

Please note that this paper is a work in progress. Arguments raised at the San Remo Expert Roundtable and comments received may be further incorporated into this article. The final version of the article will be produced after the San Remo Roundtable. (UNHCR)

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INTRODUCTION

1. The principle of non-discrimination has been correctly described as fundamental to the concept of human rights.² It is specifically affirmed, for example, in the Preamble to the United Nations Charter,³ the Universal Declaration of Human Rights, 1948 (UDHR),⁴ the International Covenant on Civil and Political Rights, 1966 (ICCPR),⁵ and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW).⁶ 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 Refugee Convention.⁷ It has not always been recognised that women and the girl-child enjoy the equal protection of the Refugee Convention.
2. However, from at least 1985 a concerted effort has been made by the UNHCR to correct this inequity and the Executive Committee of the High Commissioner's Programme has called on States to recognise that women who are victims of violence and persecution are in need of protection.⁸ The General Conclusion on

¹This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on gender-related persecution organised as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention relating to the Status of Refugees.

²Paul Sieghart, *The International Law of Human Rights* (Clarendon Press Oxford 1990) 75 and see also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 458, 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 [ICCPR]".

³The United Nations Charter also includes sex among the prohibited grounds of discrimination alongside race, language and religion: Article 1(3).

⁴Universal Declaration of Human Rights, Articles 2 and 7.

⁵International Covenant on Civil and Political Rights, 1966, Articles 2(1), 3 & 26.

⁶Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Articles 1, 2, 3, 4, & 5.

⁷The Convention relating to the Status of Refugees, 1951 and the Protocol relating to the Status of Refugees, 1967 will be referred to in this paper as the "Refugee Convention".

⁸See for example, EXCOM Conclusion No. 39 (XXXVI) *Refugee Women and International Protection* (1985) paras (b) & (k) which welcomed the recommendations regarding the situation of refugee and displaced women adopted by the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women held in Nairobi (Kenya) in July 1985 and (inter alia) recognised that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A(2) of the Refugee Convention. Subsequent UNHCR initiatives include the *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 at Geneva 22-23 February 1996 (reported in (1997) *IJRL Special Issue* 1-251) and UNHCR, *Gender-*

International Protection adopted in October 1995 by the Executive Committee:

“... calle[d] 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 recognise 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.”⁹

3. In the past decade the analysis and understanding of sex and gender in the refugee context has advanced substantially in the case law¹⁰, in state practice¹¹ and in academic writing.¹² These developments have run parallel to, and have been assisted by, developments in international human rights law and in international humanitarian law and in particular the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda.¹³ The Rome Statute of the International Criminal Court has also been significant in explicitly recognising sexual violence as a crime against humanity and as a war crime.¹⁴ 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 Refugee

Related Persecution (UNHCR Position Paper, 24 November 1999).

⁹ UN doc A/AC.96/878, IIIA.1.(o) and see generally UNHCR Division of International Protection, “Gender-Related Persecution: An Analysis of Recent Trends” (1997) *IJRL Special Issue* 79 - 80. See also the *Platform for Action adopted at the Beijing Fourth World Conference on Women* in September 1995, particularly para 136 which called upon States to consider recognising as refugees women who face persecution.

¹⁰ See for example *Matter of Kasinga* Int. Dec. 3278 (BIA 1996) (USA); *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL); *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 178 ALR 120 (FC:FC) (Australia); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 (NZRSAA). These decisions are discussed in Deborah Anker, “Refugee Status and Violence Against Women in the ‘Domestic’ Sphere: The Non-State Actor Question?” (2001) 15 *Geo. Immigr. L.J.* 391.

¹¹ See for example Immigration and Refugee Board, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 25, 1996) (Canada); Immigration and Naturalization Service, *Gender Guidelines: Considerations for Asylum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (26 May 1995) (USA). For recent developments see “INS Issues Proposed Rule on Gender - And Domestic Violence-Based Asylum Claims” 77 *Interpreter Releases* 1737 (Dec. 18, 2000); Department of Immigration and Multicultural Affairs, *Guidelines on Gender Issues for Decision Makers* (July 1996) (Australia); Dutch Immigration and Naturalisation Service, *Work Instruction No. 148: Women in the Asylum Procedure* (1997) (The Netherlands); Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK). The Swedish legislature inserted a specific provision in the Aliens Act in 1997 that 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: Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000) 3. The Refugee Act 1996 (Ireland) s 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.

¹² For the two most recent and notable examples, see Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000) and Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001). For a discussion of USA law, see Deborah E. Anker, *Law of Asylum in the United States* 3rd ed (Refugee Law Center 1999) 252-266; 365-376; 388-393 and Pamela Goldberg, “Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context (2000) 66 *Brook. L. Rev.* 309.

¹³ For a recent discussion see Erik Møse, “The Criminality Perspective” (2001) 15 *Geo. Immigr. L.J.* 463.

¹⁴ Rome Statute of the International Criminal Court, Articles 7 and 8.
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Convention.¹⁵

4. Experience has shown that a gender-inclusive and gender-sensitive interpretation of the Refugee Convention does not lead inexorably to the consequence that all women are automatically entitled to refugee status.¹⁶ The refugee claimant 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 will be a failure of state protection 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 particularised.

THE INTERPRETATION OF ARTICLE 1A(2)

5. Neither the refugee definition nor the Refugee Convention in general refers to sex or gender.¹⁷ This omission is without significance:
 - (a) The ordinary meaning of Article 1A(2) of the Refugee Convention in its context and in the light of the object and purpose of the Convention require the conclusion that the Convention protects both women and men and that it must therefore be given a gender-inclusive and gender-sensitive interpretation;¹⁸ and
 - (b) 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.¹⁹

¹⁵ See for example, Anne Leiss & Ruby Boesjes, *Female Asylum-Seekers: A Comparative Study Concerning Policy and Jurisprudence in the Netherlands, Germany, France, the United Kingdom and also dealing summarily with Belgium and Canada* (Dutch Refugee Council April 1994) 94; Julie Bissland & Kathleen Lawand, "Report of the UNHCR Symposium on Gender-Based Persecution" (1997) *IJRL Special Issue* 13, 28.

¹⁶ Chantal Bernier, "The IRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution" (1997) *IJRL Special Issue* 167, 168. Canada, which has the longest experience 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 Deborah E Anker, *Law of Asylum in the United States* 3rd ed (Refugee Law Centre 1999) 254 fn 405.

¹⁷ The non-discrimination provision of the Refugee Convention, namely Article 3 refers only to race, religion and country of origin as prohibited grounds of discrimination.

¹⁸ Vienna Convention on the Law of Treaties, 1969, Article 31 and see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA) per McHugh J. Article 31(1) provides that:

"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 UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) paras 2 to 6.

¹⁹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 465. Article 26 of the ICCPR provides:
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Universal access to refugee protection regime

6. Article 1A(2) of the Refugee Convention relevantly prescribes 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....”

7. As can be seen from the face of the text, this 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, E and F. Even then, none of these provisions make any distinction between individuals on the basis, for example, of their sex, age, disability, sexual orientation, marital or family status, race, political opinion, religious or ethical belief.

8. The intention to provide universal access to the refugee regime is expressly affirmed by the first and second recitals in the Preamble to the Refugee 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.”

Focus of inquiry is on specific characteristics and circumstances of the claimant

9. 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.

“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.”

Sex and Gender an integral element of refugee inquiry

10. The purpose of the Refugee Convention is to provide surrogate protection to men, women and children from persecution. Because men, women and children can be persecuted in different ways and because 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.
11. 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, 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 organisation of sexual difference).²⁰ Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power.²¹ 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.²² 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 refugee 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.²³
12. Gender-related persecution refers to the experiences of women who are persecuted *because* they are women, ie because of their identity and status as women. Gender-specific persecution refers to forms of serious harm which are specific to women.²⁴ The two may, however, overlap. The first will be discussed in the context of the “for reasons of” and “Convention grounds” elements. The second will be discussed in the section on “Persecution”.

Importance of the 1967 Protocol

13. The 1967 Protocol not only removed the 1 January 1951 dateline and the geographic limitation, it fundamentally transformed the Refugee Convention from a document

²⁰ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 6; Refugee Women’s Legal Group (RWLG), *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 1.8; UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 1.

²¹ Heaven Crawley op cit 7; RWLG op cit para 1.8.

²² Heaven Crawley op cit 7; RWLG op cit para 1.9.

²³ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 1.10.

²⁴ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 7.
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fixed to a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses which are properly called persecution.²⁵

Sex and gender already included in the Refugee Convention

14. The text, object and purpose of the Refugee 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 marginalisation of women in the refugee context.²⁶ It has been suggested that “sex” or “gender” be added as a sixth ground to the Refugee 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 marginalising women if misinterpreted as an implicit concession that sex and gender have no place in refugee law at the present.²⁷ The failure of decision-makers to recognise and respond appropriately to the experiences of women stems not from the fact that the Refugee 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.²⁸ 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 recognise the political nature of seemingly private acts of harm to women.²⁹

PERSECUTION

Understanding the meaning of persecution

15. Underlying the Refugee Convention is the international community’s commitment to the assurance of basic human rights without discrimination.³⁰ But the Convention does not protect persons against any and all forms of even serious harm.³¹ There must

²⁵Vienna Convention on the Law of Treaties, 1969 Article 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.

²⁶Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 4-5; UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 2.

²⁷Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) 68; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 29.

²⁸Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 35.

²⁹Ibid 35.

³⁰Preamble (first and second recitals) to the Refugee Convention; *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 733 (SC:Can).

³¹James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 103.
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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.³² 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.³³ Persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements recognised by the international community.³⁴

16. The relevant core human rights are those contained in the so-called international bill of rights comprising the Universal Declaration of Human Rights, 1948 (UDHR) and by virtue of their almost universal accession, the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).³⁵ To these must be added the Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Convention on the Rights of the Child, 1989 (CRC).³⁶
17. 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.³⁷
18. Second are those rights enunciated in the UDHR 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.³⁸ These include freedom from arbitrary arrest or detention;

³² Ibid 103-104.

³³ Ibid 108 approved in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 733 (SC:Can).

³⁴ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104-105, 112 approved in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 381, 383F, 389A, 399H, 404F (HL); [2000] 3 All ER 577, 581d, 586h, 597f, 602c (HL) and in *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51] (NZRSAA) and see Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 40-42; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 1.17; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 2.3.

³⁵ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 108-112.

³⁶ James C Hathaway, "The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute" published 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, October 1998) 80, 85-90; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51] (NZRSAA).

³⁷ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 109; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 40; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 1.20; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 2A.4.

³⁸ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 109.
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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.³⁹

19. Third are those rights contained in the UDHR 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 to progressively realise 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; protection of the family, particularly children and mothers. While the standard of protection is less absolute than that 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.⁴⁰ 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 unquestionably constitute persecution.⁴¹ 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 children⁴². It cannot be assumed that because these rights are third category rights that they are of any less significance in the refugee inquiry than first and second category rights.
20. Fourth are the rights recognised in the UDHR but not codified in either of the 1966 covenants. These rights include the right to private property and protection against unemployment.⁴³
21. 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

³⁹ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 109-110; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 40; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 2A.4.

⁴⁰ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 110-111.

⁴¹ *Ibid* 111. See further also the discussion by Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 100-101.

⁴² Steiner & Alston, *International Human Rights in Context: Law, Politics, Morals - Text and Materials* 2nd ed (Oxford 2000) 163.

⁴³ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 111; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 40. Confer/UNHCR003

universal, indivisible, interdependent and interrelated.⁴⁴

Persecution = Serious Harm + The Failure of State Protection

22. 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.⁴⁵ Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection. This can be expressed in the formula that: Persecution = Serious Harm + The Failure of State Protection.⁴⁶

Serious harm

23. Women often experience persecution differently from men.⁴⁷ In particular, they may be persecuted through sexual violence or other gender-specific or gender-related persecution.⁴⁸ 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.⁴⁹ Violence against women is to be understood to encompass, but not be limited to:⁵⁰
- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices

⁴⁴ *Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights* (A/CONF.157/24, 25 June 1993), Chapter 1, para 5 and the *Platform for Action adopted at the Beijing Fourth World Conference on Women* (A/CONF.177/20, 17 October 1995), Chapter 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.

⁴⁵ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 125.

⁴⁶ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 1.17 approved in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653F (HL) and *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 381, 403B (HL); [2000] 3 All ER 577, 600h (HL) and *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [67] (NZRSAA); Deborah Anker, "Refugee Status and Violence Against Women in the 'Domestic' Sphere: The Non-State Actor Question" (2001) *Geo. Immigr. L.J.* 391.

⁴⁷ EXCOM Conclusion No. 73 (XLIV) *Refugee Protection and Sexual Violence* (1993) paras (d) & (e).

⁴⁸ EXCOM Conclusion No. 77 (XLVI) *General* (1995) para (g); EXCOM Conclusion No. 79 (XLVII) *General Conclusion on International Protection* (1996) para (o); EXCOM Conclusion No. 81 (XLVIII) *General Conclusion on International Protection* (1997) para (t); EXCOM Conclusion No. 87 (L) *General Conclusion on International Protection* (1999) para (n).

⁴⁹ Declaration on the Elimination of Violence Against Women, 1994 (UN General Assembly Resolution A/RES/48/104, 20 December 1993), Article 1. It is well established that persecution may involve physical or mental ill-treatment. See for example *R v Secretary of State for the Home Department; Ex parte Sasitharan* [1998] Imm AR 487, 489-490 (Sedley J); *Abdulaziz Faraj v Secretary of State for the Home Department* [1999] INLR 451, 456 (CA); *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190 para [37] upheld on appeal in *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 178 ALR 120 (FC:FC).

⁵⁰ *Ibid* Article 2; UNHCR *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 4-5.
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harmful to women, non-spousal violence and violence related to exploitation;

- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;⁵¹
- (c) Physical, sexual and psychological violence perpetrated or condoned by the state, where ever it occurs.

Discrimination

24. 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.⁵² 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.⁵³ However, discrimination can affect individuals to different degrees and it is necessary to recognise and to 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 recognised as persecution for the purposes of the Refugee Convention.⁵⁴
25. Discrimination against women as defined in CEDAW 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 on equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil and any other field.⁵⁵
26. 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 CEDAW.⁵⁶

⁵¹For a definition of trafficking, see the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, 2000, Article 3.

⁵²James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 103-104.

⁵³UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 54; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 17.

⁵⁴*Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51] (NZRSAA).

⁵⁵Convention on the Elimination of All Forms of Discrimination Against Women (1979) Article 1.

⁵⁶CEDAW, *General Recommendation 19: "Violence Against Women"* (1992) para 7. This Recommendation states that the definition of discrimination in Article 1 of the Convention on the Elimination of all Forms of Discrimination Against Women includes Confer/UNHCR003

The failure of state protection

27. 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.⁵⁷ There are four situations in which it can be said that there is a failure of state protection:
- (a) Persecution committed by the state concerned;
 - (b) Persecution condoned by the state concerned;
 - (c) Persecution tolerated by the state concerned;
 - (d) 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.
28. State complicity in persecution is not a prerequisite to a valid refugee claim.⁵⁸

The standard of state protection

29. The refugee inquiry is not an inquiry into blame⁵⁹. Rather the purpose of refugee law is to identify those who have a well-founded fear of persecution for 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 Refugee Convention will be expelled or returned to the frontiers of territories where his or her life or freedom

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 para 6 of *General Recommendation 19*. The text of the *Recommendation* is reproduced in Joseph, Shultz & Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford 2000) 564.

⁵⁷ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 709, 716-717 (SC:Can); UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 5; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 19.

⁵⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 65; UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (European Series Vol. 1, No. 3, September 1995) 27-30; *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 306A (HL); *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 WLR 143, 147F, 156-157, 168 (HL); *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) and *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 381 (HL); [2000] 3 All ER 577 (HL); Walter Kälin, “Non-State Agents of Persecution and the Inability of the State to Protect” (2001) 15 Geo. Immigr. L.J. 415 and Reinhard Marx, “The Notion of Persecution by Non-State Agents in German Jurisprudence” (2001) 15 Geo. Immigr. L.J. 447.

⁵⁹ This is reflected in the wish expressed in the Preamble to the Refugee 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.” Confer/UNHCR003

would be threatened in breach of the non-refoulement obligation.⁶⁰ A refugee claimant is not required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.⁶¹ 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.⁶² 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.⁶³

Cultural relativism

30. Suffering and abuse are not culturally authentic values and cannot be justified in the name of cultural relativism.⁶⁴ Whether the harm threatened is sufficiently serious to be described as “persecution” must be measured against the core human rights entitlements recognised by the international community. Breaches of human rights cannot be ignored, discounted or explained away on the basis of culture, tradition or religion.
31. 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.⁶⁵ The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 requires states parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁶⁶ The Human Rights Committee has stated that States parties 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

⁶⁰ Refugee Convention, Article 33(1).

⁶¹ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 724 (SC:Can); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [62] to [67] (NZRSAA). Contrast *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 381 (HL).

⁶² James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 105.

⁶³ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 3.3; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 2B.3.

⁶⁴ Jerome J Shestack, “The Philosophical Foundations of Human Rights” in Symonides (ed), *Human Rights: Concept and Standards* (Ashgate 2000) 31, 59.

⁶⁵ Declaration on the Elimination of Violence Against Women, 1994, Article 4. See generally the preliminary report of the Special Rapporteur on Violence Against Women to the Commission on Human Rights, *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* (E/CN.4/1995/42, 22 November 1994) paras 63 to 69.

⁶⁶ Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 5(a). Confer/UNHCR003

rights under the International Covenant on Civil and Political Rights, 1966.⁶⁷

32. 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, suttee, bride burnings, forced marriages, rape and domestic violence are not only a violation of liberty and security of person, they are clearly dangerous and degrading to women and an expression of the inherently inferior standing which women hold in many societies.⁶⁸ The right to safety, dignity of life and freedom from cruel, inhuman or degrading treatment or punishment are not culturally derived, but stem from the common humanity of the individual.⁶⁹

Domestic violence

33. Physical and mental violence and ill treatment within the family is a wide-spread 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 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 Refugee Convention should be assessed on the basis of internationally recognised human rights standards and on the issue of causation. This issue is addressed under the heading “For Reason Of”.⁷⁰

Gender-based discrimination enforced through law

34. Gender-based discrimination is often enforced through law as well as through social practices.⁷¹ 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.⁷² The claimant will need to establish that:

- (a) The policy or law is inherently persecutory; or

⁶⁷ Human Rights Committee, *General Comment 28: Equality of Rights Between Men and Women* (2000) para 5.

⁶⁸ Nahla Valji & Lee Anne De La Hunt, *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs 1999) p 18 (South Africa); *Aguirre-Cervantes v INS* 242F. 3d 1169 (9th Cir. 2001).

⁶⁹ *Ibid* 18; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford 1995) 96-97.

⁷⁰ Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 2A.23; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 129; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 31.

⁷¹ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 51.

⁷² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 65; UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 4; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 18; Immigration and Refugee Board, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 25, 1996) (Canada) 11. Confer/UNHCR003

- (b) The policy or law is used as a means of persecution for one of the Convention reasons; or
- (c) The policy or law, although having legitimate goals, is administered through persecutory means; or
- (d) The penalty for non compliance with the policy or law is disproportionately severe.⁷³

War, civil war and civil unrest

35. 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 recognised.⁷⁴ Woman may be direct participants as fighters or they may perform supportive roles such as intelligence gathering, providing food and nursing the wounded.⁷⁵ This may place them at risk of persecution for a Convention reason. Many woman 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.⁷⁶
36. Women are particularly vulnerable to persecution by sexual violence as a weapon of war.⁷⁷ Women may be 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, political, ethnic or national group.⁷⁸ 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 symbolise the dominance of one group over another.⁷⁹ 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.⁸⁰ In the context of armed conflict

⁷³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) paras 57 to 60; UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 4-6; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 18; Immigration and Refugee Board, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 25, 1996) (Canada) 11; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 51.

⁷⁴ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 88.

⁷⁵ *Ibid* 89.

⁷⁶ *Ibid* 89.

⁷⁷ *Ibid* 89.

⁷⁸ *Ibid* 89.

⁷⁹ *Ibid* 89.

⁸⁰ *Ibid* 90.

or civil war, the rape of women may also be about gaining control over other men and the group (national, ethnic, political) of which they are a part.⁸¹

Internal protection

37. 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.⁸² 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 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. This is sometimes called the internal protection or relocation principle or the internal flight alternative.
38. 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.⁸³ 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 safely and practically accessible. Second, the proposed site of internal protection must eliminate the well-founded fear of persecution; ie the place in question must be one in which the refugee claimant is not at risk of persecution for a Convention reason. Third, 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. Fourth, 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.⁸⁴

⁸¹Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 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, Articles 7 and 8 define “crime 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 the decision of the International Criminal Court for the Former Yugoslavia, *Prosecutor v Kunarac, Kovac and Vukovic* (22 February 2001) on line at <www.un.org/icty/foca/trialc2/judgement/index.htm>.

⁸²*Canada (Attorney General) v Ward* [1993] 2 SCR 689, 709 (SC:Can); *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379, 383C, 389B, 404F (HL).

⁸³UNHCR Position Paper, *Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The So-Called “Internal Flight Alternative” or “Relocation Principle”)* (February 1999) para 13.

⁸⁴James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 134 approved and applied in *Butler v Attorney-General* [1999] NZAR 205 (NZCA) and *Al-Amidi v Minister for Immigration and Multicultural Affairs* (2000) 177 ALR 506 (Fed Court of Australia); *Refugee Appeal No. 71684/99* [2000] INLR 165 at [55] - [79]; *Michigan Guidelines on the Internal Protection Alternative* (April 1999) 21 Mich. J. Int’l L. 131 and at <<http://www.refugeecaselaw.org/refugee/guidelines.htm>>. Confer/UNHCR003

WELL-FOUNDED

39. 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.⁸⁵
40. The requirement that the fear of being persecuted be well-founded requires an objective assessment of the risk of persecution faced by the claimant.⁸⁶ This requirement can present substantial difficulty where little is known of the true conditions in the country of origin. While in many refugee determination systems the legal burden of proof lies on the refugee claimant, the duty to ascertain and evaluate all the relevant facts is shared between the claimant and the decision-maker.⁸⁷ Indeed, in some cases, it may be for the decision-maker to use all the means at his or her disposal to produce the necessary evidence in support of the refugee claim. 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 refugee claimant’s account appears credible, he or she should, unless there are good reasons to the contrary, be given the benefit of the doubt.⁸⁸ The requirement of evidence should therefore not be too strictly applied in view of the difficulty of proof inherent in the special situation of refugee claims.⁸⁹
41. Women in particular may face difficulty in establishing their claim to refugee status. Many may come from countries where they have been denied any or meaningful 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.

⁸⁵ For a discussion of the French, German and Swiss law, see Walter Kälin, “Well-Founded Fear of Persecution: A European Perspective” in Bhabha & Coll eds, *Asylum Law and Practice in Europe and North America: A Comparative Analysis* 1st ed (Federal Publications 1992) 21. For a discussion of Canadian and US law, see Barbara Jackman, “Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective” in Bhabha & Coll eds, *Asylum Law and Practice in Europe and North America: A Comparative Analysis* 1st ed (Federal Publications 1992) 37. For a summary of Australian and New Zealand case law see *Refugee Appeal No. 70366/96 Re C* [1997] 4 HKC 236, 264 (NZRSAA).

⁸⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 38.

⁸⁷ *Ibid* para 197.

⁸⁸ *Ibid* para 197.

⁸⁹ *Ibid* 197.

FOR REASONS OF

General

42. The risk faced by the refugee claimant must be causally linked to at least one of the five grounds enumerated in the Convention, that is race, religion, nationality, membership of a particular social group, or political opinion. In many states that linkage must be explicitly established 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.⁹⁰
43. It is not the duty of the refugee claimant 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 claimant's well-founded fear of being persecuted.⁹¹
44. 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.⁹²
45. 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.⁹³

Nature of the required causal link

46. The causal connection required is between a Convention ground and the claimant's well-founded fear of "*being persecuted*". The focus is on the claimant's predicament.⁹⁴
47. Because it is the claimant'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.⁹⁵
48. The causal link between the claimant'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 claimant's country of origin to withhold effective

⁹⁰ *The Michigan Guidelines on Nexus to a Convention Ground* (March 25, 2001) paras 1 & 2.

⁹¹ *Ibid* para 3.

⁹² *Ibid* para 4.

⁹³ *Ibid* para 5.

⁹⁴ *Ibid* para 6.

⁹⁵ *Ibid* para 7.

protection in the face of a privately inflicted risk.⁹⁶ Attribution of the Convention ground to the claimant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.⁹⁷

49. A causal link may be established whether or not there is evidence of particularised enmity, malignity or *animus* on the part of the person or group 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.⁹⁸
50. 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 claimant's exposure to the risk of being persecuted.⁹⁹

Standard of causation

51. 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. 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.¹⁰⁰
52. 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

⁹⁶ *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [112] (NZRSAA): "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 (eg 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. See *Shah* 646C-D, 648C, 653E-G and 654D."

⁹⁷ *The Michigan Guidelines on Nexus to a Convention Ground* (March 25, 2001) para 8.

⁹⁸ *Ibid* para 9.

⁹⁹ *Ibid* para 10.

¹⁰⁰ *Ibid* paras 11 & 12.

status need not be recognised.¹⁰¹

Evidence of causation

53. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.¹⁰² 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 claimant'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.¹⁰³
54. There is, however, no requirement that a claimant 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 claimant'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.¹⁰⁴
55. 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 generalised violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognised 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.¹⁰⁵

CONVENTION GROUNDS

General

56. Gender is a relevant and at times highly significant characteristic which must be taken into account when deciding whether the well-founded fear of persecution 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

¹⁰¹ Ibid para 13.

¹⁰² Ibid para 14.

¹⁰³ Ibid para 15.

¹⁰⁴ Ibid para 16.

¹⁰⁵ Ibid para 17.

opinion” in particular need to be properly interpreted to include women’s experiences. In some cases “women” (or some sub-category thereof) may qualify as a “particular social group”.¹⁰⁶

57. Women may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a woman’s political views, race, nationality, religion 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.¹⁰⁷

Race

58. While 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, while 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.¹⁰⁸

Religion

59. 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.¹⁰⁹
60. Religion includes but is not limited to:¹¹⁰
- (a) Freedom to hold a belief system of one’s choice or not to hold a particular belief system;

¹⁰⁶ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.1; *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 (NZRSAA) and *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 178 ALR 120 (FC:FC).

¹⁰⁷ Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.3; Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) 47 to 53.

¹⁰⁸ UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 7; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.6; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.6. The International Convention on the Elimination of All Forms of Racial Discrimination, 1966, Article 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* [1979] 2 NZLR 531 (NZCA) and *Mandla v Dowell Lee* [1983] 2 AC 548 (HL); UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 26.

¹⁰⁹ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.9; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.11.

¹¹⁰ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.9; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.12. Confer/UNHCR003

- (b) Freedom to practice a religion of one's choice or not to practice a prescribed religion; and
- (c) Freedom to practice a religion in the manner of one's choice.¹¹¹

61. Where a 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 such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes about religion.¹¹²
62. There is often overlap between religious and political persecution. The political nature of oppression of women in the context of religious laws and ritualisation must be recognised. 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.¹¹³
63. 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.¹¹⁴

Nationality

64. 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".¹¹⁵

Membership of a Particular Social Group

65. Underlying the Refugee Convention is the principle that serious harm cannot be inflicted for reasons of personal status.¹¹⁶ The Preamble to the Convention refers

¹¹¹ See for example *Matter of S-A-*, Interim Dec. 3433 at 11-12 (BIA 2000).

¹¹² Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.13 & 3.14.

¹¹³ UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 7; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.10; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.15; *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 41 (NZRSAA) <<http://www.refugee.org.nz/rsaa/text/docs/2039-93.htm>>; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [86] to [87] (NZRSAA).

¹¹⁴ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.11; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.16.

¹¹⁵ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.7; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.8; The International Convention on the Elimination of All Forms of Racial Discrimination, 1966, Article 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* [1979] 2 NZLR 531 (NZCA) and *Mandla v Dowell Lee* [1983] 2 AC 548 (HL); UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 26.

¹¹⁶ Daniel J Steinbock, "The Refugee Definition as Law: Issues of Interpretation" in Nicholson & Twomey (eds), *Refugee Rights Confer/UNHCR003*

explicitly to the principle of non-discrimination enshrined in the Universal Declaration of Human Rights, 1948. Article 2 of the Declaration 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 International Covenant on Civil and Political Rights is in similar terms.¹¹⁷

66. Neither of these instruments attempt to list comprehensively the characteristics upon which discrimination might be based. Rather, they recognise that an exhaustive definition is impossible.
67. Likewise the social group ground in the Refugee Convention is an open-ended category which does not admit of a finite list of applications.
68. But there is 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.¹¹⁸ In addition there can only be a particular social group if the group exists independently of, and is not defined by, the persecution.¹¹⁹ 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.¹²⁰
69. Cohesiveness is not a requirement for the existence of a particular social group. While cohesiveness may be helpful in proving the existence of a social group, the meaning of

and Realities: Evolving International Concepts and Regimes (Cambridge 1999) 13, 20-23. 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.

¹¹⁷ The International Covenant on Civil and Political Rights, 1966, Article 26 states:

“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*.” [emphasis added]

¹¹⁸ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 728-732 (SC:Can); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 242, 260 (HCA); *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 643B-C, 656D, 658H (HL); UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) p 7.

¹¹⁹ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 729 (SC:Can); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 242, 263-264, 285-286 (HCA); *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 639G-H, 645E, 656G, 658H, 662B (HL).

¹²⁰ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 729 (SC:Can); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 242, 263-264, 285-286 (HCA); *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 639G-H, 645E, 656G, 658H, 662B (HL); UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) p 7.
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“particular social group” should not be limited by requiring cohesiveness.¹²¹

70. 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 identified¹²²:
- (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.

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

71. 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 Refugee Convention, it is properly within the ambit of the social group category.¹²³
72. Women who behave in a manner at odds with prevailing social or cultural mores can also constitute a particular social group.¹²⁴ 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

¹²¹ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 739 (SC:Can); *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 642A-643G, 651G, 657F, 658H, 661D (HL); UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 8.

¹²² *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 739 (SC:Can); James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 161.

¹²³ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 162; *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 644D, 652C (HL); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [106] (NZRSAA); UNHCR, *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 8; EXCOM Conclusion No. 39 (XXXVI) *Refugee Women and International Protection* (1985) para k; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 70.

¹²⁴ *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL).
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segments of society. This approach would recognise 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.¹²⁵ 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.¹²⁶

73. 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 demoralising or punishing members of her family or community, or in order to pressure her into revealing information.¹²⁷

Political opinion

74. The 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.¹²⁸ 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 may be engaged.¹²⁹ 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.¹³⁰ 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.
75. 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.¹³¹ However, as the refugee definition requires a forward-looking assessment of a risk of harm anticipated in the future, an applicant claiming fear of persecution because of

¹²⁵ *Refugee Appeal No. 2039/93 Re MN* (12 February 1996); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 (NZRSAA).

¹²⁶ *Refugee Appeal No. 2039/93 Re MN* (12 February 1996); *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 (NZRSAA).

¹²⁷ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.26.

¹²⁸ James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 149.

¹²⁹ Guy S Goodwin-Gill, *The Refugee in International Law* (2nd ed) (Clarendon Press 1996) 49. Approved in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 746 (SC:Can); James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 149, 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”.

¹³⁰ Atle Grahl-Madsen, *The Status of Refugees in International Law* Vol 1 (Sijthoff 1966) 220 approved in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 746 (SC:Can).

¹³¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 80. Confer/UNHCR003

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. However, the mere fact 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, 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 she returned.¹³²

76. In some societies, overt demonstration of political opinion by women may not be possible as women are not allowed to formally 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.¹³³ In some case law, private sphere activities are seen as inherently non-political. However, 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 of the authorities in the country of origin of the claimant.¹³⁴ What is a political opinion is not a matter of definition but depends entirely on the context of the case.¹³⁵
77. "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 her partner, to be free from male domination and violence, to exercise reproductive rights

¹³² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 83.

¹³³ Department of Immigration and Multicultural Affairs, *Guidelines on Gender Issues for Decision-Makers* (July 1996) (Australia) para 4.25 (1997) IJRL *Special Issue* 195, 210.

¹³⁴ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) 58.

¹³⁵ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) 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)...."

and to reject female genital mutilation) are conflicts of a political nature.¹³⁶

78. 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 her country, culture or social, religious or ethnic group.¹³⁷ 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 or social structure as expressing politically antagonistic views through her actions or failure to act. If a woman resists gendered oppression, her resistance is political.¹³⁸
79. Where a woman does not directly or intentionally challenge institutionalised norms or behaviour she may nonetheless be imputed (ie 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.¹³⁹
80. 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.

¹³⁶ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) 46; RWLG *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.16.

¹³⁷ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 69.

¹³⁸ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.17; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) para 3.25 & 3.26.

¹³⁹ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 4.18.
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CONCLUSIONS AND RECOMMENDATIONS

INTERPRETATION OF ARTICLE 1A(2)

1. The purpose of the Refugee Convention is to provide surrogate protection to men, women and children from persecution. The refugee definition in Article 1A(2) of the Convention applies to all persons irrespective of their sex or age.
2. The text, object and purpose of the Refugee Convention and the right to equality before the law and to equal protection of the law (ICCPR, Article 26) require that the Refugee Convention be given a gender-inclusive and gender-sensitive interpretation. Sex and gender are already included in the refugee definition.

PERSECUTION

The meaning of persecution

3. Persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core human rights entitlements recognised by the international community.
4. The relevant core human rights are those contained in the so-called international bill of rights comprising the UDHR and by virtue of their almost universal accession, the ICCPR and the ICESCR. To these must be added the Convention on the Elimination of All Forms of Racial Discrimination, 1966, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and the Convention on the Rights of the Child, 1989.
5. Whether the anticipated harm rises to the level of persecution depends not on a rigid or mechanical application of the international bill of rights and the rights found therein, 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.
6. 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. Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection. This can be expressed in the formula that: Persecution = Serious Harm + The Failure of State Protection.
7. Women often experience persecution differently from men. In particular, they may be persecuted through sexual violence or other gender-specific or gender-related persecution. Such violence must be given a broad interpretation and may be defined as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts,

coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Discrimination

8. 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. However, discrimination can affect individuals to different degrees and it is necessary to recognise and to 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 recognised as persecution for the purposes of the Refugee Convention.

Failure of state protection

9. Persecution is within the refugee definition whether it be by the state or by a non-state agent of persecution. There are four situations in which it can be said that there is a failure of state protection.
 - (a) Persecution committed by the state concerned;
 - (b) Persecution condoned by the state concerned;
 - (c) Persecution tolerated by the state concerned;
 - (d) 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.
10. State complicity in persecution is not a prerequisite to a valid refugee claim.

The standard of state protection

11. The standard 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.

Cultural relativism

12. Whether the harm threatened is sufficiently serious to be described as "persecution" must be measured against the core human rights entitlements recognised by the international community. Breaches of human rights cannot be ignored, discounted or explained away on the basis of culture, tradition or religion.

Domestic violence

13. Treatment which would constitute serious harm if it occurred outside the family will also constitute serious harm if it occurs within the family.

Gender-based discrimination enforced through law

14. Gender-based discrimination is often enforced through law as well as through social practices. 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. The claimant will need to establish that:
- (a) The policy or law is inherently persecutory; or
 - (b) The policy or law is used as a means of persecution for one of the Convention reasons; or
 - (c) The policy or law, although having legitimate goals, is administered through persecutory means; or
 - (d) The penalty for non compliance with the policy or law is disproportionately severe.

War, civil war and civil unrest

15. Women are particularly vulnerable to persecution by sexual violence as a weapon of war. Sexual violence against women may also be about gaining control over other men and the group (national, ethnic, political) of which they are a part. This vulnerability and the political significance of gender during periods of war and civil unrest must be specifically recognised.

Internal protection

16. Before refugee status can be denied on the grounds that the refugee claimant has an internal protection alternative available, it must be possible to say, after making a forward-looking assessment, that she can genuinely access domestic protection which is meaningful. Four minimum conditions must be satisfied:
- (a) The proposed site of internal protection must be safely and practically accessible;
 - (b) The place in question must be one in which the refugee claimant is not at risk of persecution for a Convention reason;
 - (c) 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;
 - (d) Meaningful domestic protection implies not just the absence of risk of harm. It also requires the provision of basic norms of civil, political and socio-economic rights.

FOR REASONS OF

Nature of the required causal link

17. The causal connection required is between a Convention ground and the claimant's well-founded fear of "*being persecuted*". The focus is on the claimant's predicament.
18. Because it is the claimant's predicament which must be causally linked to a Convention ground, the fact that her *subjective* fear is based on a Convention ground is insufficient to justify recognition of refugee status.
19. The causal link between the claimant's predicament and a Convention ground will be revealed by evidence of the reasons for either the infliction or threat of a relevant harm *or* which cause the claimant's country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the claimant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.
20. A causal link may be established whether or not there is evidence of particularised enmity, malignity or *animus* on the part of the person or group responsible for infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.
21. 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 claimant's exposure to the risk of being persecuted.

Standard of causation

22. 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 recognised.

Evidence of causation

23. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence. A risk 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 claimant's race, religion, nationality, membership of a particular social group, or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted.
24. There is, however, no requirement that a claimant for asylum be more at risk than other persons or groups in her country of origin. The relevant question is instead whether the Convention ground is causally connected to the claimant'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.

25. 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 generalised violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognised 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.

CONVENTION GROUNDS

General

26. Gender is a relevant and at times highly significant characteristic which must be taken into account when deciding whether the well-founded fear of persecution 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 sub-category thereof) may qualify as a “particular social group”.
27. Women may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a woman’s political views, race, nationality, religion 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.

Race

28. While 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, while 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.

Religion

29. 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.
30. 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 practice a religion of one's choice or not to practice a prescribed religion; and
 - (c) Freedom to practice a religion in the manner of one's choice.
31. Where a 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 such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes about religion.
32. There is often overlap between religious and political persecution. The political nature of oppression of women in the context of religious laws and ritualisation must be recognised. 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.
33. 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.

Nationality

34. 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".

Membership of a Particular Social Group

35. The social group ground in the Refugee Convention is an open-ended category which does not admit of a finite list of applications.
36. Cohesiveness is not a requirement for the existence of a particular social group. While cohesiveness may be helpful in proving the existence of a social group, the meaning of "particular social group" should not be limited by requiring cohesiveness.
37. 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.

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

- 38. 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 Refugee Convention, it is properly within the ambit of the social group category.
- 39. Women who behave in a manner at odds with prevailing social or cultural mores can also constitute a particular social group. The group ties derive from shared attitudes and value systems intrinsic to the nature of the persons concerned which go to their identity 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 recognise 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. 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.
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42. In some societies, overt demonstration of political opinion by women may not be possible as women are not allowed to formally 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. In some case law, private sphere activities are seen as inherently non-political. However, 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 of the authorities in the country of origin of the claimant. What is a political opinion is not a matter of definition but depends entirely on the context of the case.
43. “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 her partner, to be free from male domination and violence, to exercise reproductive rights and to reject female genital mutilation) are conflicts of a political nature.
44. 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 her country, culture or social, religious or ethnic group. 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 or social structure as expressing politically antagonistic views through her actions or failure to act. If a woman resists gendered oppression, her resistance is political.
45. Where a woman does not directly or intentionally challenge institutionalised norms or behaviour she may nonetheless be imputed (ie 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.

PROCEDURAL ISSUES

46. Protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive refugee determination procedure.¹⁴⁰
47. Procedures for refugee determination are critical and must be made responsive to the experiences of women refugee claimants. Decision-makers must be aware of, and respond to, the procedural and evidential difficulties that women face.¹⁴¹
48. Some of the more significant issues are:
 - (a) 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.¹⁴²
 - (b) 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.¹⁴³ As a matter of routine, women should be given the opportunity to submit an independent refugee application.¹⁴⁴
 - (c) Women face particular difficulties in 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.¹⁴⁵
 - (d) Women should not be interviewed in the presence of male relatives, unless

¹⁴⁰ *Gender-Related Persecution* (UNHCR Position Paper, 24 November 1999) 8; UNHCR, *Guidelines on the Protection of Refugee Women* (July 1991) paras 57 to 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; Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) Chapter 6; Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) chapter 10; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) Section 5; Immigration and Refugee Board, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 25, 1996) (Canada) Section D; Department of Immigration and Multicultural Affairs, *Guidelines on Gender Issues for Decision-Makers* (July 1996) (Australia) Section 3; Immigration Appellate Authority, *Asylum Gender Guidelines* (November 2000) (UK) Section 5; Gill Hinshelwood, "Interviewing Female Asylum Seekers" (1997) *IJRL Special Issue* 159; Walter Kälin, "Gender-Related Persecution in Swiss Asylum Law" (2000) (publication forthcoming).

¹⁴¹ EXCOM Conclusion No. 73 (XLIV) *Refugee Protection and Sexual Violence* (1993) para g.

¹⁴² RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 5.2.

¹⁴³ *Ibid* para 5.3.

¹⁴⁴ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) para 6.2.

¹⁴⁵ RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 5.8.
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they specifically otherwise request.¹⁴⁶

- (e) Decision-makers should familiarise themselves with the role, status and treatment of women in the country from which the woman has come.¹⁴⁷
- (f) All those involved in the refugee determination process should receive training so that they are sensitive to gender issues.
- (g) Women refugee applicants should have access to a woman interviewer and interpreter who have received appropriate training.¹⁴⁸

¹⁴⁶ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) para 6.2; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 5.10 to 5.16.

¹⁴⁷ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) para 6.4; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 5.43.

¹⁴⁸ Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction* (Emancipation Council, The Hague, September 1994) para 6.3; RWLG, *Gender Guidelines for the Determination of Asylum Claims in the UK* (July 1998) para 5.21. Confer/UNHCR003