrimination provision of the 1951 Convention, namely, Art. 3, refers only to race, religion and country of origin as prohibited grounds of discrimination.

gender-inclusive and gender-sensitive interpretation.<sup>19</sup> In addition, Article 26 of the ICCPR confers an independent right to equality before the law and to the equal protection of the law, over and above the accessory prohibition of discrimination in Article 2 of the ICCPR.<sup>20</sup>

#### A. Universal access to the refugee protection regime

As can be seen from the face of the text, the refugee definition applies to all persons without distinction as to sex, age, disability, sexual orientation, marital status, family status, race, religious belief, ethnic or national origins, political opinion, or any other status or characteristic. The only categories of persons who are not included in the definition are those described in the cessation provisions of Article 1C and the exclusion provisions of Articles 1D, 1E, and 1F. Even then, none of these provisions makes any distinction between individuals on the basis, for example, of their sex, age, disability, sexual orientation, marital or family status, race, political opinion, or religious or ethical belief.

The intention to provide universal access to the refugee regime is expressly affirmed by the first and second recitals in the Preamble to the 1951 Convention:

*Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

*Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms . . .

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

20 Nowak, *CCPR Commentary*, above n. 1, p. 465. Art. 26 of the ICCPR provides:

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

**B. The focus of the inquiry is on the specific characteristics and circumstances of the claimant**

While access to the refugee protection regime is universal, the refugee definition is strict and requires a highly specific examination of the particular characteristics and circumstances of the refugee claimant. It must be demonstrated that the individual has a well-founded fear of being persecuted and that that fear is for at least one of the five 'reasons' enumerated in the definition. In more general terms, the inquiry is into who the individual is or what he or she believes and the reason why that person is unable or unwilling to avail him or herself of the protection of the country of origin. Both sex and gender are an inherent aspect of the question whether the claimant meets the refugee definition.

**C. Sex and gender are integral elements of the refugee inquiry**

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

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

The term 'gender' . . . refers to the social construction of power relations between women and men, and the implications of these relations for women's (and men's) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and culturally specific, so that what it is to be a 'woman' or 'man' varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences.<sup>21</sup>

Indeed, as the Refugee Women's Legal Group in the United Kingdom has further clarified:

21 Crawley, *Refugees and Gender*, above n. 12, pp. 6–7. See also, Refugee Women's Legal Group (RWLG), 'Gender Guidelines for the Determination of Asylum Claims in the UK', July 1998, paras. 1.8–1.15 (hereinafter 'RWLG, Gender Guidelines'); UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 1.

Gender is a social relation that enters into, and partly constitutes, all other social relations and identities. Women's experiences of persecution, and of the process of asylum determination, will also be shaped by differences of race, class, sexuality, age, marital status, sexual history and so on. Looking at gender, as opposed to sex enables an approach [to the refugee definition] which can accommodate specificity, diversity and heterogeneity.<sup>22</sup>

Gender-related persecution refers to the experiences of women who are persecuted *because* they are women, that is, because of their identity and status as women. Gender-specific persecution refers to forms of serious harm which are specific to women.<sup>23</sup> The reasons for such persecution and the form it takes may, however, overlap. The former will be discussed in the context of the 'for reasons of' and 'Convention grounds' elements. The latter will be discussed in the section on 'Persecution'.

#### D. The importance of the 1967 Protocol

The 1967 Protocol to the 1951 Convention not only removed the 1 January 1951 dateline and the geographic limitation, it fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses which are properly called persecution.<sup>24</sup>

#### E. Sex and gender are already included in the 1951 Convention

The text, object, and purpose of the 1951 Convention require a gender-inclusive and gender-sensitive interpretation. Sex and gender are already included in the refugee definition. If sight of this fact is lost, a misconceived interpretation can reflect and reinforce gender biases leading to the marginalization of women in the refugee context.<sup>25</sup> It has been suggested that 'sex' or 'gender' be added as a sixth ground to the 1951 Convention. Quite apart from the fact that there is no realistic prospect of the Convention being expanded in this way, the argument in favour of a sixth ground may have the unintended effect of further marginalizing women

22 RWLG, 'Gender Guidelines', above n. 21, para. 1.10.

23 Crawley, *Refugees and Gender*, above n. 12, p. 7.

24 Vienna Convention on the Law of Treaties, above n. 19, Art. 31(3)(a), specifically provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

25 Crawley, *Refugees and Gender*, above n. 12, pp. 4–5; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 2.



if misinterpreted as an implicit concession that sex and gender have no place in refugee law at the present.<sup>26</sup>

The failure of decision makers to recognize and respond appropriately to the experiences of women stems not from the fact that the 1951 Convention does not refer specifically to persecution on the basis of sex or gender, but rather because it has often been approached from a partial perspective and interpreted through a framework of male experiences.<sup>27</sup> The main problem facing women as asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.<sup>28</sup>

### III. Understanding the meaning of ‘persecution’

Underlying the 1951 Convention is the international community’s commitment to the assurance of basic human rights without discrimination.<sup>29</sup> The Convention does not, however, protect persons against any and all forms of even serious harm.<sup>30</sup> There must be a risk of a type of harm that would be inconsistent with the basic duty of protection owed by a State to its own population.<sup>31</sup> The dominant view is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.<sup>32</sup> Persecution is most appropriately defined as the sustained or systemic failure of State protection in relation to one of the core entitlements recognized by the international community.<sup>33</sup>

The relevant core human rights are those contained in the so-called international bill of rights, comprising the Universal Declaration of Human Rights and, by virtue of their almost universal accession, the ICCPR and the International Covenant on

26 T. Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, Sept. 1994), p. 68; UNHCR, ‘Interpreting Article 1’, above n. 19, para. 19.

27 Crawley, *Refugees and Gender*, above n. 12, p. 35. 28 *Ibid.*

29 Preamble (first and second recitals) to the 1951 Convention; *Canada (Attorney-General) v. Ward*, Supreme Court, Canada, [1993] 2 SCR 689 at 733; (1993) 103 DLR (4th) 1 (hereinafter ‘*Ward*’).

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

31 *Ibid.*, pp. 103–4.

32 *Ibid.*, p. 108, approved in *Ward*, above n. 29, [1993] 2 SCR 689 at 733.

33 Hathaway, *Law of Refugee Status*, above n. 30, pp. 104–5 and 112, approved in *Horvath v. Secretary of State for the Home Department*, UK House of Lords, [2001] 1 AC 489 at 495F, 501C, 512F and 517D (hereinafter ‘*Horvath*’) and by Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, (2002) 187 ALR 574, and [2002] HCA 14, 11 April 2002, at para. 111. See also, Refugee Appeal No. 71427/99, above n. 10, at para. 51; Crawley, *Refugees and Gender*, above n. 12, pp. 40–2; RWLG, ‘Gender Guidelines’, above n. 21, para. 1.17; IAA, ‘Asylum Gender Guidelines’, above n. 11, para. 2.3.

Economic, Social and Cultural Rights, 1966.<sup>34</sup> To these must be added the Convention on the Elimination of All Forms of Racial Discrimination, 1965,<sup>35</sup> the Convention on the Elimination of All Forms of Discrimination Against Women, 1979,<sup>36</sup> and the Convention on the Rights of the Child, 1989.<sup>37</sup>

Four distinct types of obligation have been identified. First are those rights stated in the UDHR and translated into immediately binding form in the ICCPR, and from which no derogation whatsoever is permitted, even in times of compelling national emergency. These include: freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman or degrading punishment or treatment; freedom from slavery; the right to recognition as a person in law; and freedom of thought, conscience, and religion.<sup>38</sup>

Second are those rights enunciated in the Universal Declaration and translated into binding and enforceable form in the ICCPR, but from which States may derogate during a public emergency which threatens the life of the nation and the existence of which is officially proclaimed.<sup>39</sup> These include: freedom from arbitrary arrest or detention; equal protection of the law; fair criminal proceedings; personal and family privacy and integrity; freedom of internal movement; the right to leave and return; freedom of opinion, expression, assembly, and association; the right to form and join trade unions; the ability to partake in government; access to public employment without discrimination; and the right to vote.<sup>40</sup>

Third are those rights contained in the Universal Declaration and carried forward into the ICESCR. In contrast to the ICCPR, the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires States to take steps to the maximum of their available resources progressively to realize rights in a non-discriminatory way. Examples of this third category of rights are the right to work, the right to food, clothing, housing, medical care, social security, and basic education; and protection of the family, particularly children and mothers. While the standard of protection is less absolute than that

34 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 220 A (XXI), 16 Dec. 1966, 993 UNTS 3 (hereinafter 'ICESCR'). See generally, Hathaway, *Law of Refugee Status*, above n. 30, pp. 108–12.

35 Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195.

36 Above n. 5.

37 Convention on the Rights of the Child, 1989, UNGA Res. 44/25, 20 Dec. 1989. See also generally, J. C. Hathaway, 'The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute', in *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Proceedings of the 1998 Conference of the International Association of Refugee Law Judges, Oct. 1998), pp. 80 and 85–90; Refugee Appeal No. 71427/99, above n. 10, at para. 51.

38 Hathaway, *Law of Refugee Status*, above n. 30, p. 109; Crawley, *Refugees and Gender*, above n. 12, p. 40; RWLG, 'Gender Guidelines', above n. 21, para. 1.20; IAA, 'Asylum Gender Guidelines', above n. 11, para. 2A.4.

39 Hathaway, *Law of Refugee Status*, above n. 30, p. 109.

40 *Ibid.*, pp. 109–10; Crawley, *Refugees and Gender*, above n. 12, p. 40; IAA, 'Asylum Gender Guidelines', above n. 11, para. 2A.4.

which applies to the first two categories of rights, the State is in breach of its basic obligations where it either ignores these interests, notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment.<sup>41</sup> Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living or the entitlement to food, shelter, or health care will, at a certain level, be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and will unquestionably constitute persecution.<sup>42</sup> Economic, social, and cultural rights have particular impact on standards of living and are directly relevant in the context of refugee claims by women and children.<sup>43</sup> It cannot be assumed that because these rights are third category rights they are of any less significance in the refugee inquiry than first and second category rights.

Fourth are the rights recognized in the Universal Declaration but not codified in either of the 1966 Covenants. These rights include the right to private property and protection against unemployment.<sup>44</sup>

Whether the anticipated harm rises to the level of persecution depends not on a rigid or mechanical application of the categories of rights, but on an assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened. It must also be remembered that all human rights and fundamental freedoms are universal, indivisible, interdependent, and interrelated.<sup>45</sup>

#### A. Persecution = serious harm + the failure of State protection

Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the State's ability and willingness to respond effectively to that risk.<sup>46</sup> Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of

41 Hathaway, *Law of Refugee Status*, above n. 30, pp. 110–11.

42 Ibid., p. 111. See further also the discussion by R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford, 1995), pp. 100–1.

43 H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals – Text and Materials* (2nd edn, Oxford University Press, 2000), p. 163.

44 Hathaway, *Law of Refugee Status*, above n. 30, p. 111; Crawley, *Refugees and Gender*, above n. 12, p. 40.

45 'Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights', UN doc. A/CONF.157/24, 25 June 1993, ch. 1, para. 5; and the 'Platform for Action' adopted at the 1995 Fourth World Conference on Women, above n. 8, ch. 1, para. 2. Reference may also be made to the General Comments of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, and the General Recommendations of the Committee on the Elimination of All Forms of Discrimination Against Women and of the Committee on the Elimination of Racial Discrimination.

46 Hathaway, *Law of Refugee Status*, above n. 30, p. 125.

protection. This can be expressed in the formula: persecution = serious harm + the failure of State protection.<sup>47</sup>

## B. Serious harm

Women often experience persecution differently from men.<sup>48</sup> In particular, they may be persecuted through sexual violence or other gender-specific or gender-related persecution.<sup>49</sup> Such violence must be given a broad interpretation and may be defined as any act of gender-related 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>50</sup> Violence against women is to be understood to encompass, but not be limited to:<sup>51</sup>

1. 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;
2. 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;<sup>52</sup> and

47 RWLG, 'Gender Guidelines', above n. 21, para. 1.17, approved in *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 653F; *Horvath*, above n. 33, [2001] 1 AC 489 at 515H; Refugee Appeal No. 71427/99, above n. 10, at para. 67; and *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10, at paras. 31 and 118. See also, Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere', above n. 10, p. 391.

48 Executive Committee, Conclusion No. 73 (XLIV) 1993, Refugee Protection and Sexual Violence, paras. d and e.

49 Executive Committee, Conclusion No. 77 (XLVI) 1995, General, para. g; Executive Committee, Conclusion No. 79 (XLVII) 1996, General Conclusion on International Protection, para. o; Executive Committee, Conclusion No. 81 (XLVIII) 1997, General Conclusion on International Protection, para. t; Executive Committee, Conclusion No. 87 (L) 1999, General Conclusion on International Protection, para. n.

50 UN General Assembly, 'Declaration on the Elimination of Violence Against Women', 20 Dec. 1993, UN doc. A/RES/48/104, 23 Feb. 1994, Art. 1. It is well established that persecution may involve physical or mental ill-treatment. See e.g., *R. v. Secretary of State for the Home Department, ex parte Sasitharan*, English High Court (Queen's Bench Division), [1998] Imm AR 487 at 489–90 per Sedley J; *Abdulaziz Faraj v. Secretary of State for the Home Department*, English Court of Appeal, [1999] INLR 451 at 456; *Khawar v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (1999) 168 ALR 190, para. 37, upheld on appeal in *Minister for Immigration and Multicultural Affairs v. Khawar*, above n. 10.

51 UNGA, 'Declaration on the Elimination of Violence Against Women', above n. 50, Art. 2; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, pp. 4–5.

52 For a definition of trafficking, see the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, Nov. 2000, UN doc. A/55/383, Art. 3.

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

### C. Discrimination

Differences in the treatment of various groups do exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. Discrimination on its own is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution. Not every breach of a refugee claimant's human rights constitutes persecution.<sup>53</sup> It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned.<sup>54</sup> Discrimination can, however, affect individuals to different degrees and it is necessary to recognize and give proper weight to the impact of discriminatory measures on women. Various acts of discrimination, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution for the purposes of the 1951 Convention.<sup>55</sup>

Discrimination against women, as defined in the Convention for the Elimination of Discrimination Against Women, 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>56</sup>

As the Committee on the Elimination of Discrimination Against Women has noted:

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of . . . the Convention [for the Elimination of Discrimination Against Women].<sup>57</sup>

53 Hathaway, *Law of Refugee Status*, above n. 30, pp. 103–4.

54 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), at para. 54 (hereinafter 'UNHCR, *Handbook*'); UNHCR, 'Interpreting Article 1', above n. 19, para. 17.

55 Refugee Appeal No. 71427/99, above n. 10, at para. 51.

56 Convention on the Elimination of All Forms of Discrimination Against Women, above n. 5, Art. 1.

57 Committee on the Elimination of Discrimination Against Women, 'Violence Against Women', General Recommendation No. 19, 1992, para. 7, available on <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>. This Recommendation states that the definition of discrimination in Art. 1 of the Convention on the Elimination of all Forms of Discrimination Against Women

#### D. The failure of State protection

While persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of State protection, the refugee definition does not require that the State itself be the agent of harm. Persecution at the hands of ‘private’ or non-State agents of persecution equally falls within the definition. The State’s inability to protect the individual from persecution constitutes failure of local protection.<sup>58</sup> There are four situations in which it can be said that there is a failure of State protection:

1. persecution committed by the State concerned;
2. persecution condoned by the State concerned;
3. persecution tolerated by the State concerned; and
4. persecution not condoned or not tolerated by the State concerned but nevertheless present because the State either refuses or is unable to offer adequate protection.

State complicity in persecution is not a prerequisite to a valid refugee claim.<sup>59</sup>

#### E. The standard of State protection

The refugee inquiry is not an inquiry into blame.<sup>60</sup> Rather the purpose of refugee law is to identify those who have a well-founded fear of persecution for

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women 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. See General Recommendation No. 19, para. 6. The text of the Recommendation is reproduced in S. Joseph, J. Shultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2000), p. 564.

58 *Ward*, above n. 29, [1993] 2 SCR 689 at 709 and 716–17; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 5; UNHCR, ‘Interpreting Article 1’, above n. 19, para. 19.

59 UNHCR, *Handbook*, above n. 54, para. 65; UNHCR, ‘An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR’, *European Series*, vol. 1, No. 3, Sept. 1995, pp. 27–30; *Adan v. Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293 at 306A; *R. v. Secretary of State for the Home Department, ex parte Adan*, *R. v. Secretary of State for the Home Department, ex parte Aitseguer (conjoined appeals)*, House of Lords, [2001] 2 WLR 143 at 147F, 156–7, and 168; *Islam and Shah*, above n. 10; *Horvath*, above n. 33; *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10; W. Kälin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’, 15 *Georgetown Immigration Law Journal*, 2001, p. 415; and R. Marx, ‘The Notion of Persecution by Non-State Agents in German Jurisprudence’, 15 *Georgetown Immigration Law Journal*, 2001, p. 447.

60 This is reflected in the wish expressed in the Preamble to the 1951 Convention that ‘all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States’.

a Convention reason. The level of protection provided by a State should be such as to reduce the risk to a refugee claimant to the point where the fear of persecution could be said to be no longer well-founded. Otherwise an individual who holds a well-founded fear of being persecuted for one of the five reasons stated in the 1951 Convention will be expelled or returned to the frontiers of territories where his or her life or freedom would be threatened in breach of the *non-refoulement* obligation.<sup>61</sup>

A refugee claimant is not required to risk his or her life seeking ineffective protection of a State, merely to demonstrate that ineffectiveness.<sup>62</sup> The proper approach to the question of State protection is to enquire whether the protection available from the State will reduce the risk of serious harm to below the level of well-foundedness. The duty of the State is not, however, to eliminate all risk of harm,<sup>63</sup> but before it can be said that the refugee claimant can access State protection, that protection must be meaningful, accessible, effective, and available to all regardless of sex, race, ethnicity, sexual orientation, disability, religion, class, age, occupation, or any other aspect of identity. In some cases, there may be protection in theory, but not in actual practice.<sup>64</sup>

## F. Cultural relativism

Suffering and abuse are not culturally authentic values and cannot be justified in the name of cultural relativism.<sup>65</sup> Whether the harm threatened is sufficiently serious to be described as ‘persecution’ must be measured against the core human rights entitlements recognized by the international community. Breaches of human rights cannot be ignored, discounted, or explained away on the basis of culture, tradition, or religion.

The Declaration on the Elimination of Violence Against Women, 1994, stipulates that States ‘should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to [the] elimination [of violence against women]’.<sup>66</sup> The Convention on the Elimination of All Forms of Discrimination

61 1951 Convention, Art. 33(1).

62 *Ward*, above n. 29, [1993] 2 SCR 689 at 724; Refugee Appeal No. 71427/99, above n. 10, at paras. 62–7. Contrast *Horvath*, above n. 33.

63 Hathaway, *Law of Refugee Status*, above n. 30, p. 105.

64 RWLG, ‘Gender Guidelines’, above n. 21, para. 3.3; IAA, ‘Asylum Gender Guidelines’, above n. 11, para. 2B.3.

65 J. J. Shestack, ‘The Philosophical Foundations of Human Rights’, in *Human Rights: Concept and Standards* (ed. J. Symonides, Ashgate, Aldershot, 2000), pp. 31 and 59.

66 Declaration on the Elimination of Violence Against Women, above n. 50, Art. 4. See generally, ‘Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45’, UN doc. E/CN.4/1995/42, 22 Nov. 1994, paras. 63–9, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/>

Against Women requires States parties to take all appropriate measures ‘[t]o 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’.<sup>67</sup> The Human Rights Committee has stated that States parties to the ICCPR should ensure that traditional, historical, religious, or cultural attitudes are not to be used to justify violations of women’s right to equality before the law and to equal enjoyment of all rights under the Covenant.<sup>68</sup>

Implicit in these requirements is an obligation to protect women from practices premised on assumptions of inferiority or traditional stereotypes. Practices such as female genital mutilation,<sup>69</sup> suttee,<sup>70</sup> bride burnings, forced marriages, rape, and domestic violence are not only a violation of liberty and security of the person, they are clearly dangerous and degrading to women and an expression of the inherently inferior standing which women hold in many societies.<sup>71</sup> The right to safety, dignity of life, and freedom from cruel, inhuman or degrading treatment or punishment is not culturally derived, but stems from the common humanity of the individual.<sup>72</sup>

## G. Domestic violence

Physical and mental violence and ill-treatment within the family are a widespread and often gender-specific form of harm. The fact that such treatment occurs within the family context does not mean that it will not constitute ‘serious

75ccfd797b0712d08025670b005c9a7d?Opendocument, and ‘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’, UN doc. E/CN.4/1996/53, 6 Feb. 1996, paras. 100–15, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c41d8f479a2e9757802566d6004c72ab?Opendocument>.

67 Convention on the Elimination of All Forms of Discrimination Against Women, above n. 5, Art. 5(a).

68 Human Rights Committee, ‘Equality of Rights Between Men and Women’, General Comment No. 28, 2000, para. 5.

69 See e.g., World Health Organization/UN Children’s Fund (UNICEF)/UN Fund for Population Activities (UNFPA), ‘Joint Statement on Female Genital Mutilation’, 1997, which concluded that female genital mutilation is an infringement on the physical and psychosexual integrity of women and girls, is a form of violence against them, and is therefore universally unacceptable.

70 The former Hindu custom whereby a widow burnt herself to death on her husband’s funeral pyre.

71 N. Valji and L. A. De La Hunt, ‘Gender Guidelines for Asylum Determination’, National Consortium on Refugee Affairs, 1999, p. 18 (South Africa); *Aguirre-Cervantes v. INS*, 242 F 3d 1169 (9th Circuit), 2001.

72 Valji and De La Hunt, ‘Gender Guidelines for Asylum Determination’, above n. 71, p. 8; R. Higgins, *Problems and Process*, above n. 42, pp. 96–7.



harm'. Treatment which would constitute serious harm if it occurred outside the family will also constitute serious harm if it occurs within the family. As with other forms of harm, whether it constitutes persecution within the meaning of the 1951 Convention should be assessed on the basis of internationally recognized human rights standards and on the issue of causation. This issue is addressed below in section V, 'Understanding the meaning of "for reason of"'.<sup>73</sup>

## H. Gender-based discrimination enforced through law

Gender-based discrimination is often enforced through law as well as through social practices.<sup>74</sup> A woman's claim to refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects.<sup>75</sup> The claimant will need to establish that:

1. the policy or law is inherently persecutory; or
2. the policy or law is used as a means of persecution for one of the Convention reasons; or
3. the policy or law, although having legitimate goals, is administered through persecutory means; or
4. the penalty for non-compliance with the policy or law is disproportionately severe.<sup>76</sup>

## I. War, civil war, and civil unrest

The role of women in the biological and social reproduction of group identity places them in a position of particular vulnerability during war, civil war, and civil unrest. This vulnerability and the political significance of gender during periods of war and civil unrest must be specifically recognized.<sup>77</sup> Women may be direct participants as fighters or they may perform supportive roles such as intelligence gathering, providing food, and nursing the wounded. This may place them

73 IAA, 'Asylum Gender Guidelines', above n. 11, para. 2A.23; Crawley, *Refugees and Gender*, above n. 12, p. 129; UNHCR, 'Interpreting Article 1', above n. 19, para. 31.

74 Crawley, *Refugees and Gender*, above n. 12, p. 51.

75 UNHCR, *Handbook*, above n. 54, para. 65; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 4; UNHCR, 'Interpreting Article 1', above n. 19, para. 18; Immigration and Refugee Board, 'Women Refugee Claimants', above n. 11, p. 11.

76 UNHCR, *Handbook*, above n. 54, paras. 57–60; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, pp. 4–6; UNHCR, 'Interpreting Article 1', above n. 19, para. 18; Immigration and Refugee Board, 'Women Refugee Claimants', above n. 11, p. 11; Crawley, *Refugees and Gender*, above n. 12, p. 51.

77 *Ibid.*, p. 88.

at risk of persecution for a Convention reason. Many women may be targeted for persecution because of their race, nationality, clan membership, or association. In addition, women may be targeted because, as women, they have a particular symbolic status.<sup>78</sup>

Women are particularly vulnerable to persecution by sexual violence as a weapon of war.<sup>79</sup> As Crawley has noted:

[W]omen are specifically targeted for violence because of the symbolism of gender roles. The violation of women's bodies acts as a symbol of the violation of the country (or equally a given political, ethnic or national group) . . . During war, women's bodies become highly symbolic and the physical territory for a broader political struggle in which sexual violence including rape is used as a military strategy to humiliate and demoralise an opponent; women's bodies become the battleground for 'pay backs', they symbolize the dominance of one group over another . . . It is important to recognise that sexual violence and rape may be an actual *weapon* or a *strategy* of war itself, rather than just an expression or consequence. In the context of armed conflict or civil war, the rape of women is also about gaining control over other men and the group (national, ethnic, political) of which they are a part.<sup>80</sup>

## J. Internal protection

Refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable.<sup>81</sup> Where the risk of persecution stems from actions of a State agent or non-State agent that can and will be effectively suppressed by the national government, there is no need for this surrogate international protection. As a result many countries take into account whether the claimant can avail him or herself of a safe place in the country of origin.

<sup>78</sup> Ibid., p. 89.      <sup>79</sup> Ibid.

<sup>80</sup> Ibid., pp. 89–90. Sexual violence is prohibited by common Article 3 to the Geneva Conventions of 1949 and by the two Additional Protocols of 1977. The Rome Statute of the International Criminal Court, Arts. 7 and 8, defines 'crimes against humanity' and 'war crimes' as including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. See also, International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, 2 Sept. 1998, Case No. ICTR-96-4-T, available at <http://www.ictt.org>, which defines rape in international law and holds that rape can constitute genocide and, more recently, the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac, Kovac and Vukovic*, 22 Feb. 2001, at [www.un.org/icty/foca/trialc2/judgement/index.htm](http://www.un.org/icty/foca/trialc2/judgement/index.htm).

<sup>81</sup> *Ward*, above n. 29, [1993] 2 SCR 689 at 709; *Horvath*, above n. 33, [2001] 1 AC 489 at 495C, 501C, and 517D; *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10, at paras. 20 and 113.

This is sometimes called the internal protection, internal relocation, or internal flight alternative.

The protection analysis requires an objective and forward-looking assessment of the situation in the part or parts of the country proposed as alternative or safe locations.<sup>82</sup> Before refugee status can be denied on the grounds that the refugee claimant has an internal protection alternative available allowing him or her to relocate, it must be possible to say that he or she can genuinely access domestic protection which is meaningful. Four minimum conditions must be satisfied. First, the proposed site of internal protection must be safely and practicably accessible. Secondly, the proposed site of internal protection must eliminate the well-founded fear of persecution, that is, the place in question must be one in which the refugee claimant is not at risk of persecution for a Convention reason. Thirdly, in the proposed site of internal protection the individual must not be exposed to a risk of other forms of Convention or non-Convention-related serious harm, even if not rising to the level of persecution. Fourthly, meaningful domestic protection implies not just the absence of risk of harm, it requires also the provision of basic norms of civil, political, and socio-economic rights.<sup>83</sup>

The first condition means that a woman cannot be required to put her or her children's personal safety at risk. It also means that, where it is a requirement of the society in the country of origin that she travel in the company of a male relative but no such relative is available, the proposed site is not practicably accessible. Where the woman is responsible for the care of children, the proposed site of internal protection must be safely and practicably accessible by the group. The second condition is largely self-explanatory.

It is the third and fourth conditions which have particular application to refugee claims by women. In many societies women do not enjoy equal rights or equal access to rights. It may be that women cannot access accommodation and other fundamental necessities or cannot do so unless accompanied by a husband or a male relative. In many flight situations this may not be possible. Equally, women on their own, particularly if accompanied by children, may suffer discrimination in all aspects of life due to custom, religion, or socially constructed roles. These features can be exacerbated by the rupturing of the social fabric which often accompanies armed conflict, civil unrest, or persecution. The ability of women to access for themselves and their families basic civil, political, and socio-economic rights is of the first

82 UNHCR Position Paper, 'Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle")', Feb. 1999, para. 13.

83 Hathaway, *Law of Refugee Status*, above n. 30, p. 134, approved and applied in *Butler v. Attorney-General*, New Zealand Court of Appeal, [1999] NZAR 205 and *Al-Amidi v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, (2000) 177 ALR 506; Refugee Appeal No. 71684/99, NZ RSAA, [2000] INLR 165 at paras. 55–79; *Canaj v. Secretary of State for the Home Department*, English Court of Appeal, [2001] INLR 342 at para. 31; 'Michigan Guidelines on the Internal Protection Alternative', 21 *Michigan Journal of International Law*, April 1999, 131 and at <http://www.refugeecaselaw.org/refugee/guidelines.htm>.

importance. They must be able to provide the family with enough to eat, to maintain the household, to take care of the children and, in many cases, to support their spouse or partner. It must also be remembered that in some circumstances women face particular problems as their difficulties can stem not only from their religion, race, ethnicity, or other minority status, but also because of their sex or gender. The denial of refugee status on the basis that an internal protection alternative exists in the country of origin cannot be premised on the implicit assumption that a woman must tolerate the denial of her basic human rights.

#### IV. Understanding the meaning of ‘well-founded’

The requirement that the refugee claimant hold a ‘well-founded’ fear of being persecuted if returned to the country of origin requires a forward-looking assessment of the prospective risk of harm. That assessment must be made by the decision maker at the date of the decision on the refugee claim.<sup>84</sup>

The requirement that the fear of being persecuted be well-founded requires an objective assessment of the risk of persecution faced by the claimant.<sup>85</sup> This requirement can present substantial difficulty where little is known of the true conditions in the country of origin. As the UNHCR *Handbook* indicates:

[W]hile the burden of proof in principle lies on the refugee claimant, the duty to ascertain and evaluate all the relevant facts is shared between the claimant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. 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 should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.<sup>86</sup>

84 For a discussion of the French, German, and Swiss law, see W. Kälin, ‘Well-Founded Fear of Persecution: A European Perspective’ in *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (ed. J. Bhabha and G. Coll, 1st edn, Federal Publications, Washington DC, 1992), p. 21. For a discussion of Canadian and US law, see B. Jackman, ‘Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective’, in *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (ed. J. Bhabha and G. Coll, 1st edn, Federal Publications, Washington DC, 1992), p. 37. For a more recent comparative study, see J.-Y. Carlier, D. Vanheule, P. Galiano, and K. Hullmann (eds.), *Who is a Refugee? A Comparative Case Law Study* (Kluwer, The Hague, 1997). For a summary of Australian and New Zealand case law, see *Re C.*, Appeal No. 70366/96, NZ RSA, [1997] 4 HKC 236 at 264.

85 UNHCR, *Handbook*, above n. 54, para. 38.

86 UNHCR, *Handbook*, above n. 54, paras. 196–7.

Women in particular may face difficulty in establishing their claim to refugee status. Many may come from countries where they have been denied meaningful or even any education and may be illiterate. Many may come from countries where they have been denied meaningful participation in life and may be inarticulate. In some countries, women live in seclusion. Little may be known about them or their status and treatment, both in their society at large and in the home. Most importantly, there may be little information as to their ability to access meaningful State protection. The shared responsibility of the decision maker to ascertain all the relevant facts in cases of this kind must be given meaningful effect, as must the benefit of the doubt principle.

## V. Understanding the meaning of ‘for reasons of’

In a move to establish how best to conceive the causal linkage or nexus between the Convention ground and the risk of being persecuted, a colloquium elaborated in 2001 the ‘Michigan Guidelines on Nexus to a Convention Ground’.<sup>87</sup> These state as follows:

1. . . . The risk faced by the applicant must be causally linked to at least one of the five grounds enumerated in the Convention – race, religion, nationality, membership of a particular social group, or political opinion.

2. In many states, the requisite causal linkage is explicitly addressed . . . [while] in other states causation is not treated as a free-standing definitional requirement, but rather is subsumed within the analysis of other Convention requirements . . .

3. It is not the duty of the applicant accurately to identify the reason that he or she has a well-founded fear of being persecuted. The state assessing the claim to refugee status must decide which, if any, Convention ground is relevant to the applicant’s well-founded fear of being persecuted.

4. The risk of being persecuted may sometimes arise only when two or more Convention grounds combine in the same person, in which case the combination of such grounds defines the causal connection to the well-founded fear of being persecuted.

5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution.

87 ‘Michigan Guidelines on Nexus to a Convention Ground’, 25 March 2001, 23 *Michigan Journal of International Law*, 2002, p. 210; also available at <http://www.refugeecaselaw.org/refugee/guidelines2001.htm>.

**Nature of the required causal link**

6. The causal connection required is between a Convention ground and the applicant's well-founded fear of '*being persecuted*' . . . The focus [is] on the applicant's predicament . . .

7. Because it is the applicant's predicament which must be causally linked to a Convention ground, the fact that his or her *subjective* fear is based on a Convention ground is insufficient to justify recognition of refugee status.

8. The causal link between the applicant's predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm *or* which cause the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk . . .<sup>88</sup>

As stated by the New Zealand Refugee Appeals Authority:

Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided *either* by the serious harm limb *or* by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because 'persecution' is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is 'for reason of' a Convention ground, the summative construct is itself for reason of a Convention ground.<sup>89</sup>

The Michigan Guidelines continue:

8. . . . Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.

9. A causal link may be established whether or not there is evidence of particularized enmity, malignity or *animus* on the part of the person or group

<sup>88</sup> *Ibid.*, paras. 1–8 (emphasis added).

<sup>89</sup> Refugee Appeal No. 71427/99, above n. 10, at para. 112 (emphasis added). This passage was adopted and applied by Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10, at para. 120 and see also, Gleeson CJ at paras. 29–31 and McHugh and Gunmow JJ at paras. 79–80. See also, *Islam and Shah*, above n. 10, at 646C–D, 648C, 653E–G, and 654D.

responsible for the infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.

10. The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant's exposure to the risk of being persecuted.

#### **Standard of causation**

11. Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.

12. The standard of causation must also take account of the practical realities of refugee status determination, in particular the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.

13. In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

#### **Evidence of causation**

14. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.

15. A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group. Thus, evidence that persons who share the applicant's race, religion, nationality, membership of a particular social group, or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground is a contributing factor to the risk of being persecuted.

16. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicant's predicament, irrespective of whether other

individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.

17. No special rule governs application of the causal nexus standard in the case of refugees who come from a country in which there is a risk of war or other large-scale violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.<sup>90</sup>

## VI. The five Convention grounds

Gender is a relevant and at times highly significant factor and characteristic which must be taken into account when deciding whether the well-founded fear of being persecuted is for a Convention reason. Gender must inform the assessment of race, religion, nationality, membership of a particular social group, or political opinion. ‘Religion’ and ‘political opinion’ in particular need to be properly interpreted to include women’s experiences. In some cases, ‘women’ (or some subcategory thereof) may qualify as a ‘particular social group’.<sup>91</sup>

The UK Immigration Appellate Authority has noted:

Women may face persecution because of a Refugee Convention ground which is attributed or imputed to them. In many societies a woman’s political views, race, nationality, religion and social affiliations are often seen as aligned with relatives or associates or with those of her community. It is therefore important to consider whether a woman is persecuted because of a Convention ground which has been attributed or imputed to her.<sup>92</sup>

### A. Race

On this Convention ground, the UK Refugee Women’s Legal Group has noted:

90 ‘The Michigan Guidelines on Nexus to a Convention Ground’, above n. 87, paras. 8–17.

91 RWLG, ‘Gender Guidelines’, above n. 21, para. 4.1; *Islam and Shah*, above n. 10; Refugee Appeal No. 71427/99, above n. 10; and *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, above n. 10.

92 IAA, ‘Asylum Gender Guidelines’, above n. 11, para. 3.3; Spijkerboer, *Women and Refugee Status*, above n. 26, pp. 47–53.



Whilst actual or attributed racial identity is not specific to women, it may operate in tandem with gender to explain why a woman fears persecution. For example, whilst the destruction of ethnic identity and/or prosperity of a racial group may be through killing, maiming or incarcerating men, women may be viewed as propagating ethnic identity through their reproductive role, and may be persecuted through, for example, sexual violence or control of reproduction.<sup>93</sup>

## B. Religion

A woman may face harm for her adherence to, or rejection of, a religious belief or practice or for her decision to adhere to a religious belief or practice in a manner different to that prescribed.<sup>94</sup>

Religion includes but is not limited to:

- (a) freedom to hold a belief system of one's choice or not to hold a particular belief system;
- (b) freedom to practise a religion of one's choice or not to practice a prescribed religion; and
- (c) freedom to practise a religion in the manner of one's choice.<sup>95</sup>

To cite the UK Immigration Appellate Authority's 'Asylum Gender Guidelines':

Where the religion assigns particular roles or behavioural codes to women, a woman who refuses or fails to fulfil her assigned role or abide by the codes may have a well-founded fear of persecution on the ground of religion.

Failure to abide by the behavioural codes set out for women may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes about religion.<sup>96</sup>

There is often overlap between religious and political persecution. The political nature of oppression of women in the context of religious laws and ritualization

93 RWLG, 'Gender Guidelines', above n. 21, para. 4.6. See also, UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 7; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.6. The Convention on the Elimination of All Forms of Racial Discrimination, above n. 35, Art. 1, gives a broad definition to the term 'racial discrimination'. It means 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. The broad interpretation given to race and national or ethnic origins is confirmed by *King-Ansell v. Police*, New Zealand Court of Appeal, [1979] 2 NZLR 531; and *Mandla v. Dowell Lee*, UK House of Lords, [1983] 2 AC 548; UNHCR, 'Interpreting Article 1', above n. 19, para. 26.

94 RWLG, 'Gender Guidelines', above n. 21, para. 4.9; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.11.

95 RWLG, 'Gender Guidelines', above n. 21, para. 4.9; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.12. See e.g., *Matter of S.A.*, Interim Decision No. 3433 (BIA) 2000, p. 11–12.

96 IAA, 'Asylum Gender Guidelines', above n. 11, paras. 3.13 and 3.14.

must be recognized. Where religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion regardless of what a woman herself actually believes.<sup>97</sup> As the Refugee Women's Legal Group has also noted: 'A woman's religious identity may be aligned with that of other members of her family or community. Imputed or attributed religious identity may therefore be important.'<sup>98</sup>

### C. Nationality

Nationality should be understood not simply as citizenship but, in its broadest sense, to include membership of an ethnic or linguistic group and may overlap with the terms 'race', 'religion', and 'political opinion'.<sup>99</sup>

### D. Membership of a particular social group

Underlying the 1951 Convention is the principle that serious harm cannot be inflicted for reasons of personal status.<sup>100</sup> The Preamble to the Convention refers explicitly to the principle of non-discrimination enshrined in the Universal Declaration, Article 2 of which states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth *or other status* . . . (emphasis added)

Article 26 of the ICCPR is in similar terms and requires that

. . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth *or other status*. (emphasis added)<sup>101</sup>

97 UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 7; RWLG, 'Gender Guidelines', above n. 21, para. 4.10; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.15; Refugee Appeal No. 2039-93 *Re M.N.*, NZ RSAA, 12 Feb. 1996, p. 41, available at <http://www.refugee.org.nz/rsaa/text/docs/2039-93.htm>; Refugee Appeal No. 71427/99, above n. 10, at paras. 86–7.

98 RWLG, 'Gender Guidelines', above n. 21, para. 4.11. See also, IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.16.

99 RWLG, 'Gender Guidelines', above n. 21, para. 4.7; IAA, 'Asylum Gender Guidelines', above n. 11, para. 3.8. See also, above n. 93.

100 D. J. Steinbock, 'The Refugee Definition as Law: Issues of Interpretation' in *Refugee Rights and Realities: Evolving International Concepts and Regimes* (ed. F. Nicholson and P. Twomey, Cambridge University Press, 1999), p. 13, at pp. 20–3. At p. 20, the author states that the aims of the refugee definition concern the two great paradigms of the post-war period: the rights of non-discrimination and of free expression. They thereby serve to safeguard two essential attributes of the human personality.

101 Art. 26 is quoted in full above at n. 20.

Neither of these instruments attempts to list comprehensively the characteristics upon which discrimination might be based. Rather, they recognize that an exhaustive definition is impossible.

Likewise the social group ground in the 1951 Convention is an open-ended category which does not admit of a finite list of applications. There is nevertheless an inherent limitation involved in the words ‘particular social group’. Membership of a particular social group is one of only five categories. It is not an all-encompassing category. Not every association bound by a common thread is included.<sup>102</sup> In addition, in common law jurisdictions at least, there can only be a particular social group if the group exists independently of, and is not defined by, the persecution. Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.<sup>103</sup>

Cohesiveness is not a requirement for the existence of a particular social group. While this may be helpful in proving the existence of a social group, the meaning of ‘particular social group’ should not be limited by requiring cohesiveness.<sup>104</sup>

The other four Convention grounds (race, religion, nationality, and political opinion) describe a characteristic or status which is either beyond the power of an individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed. Applying this core concept of protection against the infliction of harm on the basis of difference in personal status or characteristics, three possible categories of ‘particular social group’ have been identified:

- (a) groups defined by an innate or unchangeable characteristic;
- (b) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (c) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>105</sup>

The first category would embrace individuals fearing persecution on such bases as sex, linguistic background, and sexual orientation, while the second would encompass, for example, human rights activists. Excluded are groups defined by a

102 For a more detailed investigation of the Convention ground ‘membership of a social group’ see the paper by T. A. Aleinikoff in Part 4.1 of this book; *Ward*, above n. 29, [1993] 2 SCR 689 at 728–32; *Applicant A.*, above n. 19, at (1997) 190 CLR 225 at 242 and 260; *Islam and Shah*, above n. 10, at [1999] 2 AC 629 at 643B–C, 656D, and 658H; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 7.

103 *Ward*, above n. 29, [1993] 2 SCR 689 at 729; *Applicant A.*, above n. 19, (1997) 190 CLR 225 at 242, 263–4, and 285–6; *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 639G–H, 645E, 656G, 658H, and 662B. See also, UNHCR, ‘2000 Position Paper on Gender-Related Persecution’, above n. 9, p. 7.

104 *Ward*, above n. 29, [1993] 2 SCR 689 at 739; *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 642A–643G, 651G, 657F, 658H, and 661D; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 8.

105 *Ward*, above n. 29, [1993] 2 SCR 689 at 739; Hathaway, *Law of Refugee Status*, above n. 30, p. 161.

characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.

Sex-based groups are clear examples of social groups defined by an innate and immutable characteristic. Thus, while sex is not a separately enumerated ground in the Convention, it is properly within the ambit of the social group category.<sup>106</sup>

Women who behave in a manner at odds with prevailing social or cultural mores can also constitute a particular social group.<sup>107</sup> The group ties derive from shared attitudes and value systems intrinsic to the nature of the persons concerned which go to their identity or status. In this context, external factors beyond the 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 may help 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 accepted social codes and who are at risk of severe punishment because of their choice fall within the Convention.<sup>108</sup> In this regard, more than one Convention reason may be relevant, including not only social group membership but also actual or imputed political opinion or religion.<sup>109</sup>

Family or kin associations may define a particular social group. There are cases where women are persecuted solely because of their family or kinship relationships. For example, a woman may be persecuted as a means of demoralizing or punishing members of her family or community, or in order to pressure her into revealing information.<sup>110</sup>

## E. Political opinion

The 1951 Convention definition refers to 'political opinion' rather than to 'political activity'. There is no requirement that a claimant have acted upon his or her beliefs prior to departure from his or her country in order to qualify for refugee status.<sup>111</sup> Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, and policy

106 Hathaway, *Law of Refugee Status*, above n. 30, p. 162; *Islam and Shah*, above n. 10, [1999] 2 AC 629 at 644D and 652C; Refugee Appeal No. 71427/99, above n. 10, at para. 106; UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 8; Executive Committee, Conclusion No. 39 (XXXVI) 1985, *Refugee Women and International Protection*, para. k; Crawley, *Refugees and Gender*, above n. 12, p. 70.

107 *Islam and Shah*, above n. 10.

108 Refugee Appeal No. 2039/93 *Re M.N.*, 12 Feb. 1996; Refugee Appeal No. 71427/99, above n. 10.

109 *Ibid.* 110 RWLG, 'Gender Guidelines', above n. 21, para. 4.26.

111 Hathaway, *Law of Refugee Status*, above n. 30, p. 149.

may be engaged.<sup>112</sup> This may include opinion as to gender roles. Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground that they are alleged or known to hold opinions contrary to, or critical of, the policies of the government or ruling party.<sup>113</sup> This broad construction must also be applied where the agent of persecution is not the State, but a non-State agent of persecution or private actor.

As stated in paragraph 80 of the UNHCR *Handbook*: 'Holding political opinions different from those of the agent of persecution is not in itself a ground for claiming refugee status, and an applicant must show that he or she has a well-founded fear of being persecuted for reason of holding such opinions.' As the refugee definition requires a forward-looking assessment of a risk of harm anticipated in the future, however, an applicant claiming fear of persecution because of political opinion need not show that the agent of persecution in the country of origin knew of the opinions before the applicant left the country. He or she may have concealed any political opinion and never have suffered any discrimination or persecution. The mere fact, however, of refusing to avail him or herself of the protection of the government, or a refusal to return may disclose the applicant's true state of mind and give rise to a risk of persecution. 'In such circumstances', as stated in paragraph 83 of the *Handbook*, 'the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he [or she] returned'.<sup>114</sup>

In some societies, overt demonstration of political opinion by women may not be possible as women are not allowed formally to participate in political life. Furthermore, the fact that a woman may challenge particular social conventions about the manner in which women should behave may be considered political by the authorities and may attract persecutory treatment on that basis.<sup>115</sup> In some case law, private sphere activities are seen as inherently non-political, but there is no such thing as an inherently political or inherently non-political activity. Whether or not activities are political depends on their context; whether or not they can give rise to legitimate claims to refugee status depends on the reaction of the agent of persecution and/or of the authorities in the country of origin of the claimant.<sup>116</sup> What is a

112 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996) p. 49, approved in *Ward*, above n. 29, [1993] 2 SCR 689 at 746. See also, Hathaway, *Law of Refugee Status*, above n. 30, p. 154: 'Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion.'

113 A. Grahl-Madsen, *The Status of Refugees in International Law*, (A. W. Sijthoff, Leyden, 1966), vol. I, p. 220, approved in *Ward*, above n. 29, [1993] 2 SCR 689 at 746.

114 UNHCR, *Handbook*, above n. 54, para. 83.

115 Department of Immigration and Multicultural Affairs, *Guidelines on Gender Issues for Decision-Makers*, July 1996 (Australia), para. 4.25, reproduced in *International Journal of Refugee Law*, special issue, 1997, pp. 195 and 210.

116 Spijkerboer, *Women and Refugee Status*, above n. 26, p. 58.

political opinion is not a matter of definition but depends entirely on the context of the case.<sup>117</sup>

‘Private’ issues commonly associated with women are not inherently less political than those taking place in the ‘public’ sphere. Conflicts concerning the demarcation of privacy (for example, freedom to choose to wear the veil or not, to have an education or undertake certain work, to be sexually active or not, to choose one’s partner, to be free from male domination and violence, to exercise reproductive rights, or to reject female genital mutilation) can be viewed as conflicts of a political nature.<sup>118</sup>

Where the refugee claimant is not directly involved in political activity in the conventional sense, a claim for refugee status requires that political opinion be properly understood to include an opinion regarding the treatment or status of women within the claimant’s country, culture, or social, religious, or ethnic group.<sup>119</sup> As the Refugee Women’s Legal Group has noted:

A woman who opposes institutionalised discrimination against women or expresses views of independence from the social or cultural norms of society may sustain or fear harm because of her actual political opinion or a political opinion that has been or will be imputed to her. She is perceived within the established political/social structure as expressing politically antagonistic views through her actions or failure to act. If a woman resists gendered oppression, her resistance is political.

Where a woman does not directly or intentionally challenge institutionalised norms or behaviour she may nonetheless be imputed (i.e. attributed) with a political opinion. This can be seen, for example, in the characterisation of a raped woman as adulterous, in the social ostracism of an unmarried, separated, divorced, widowed or lesbian woman, and in the politicisation of (unintentional) violations of dress codes.<sup>120</sup>

117 Spijkerboer, *Women and Refugee Status*, above n. 26, p. 58:

Private talk in itself can be subversive, and therefore a political act, as in Orwell’s 1984. In the context of refugee law, cooking will normally be a private act, and therefore irrelevant. This may change, however, if the food is given to a political opponent of the authorities, or if the cooking is done communally by relatives of ‘disappeared’ persons. There is political talk and private talk – as we know. But there is also private cooking and political cooking.

Therefore, an analysis of refugee law that uses the public/private distinction has to be on its guard. Public and private are not aspects of acts. They are aspects of analyses, be it by the authorities of the country of origin of an applicant (who may find cooking political), be it by an asylum adjudicator (who may find cooking inherently private).

118 Spijkerboer, *Women and Refugee Status*, above n. 26, p. 46; RWLG, ‘Gender Guidelines’, above n. 21, para. 4.16.

119 Crawley, *Refugees and Gender*, above n. 12, p. 69.

120 RWLG, ‘Gender Guidelines’, above n. 21, paras. 4.17–4.18. See also, IAA, ‘Asylum Gender Guidelines’, above n. 11, paras. 3.25–3.26.

Women's opinions on social and economic issues and their activities in these spheres may be interpreted by the authorities in the country of origin as political opinions. Social and economic rights may be violated for political reasons.

## VII. Procedural issues

Protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive refugee determination procedure.<sup>121</sup> Procedures for refugee determination are critical and must be made responsive to the experiences of women refugee claimants.<sup>122</sup> Decision makers must be aware of, and respond to, the procedural and evidential difficulties that women face.

Among the more significant issues identified by the Refugee Women's Legal Group is the fact that:

some women asylum seekers arrive alone. Others arrive as part of a family unit and are sometimes not interviewed about their experiences even when it is possible that they, rather than, or as well as, their male relatives, face a risk of being persecuted. Male relatives or associates may not raise relevant issues because they are unaware of the details, or their importance, or are ashamed to report them.

It is important not to assume that a woman's status is derivative; a woman's claim to refugee status may in some cases be as strong as, or stronger than, that of her male relative or associate.<sup>123</sup>

It has also been noted that as a matter of routine, women should be given the opportunity to submit an independent refugee application.<sup>124</sup> Indeed, the Refugee Women's Legal Group has pointed out: 'Women face particular difficulties in

121 UNHCR, 2000 Position Paper on Gender-Related Persecution, above n. 9, p. 8; UNHCR, 'Guidelines on the Protection of Refugee Women', July 1991, paras. 57–76 and in particular the gender-sensitive techniques for interviewing women refugees (para. 72) and country conditions affecting women (para. 73); UNHCR, 'Sexual Violence Against Refugees: Guidelines on Prevention and Response', 1995, para. 4.3; Spijkerboer, *Women and Refugee Status*, above n. 26, ch. 6; Crawley, *Refugees and Gender*, above n. 12, ch. 10; RWLG, 'Gender Guidelines', above n. 21, section 5; Immigration and Refugee Board, 'Women Refugee Claimants', above n. 11, section D; Department of Immigration and Multicultural Affairs (Australia), 'Guidelines on Gender Issues for Decision-Makers', July 1996, section 3; IAA, 'Asylum Gender Guidelines', above n. 11, section 5; G. Hinshelwood, 'Interviewing Female Asylum Seekers', *International Journal of Refugee Law*, special issue, 1997, p. 159; W. Kälin, 'Gender-Related Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer, The Hague, 2002), p. 111.

122 Executive Committee, Conclusion No. 73 (XLIV) 1993, Refugee Protection and Sexual Violence, para. g.

123 RWLG, 'Gender Guidelines', above n. 21, paras. 5.2–5.3.

124 Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.2.

making their case to the authorities, especially when they have had experiences that are difficult and/or painful to describe. The interview should be non-confrontational and exploratory.<sup>125</sup> As a result, it is important that women should not be interviewed in the presence of male relatives, unless they specifically otherwise request.<sup>126</sup> For their part, ‘interviewers and decision makers should familiarise themselves with the role, status and treatment of women in the country from which a woman has fled’.<sup>127</sup> It is therefore necessary to train all those involved in the refugee determination process so that they are sensitive to gender issues. In particular, women refugee applicants should have access to a woman interviewer and interpreter who have received appropriate training.<sup>128</sup>

### VIII. Conclusion

In conclusion, developments in international human rights law and international humanitarian law, including international jurisprudence, as well as substantial advancements in State practice, in case law, and in academic writing, have seen progress towards a gender-sensitive interpretation of the provisions of the 1951 Convention in many jurisdictions. State practice, while variable, demonstrates a convergence of understanding that the refugee definition, properly interpreted, can encompass gender-related claims. It has also strengthened the ability of women claimants in particular to access gender-sensitive asylum procedures, and to have their claims interpreted beyond the narrow confines of a framework of male experiences. The text, object, and purpose of the 1951 Convention, including the principle of non-discrimination, require a gender-inclusive and gender-sensitive interpretation, without which gender biases can be reinforced. In this respect, there is no need to add a sixth ground to those already enumerated in the 1951 Convention itself.

125 RWLG, ‘Gender Guidelines’, above n. 21, para. 5.8.

126 Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.2; RWLG, ‘Gender Guidelines’, above n. 21, paras. 5.10–5.16.

127 RWLG, ‘Gender Guidelines’, above n. 21, para. 5.43. See also, Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.4.

128 Spijkerboer, *Women and Refugee Status*, above n. 26, para. 6.3; RWLG, ‘Gender Guidelines’, above n. 21, para. 5.21.