

Tiia Fehrmann

Women's Gender-Based Violence as Grounds for Asylum Under the 1951 Refugee Convention and  
1967 Protocol

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Author: Tiia Fehrmann

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Supervisor: Elina Pirjatanniemi

Supervisor:

The exclusion of women’s experiences from the refugee discourse is inherent in the 1951 Convention refugee definition. As the language itself does not speak of gender there has been unnecessary conceptual barriers to women’s claims. However, today, seventy years after establishing the 1951 Convention it is generally accepted that the Convention refugee definition as a whole should be interpreted with an awareness of possible gender dimensions and that it is essential to define and distinguish between the terms “gender” and “sex”. The evolution of the notion of gender-related violence has had a positive impact on breaking the barriers to women’s gender-related asylum claims. It has been recognised that gender (rather than sex) may have an impact in the form of persecution, while the reasons for persecution may arise from the construction of gender in the society.

This thesis provides a gender-sensitive overview of the existing refugee discourse and examines the barriers to women’s claims for asylum under the 1951 Convention and its 1967 Protocol grounds “particular social group” and “political opinion”. Furthermore, it examines scholarly writings and interpretative guidelines to find answers to the question of, whether women’s claims for asylum will be better incorporated to the refugee discourse by adopting gender-sensitive interpretation or by adding “gender” as independent ground to the Convention. In doing so, it has analysed the 1951 Convention refugee definition elements that have deemed most problematic in gender-related cases: definition and understanding of the term “persecution”, non-state actors of persecution, and “nexus” between persecution and one of the enumerated Convention grounds. Furthermore, the thesis assesses a trilogy of cases from common law countries that have contributed to the evolutionary reading of the refugee definition for better inclusion of women’s gender-related claims to the discourse.

The drafters of the 1951 Convention left the indispensable element of flexibility on the concept of persecution on purpose to ensure that it can be applied to circumstances as they might arise. The indeterminacy has allowed the concept to evolve to the “changing nature of persecution” and include forms of harm, that may not have been relevant to the drafters 70 years ago, such as FGM or domestic violence.

Were gender to be added as a sixth enumerated ground, there would still be a need to adjudicate women’s claims to refugee on a case-by-case basis, in order to ensure their protection under international law. Adding gender as a sixth enumerated ground could, however, provide a platform for women’s experiences of persecution in the refugee discourse, in situations where women are being persecuted as women or because they are women. However, gender-sensitive interpretation of the existing grounds and the gender inclusive evolution of the State jurisprudence may provide a timelier redress to the challenge’s women face in the refugee discourse.

Key words:

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## ABBREVIATIONS

BIA	Board of Immigration Appeals (USA)
CEAS	Common European Asylum System
ECHR	European Convention on Human Rights and Fundamental Freedoms (1950)
ECtHR	European Court of Human Rights
ExCom	Executive Committee
FGM	Female genital mutilation
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
IFA	Internal Flight Alternative
INS	Immigration and Naturalization Service (USA)
IPA	Internal Protection Alternative
MIMA	Minister of Immigration and Multicultural Affairs (Australia)
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
USCIS	United States Citizenship and Immigration Services

# 1. Introduction

## 1.1. The Refugee Definition and Barriers to Women's Claims

In the European Union alone, women constitute, on average, one in three of those applying for asylum in their own right.<sup>1</sup> Although women can be persecuted for the same reasons as men, there are situations which concern women specifically. Women's asylum claims relating to gender-related abuses such as rape, physical abuse, torture and sexual harassment have been largely ignored under the 1951 United Nations Convention Relating to the Status of Refugees<sup>2</sup> (hereafter: the Refugee Convention) and its 1967 Protocol. The Refugee Convention, with its updating Protocol of 1967, is the central feature of today's international regime of refugee protection. One hundred and forty-six out of total 193 United Nations members have now ratified either one or both instruments (as of September 2019). Entered into force in 1954, the Refugee Convention is still today the most widely ratified refugee treaty, providing protection for the activities of the United Nations High Commissioner for Refugees (UNHCR). It was not until the 1967 Protocol that the geographic and temporal limits were removed, making the 1951 Convention universally applicable.

Historically, the 1951 Refugee Convention was the international community's response to the failure to protect refugees and other persecuted groups fleeing Holocaust.<sup>3</sup> The temporary specialized agency of the United Nations (UN) — International Refugee Organization (IRO)—catered to the substantial refugee problem caused by the World War II by providing a list defining who is a refugee (e.g., victims of the Nazi or fascist regimes).<sup>4</sup> The 1951 Convention leaves the list approach behind, proposing a limited but general approach. According to the 1951 Convention, in order to qualify as a refugee not only must one show that he or she is fleeing from persecution, but also that there is a causal nexus element between persecution and one of the enumerated Convention grounds, namely race, religion, nationality, political opinion or membership to a particular social group.<sup>5</sup> The Convention does not recognise gender alone as a ground for persecution. Thus gender-

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<sup>1</sup> European Commission, Eurostat Asylum Statistics (Eurostat Statistics Explained, 16 March 2021) available at: <[https://ec.e14.uropa.eu/eurostat/statistics-explained/index.php?title=Asylum\\_statistics#Age\\_and\\_gender\\_of\\_first-time\\_applicants](https://ec.e14.uropa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics#Age_and_gender_of_first-time_applicants)> last accessed 21.4.2021

<sup>2</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>3</sup> Ibid. p. 2.

<sup>4</sup> Constitution of the International Refugee Organization (adopted July 3 1947), entered into force 20 August 1948, terminated 31 December 1951, 62 Stat. 3037; Treaties and other International Acts Series 1846, Part I, Section A, Article 1(a).

<sup>5</sup> Refugee Convention (n. 2) Art. 33.

based persecution is often discussed in the context of the ‘membership in a particular group category’ or ‘political opinion’.

Throughout the time, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women have gone unrecognised.<sup>6</sup> The absence of women’s point of view from international refugee law and policy was discovered during the 1980’s transnational movement calling for equal inclusion of women within the refugee protection.<sup>7</sup> The movement was acknowledged by the UNHCR and other United Nations (UN) bodies which began to recognise the gaps in protection for women fleeing gender-based persecution and the particular issues involved in their cases. Since then, there has been a steady stream of developments concerning gender-related asylum claims. At the beginning of 1985, the Executive Committee (ExCom) of the UNHCR issued its first conclusion on refugee women.<sup>8</sup> The UNHCR conclusion was followed by the creation of new field manuals, training programs, and policy documents such as the 1989 UNHCR Policy on Refugee Women, in which women’s concerns were added to the otherwise unchanged refugee programs.<sup>8</sup> This ‘add women and stir’ approach left the overarching framework unchallenged, leaving the male experience and point of view the norm.<sup>9</sup> The ‘add women and stir’ approach and decision-makers involved in refugee determination tendency to view people as refugees first and women or men second<sup>10</sup> has been criticized for relegating gender identities and gender concerns secondary.<sup>11</sup> The criticism pointed out the necessity of placing gender at the centre of the analysis.<sup>12</sup> Meanwhile, women’s concerns were represented as the exception to, or deviation from, this male standard.<sup>13</sup> This compartmentalization means that women-specific programs must compete with the mainstream programs and policies for finances and resources, leaving women-specific programs with less power, priority, and resources than the mainstream ones.<sup>14</sup>

The UN bodies continued the development of more gender-sensitive and gender-inclusive refugee discourse, and in 1991, the ExCom recommended the expansion of the refugee definition to include individuals who have experienced sexual violence or other gender-related forms

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<sup>6</sup> UNHCR, ‘Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees,’ HCR/GIP/02/01, (7 May 2002), (hereafter: Gender Guidelines) para. 5.

<sup>7</sup> Johanna N. Tvedt, ‘Accounting for Gender in International refugee Law: A Close reading of the UNHCR Gender Guidelines and the Discursive Construction of Gender as identity’ (*Master’s Theses*, University of San Francisco, 2013) p. 26.

<sup>8</sup> UNHCR ExCom Conclusion No. 39 ‘Conclusion on Refugee Women and International Protection’ (1985).

<sup>9</sup> Tvedt (n. 7.) p. 26.

<sup>10</sup> Tvedt (n. 7.) p. 26, Doreen Indra ‘Gender. A Key Dimension of the refugee Experience’ (1987) p. 4.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Tvedt (n. 6.) p. 26.

<sup>14</sup> Hilary Charlesworth ‘What Are Women’s international Human Rights?’ (1994). p. 63.



of persecution.<sup>15</sup> In addition to issuing its guidelines, the UNHCR ExCom has recommended countries to develop and implement domestic guidelines and criteria regarding protection for women's gender-based claims for asylum.<sup>16</sup> Since 1993 many countries signatory to the 1951 Convention and its 1967 Protocol have issued guidelines for gender claims or have amended their legislation to instruct adjudicators to recognise gender-based persecution as a potential ground for refugee protection.<sup>17</sup> A great number of the national gender guidelines and policy papers focus on procedural questions or problems and evidentiary considerations that are specific to women's asylum claims. It has been recognised that when demonstrating that their claims are credible and trustworthy, women refugee claimants face special problems. For example, women from certain cultures are reluctant to disclose their full experiences of gender-specific harm such as sexual violence due to the dishonour it may bring to the family or because of the stigma. Sometimes the women come from cultures where they lack access to education, may be illiterate or the women's only access to information is via their male relatives or spouses. Some guidelines have emphasized that women should be given an opportunity to be interviewed on their own, outside the hearing of other family members, and acknowledge the importance of the availability of female asylum officers, awareness of different traumas (e.g., post-traumatic stress disorder, rape trauma syndrome, battered woman syndrome), body language, interpreters and legal representatives in gender-related cases.<sup>18</sup> These examples provide an implication of how the signatory States have adopted the recommendations of the UNHCR. However, despite the attempts to harmonize the practice on a national level, considerable disparities remain, especially with the common law – civil law realms.

The European Parliament has approved two resolutions on the issue.<sup>19</sup> Moreover, the European Union has worked on the harmonization of the Common European Asylum System (CEAS) and addresses the matter in the Council directive developed as a part of the process.<sup>20</sup> In its resolution of March 13, 2012, the European Parliament called on the Commission “to implement its commitment

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<sup>15</sup> UNHCR ‘Guidelines on the Protection of Refugee Women’ (July 1991) U.N. Doc. ES/SCP/67. paras. 3-4.

<sup>16</sup> UNHCR ExCom Conclusion No 73(XLIV) ‘Conclusion on Refugee protection and Sexual Violence’ (1993)

<sup>17</sup> UNHCR, ‘Resettlement Handbook and Country Chapter’ (July 2011, revised April 2018); at the time of writing this thesis, there is 145 States signatory to the Refugee Convention.

<sup>18</sup> *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*: UPDATE, Issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, Immigration and Refugee Boards, Ottawa, Canada, 25 November 1996 (hereafter IRB Gender Guidelines 1996), p. 15; Memorandum: *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of international Affairs, Immigration and Naturalization Service, USA, (hereafter INS Gender Guidelines), p. 1; United Kingdom Asylum and Immigration tribunal/ Immigration Appellate Authority, ‘Immigration Appellate Authority (UK): Asylum Gender Guidelines, 1 November 2000, (IAA Gender Guidelines) section. 5.

<sup>19</sup> Heaven Crawley ‘Refugees and Gender: Law and Process’ (Jordan, 2001)

<sup>20</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

to mainstream gender equality in the Common European Asylum System.”<sup>21</sup> Against this backdrop of extensive intergovernmental, executive and legislative activity on gender asylum, the refugee determination tribunals of a number of states have considered the issue when adjudicating gender-based claims, developing the case law.

The need to integrate women’s concerns lead to an approach called ‘gender mainstreaming’.<sup>22</sup> The approach seeks to integrate women’s concerns “within every corner of the humanitarian and human rights system” and attempts to assess the seemingly neutral policies, programs and legislation, in all areas and at all levels.<sup>23</sup> Parallel to many women-specific policies, the UNHCR developed a ‘two-pronged approach’ of combining specific programs aimed at refugee women with a focus on integrating their concerns into the ‘mainstream’ projects.<sup>24</sup> The approach has been criticized for achieving the opposite of its intention. Edwards argues that as female claimants must fit their experiences of violence into male-defined criteria, they are subjected to additional, and thus unequal, legal burdens.<sup>25</sup> Moreover, Charlesworth has voiced concerns about blending the focus on the exclusion of women with concerns for all refugees generally. She argues that the strategy loses its critical edge by “allowing the mainstream to tame and deradicalize claims to equality.”<sup>26</sup> Indeed, when women’s claims are not recognised as arising from gender-based persecution, the women’s experiences are easily ignored.

At the heart of much feminist critique is the gendered assumption of the dichotomy between public and private spheres where women’s activities are relegated to the undervalued private sphere and men’s activities to the privileged public sphere.<sup>27</sup> This understanding has its roots in the drafting process of the 1951 Convention where it was decided that “the equality of the sexes was a matter for national legislation”.<sup>28</sup> Thus, States have had much leeway within the refugee discourse to dismiss the disadvantages suffered by women as ‘private matters’ outside of the scope of international law.<sup>29</sup> This gendered notion of the private and public affects the reading of all aspects of the refugee definition from codification of the notion of ‘persecution’ to the agents of persecution and what

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<sup>21</sup> European Parliament resolution of 13 March 2012 on equality between women and men in the European Union- 2011 (2011/2244(INI)) para. 43.

<sup>22</sup> Tvedt (n. 7) p. 28.

<sup>23</sup> Alice Edwards ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010’ (2010). p. 35.

<sup>24</sup> Ibid.

<sup>25</sup> Alice Edwards ‘Violence Against Women Under International Human Rights Law’ (2011). p. 106.

<sup>26</sup> Hilary Charlesworth ‘Not Waving but Drowning. Gender Mainstreaming and Human Rights in the United Nations’ (2005) p. 2

<sup>27</sup> Jenni Millbank ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’ (2002) p. 157.

<sup>28</sup> Edwards (n. 23) p. 23.

<sup>29</sup> Anjana Bahl ‘Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution’ (1997) p. 35.

constitutes a ‘political opinion’.<sup>30</sup> Indeed, the interpretations of the Refugee Convention have typically privileged persecution occurring within the male dominated public sphere, whilst disregarding the legitimacy of persecution arising from activities within the private sphere.<sup>31</sup> This is substantial in terms of interpreting the enumerated grounds for persecution, particularly ‘political opinion’, which has been understood in refugee law as “opinions contrary to or critical of the policies of the government or ruling party.”<sup>32</sup> In other words, there is a certain association granted between the ‘political’ and public spheres involving the State machinery.<sup>33</sup> Because women’s experiences are labelled as ‘private’ and ‘non-political’ it denies them any systematic or societal meaning and importance, thus making it difficult for the decision-makers to recognise women as deserving refugee protection.<sup>38</sup>

Further, one of the issues with the public/ private dichotomy is the way the refugee Convention conceptualizes the agents of persecution. Unlike in human rights law in general, with the focus on State responsibility, the refugee law was constructed with State persecution in mind.<sup>34</sup> Although women may be victims of State-sanctioned abuse and persecution, alike men, they are also predominantly targets of certain forms of harm which are labelled ‘intimate’ or ‘private’, such as domestic or spousal abuse, female genital mutilation (FGM), forced marriage, or honour killings. In these instances, the persecutor may not be a State official, but rather a member of family or community.<sup>35</sup> This privileging of the public illustrates yet another means of excluding women from the refugee discourse.

Finally, the last set of criticism arising from the feminist discourse focuses on the ways in which women have been treated and conceptualized as a homogenous group (the intersectionality theory). This general theory of gender and identity provides great insight to the multiple forms of discrimination which affects women’s lives. The woman refugee claimant is affected by the power structures in the country of origin and in particular by the civil, political and economic position therein. As explained by Heaven Crawley: “The term ‘gender’... refers to the social construction of power relations between women and men, and the implications of these relations for women’s (and men’s) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences

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<sup>30</sup> Tvedt (n. 7) p. 30.

<sup>31</sup> Ibid. p. 31.

<sup>32</sup> Alice Edwards ‘Age and Gender Dimensions in Refugee Law’ (2003). p. 68

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Todd Stewart Schenk ‘A Proposal to Improve the Treatment of Women in Asylum Law: Adding a ‘Gender’ Category to the International Definition of ‘Refugee’ (1994) p. 306.

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 contextualize those experiences.”<sup>36</sup> Focusing on the inter-relationships between various ‘social divisions’, such as gender, class, sexual orientation, race, and physical ability,<sup>37</sup> intersectionality refers to how such categories constitute axes of identity that intersect and combine in creating unique experiences and identities.<sup>38</sup> Women’s experiences of persecution, and the asylum process, are shaped by differences in race, class, sexuality, age, marital status and so on. Thus, “looking at gender, as opposed to sex, enables an approach to the refugee definition, which can accommodate specificity, diversity and heterogeneity.”<sup>39</sup> Whilst the ‘add women and stir’ approach sought to ‘add’ the experiences of the singular group, namely ‘women’, to already existing institutions and programs, the intersectionality approach seeks a more constitutive way forward. Here, social divisions are not simply added to one another in constituting identities, but rather combined to make unique experiences.<sup>40</sup> Indeed, the intersectional approach acknowledges that social categories cannot be separated and isolated, instead they are changeable and dynamic.<sup>41</sup>

The feminist engagement is multifaceted and dynamic, and there are multiple perspectives as to how to include women’s experiences into the refugee discourse. Within the literature reviewed for the purposes of this thesis, however, two diverging approaches emerge. On the one hand, some scholars and activists argue that the refugee definition, as it appears in the Convention, can and should be interpreted in new and creative ways in order to ensure proper gender sensitivity in the ways we understand the conditions of an asylum claim. On the other hand, scholars also hold that women’s point of view can only be sufficiently incorporated through modification of the language and definition itself, mainly in the form of adding gender as an additional sixth enumerated ground for persecution.<sup>42</sup> However, the issue of gender-inequality and the barriers to women’s claims within the refugee law is complex and there is no simple solution or a quick fix to make the refugee definition gender inclusive.<sup>43</sup>

The current trend of funnelling women’s gender-based asylum claims into ‘particular social group’ or ‘political opinion’ category is problematic for multiple reasons. Despite the evolving

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<sup>36</sup> Crawley (n. 19) pp. 6-7.

<sup>37</sup> Nira Yuval-Davis ‘European Journal of Women’s Studies’ (2006). p. 194.

<sup>38</sup> Tvedt (n. 7) p. 29.

<sup>39</sup> Refugee Women’s Legal Group (RWLG) ‘Gender Guidelines for the Determination of Asylum Claims in the UK’ (1998) (RWLG Gender Guidelines) para.1.10.

<sup>40</sup> Yuval-Davis (n. 35) p. 195.

<sup>41</sup> Tvedt (n. 7) p. 30.

<sup>42</sup> Ibid. p. 38.

<sup>43</sup> Ibid. p. 44.

Guidelines and State practice it is difficult to understand the precise nature of the reasoning, or evidential basis on which the findings are made.<sup>44</sup> Arguably, the ambiguity, disparity and inconsistency of the practice of decision-makers, not only goes against the rule of law, but also makes it difficult for an individual to challenge decisions on appeal. Thus, it provides very little guidance for future applicants with similar claims.<sup>45</sup>

## 1.2. The aim and structure of the thesis

The purpose of this thesis is to better understand the ambiguities and barriers surrounding women's gender-based claims under the 1951 Convention grounds 'particular social group' and 'political opinion'. The 'particular social group' ground has been criticized for being the ground with the least clarity, leading to varying approaches and protection gaps. In addition, in cases where the claimant has tried her claim under the 'political opinion' ground the adjudicators have often refused to see women's experiences as political and their claims have been usually adjudicated under other grounds, such as 'particular social group'. Thus, this thesis shall examine how the 1951 Convention grounds 'particular social group' and 'political opinion' are interpreted in a gender-sensitive manner to include women's experiences into the refugee discourse; whether gender-sensitive interpretation or adding gender as an independent ground to the 1951 Convention can better include women's experiences of refugee; and what kind of interpretative trends can we find by studying the evolving case law, scholarly writings, and guidelines.

After the introduction the thesis proceeds to its first substantial chapter (Chapter 2. Gender-Sensitive Interpretation of Article 1A (2)), which examines the 1951 Convention refugee definition more in detail. The aim of the chapter is to assess the conceptual barriers that the refugee definition proposes to women's claims and whether there are trends or common practices that better include women's experiences to the refugee discourse. The subchapters analyse each of the components of the refugee definition through gendered lenses. First the chapter shall analyse the definition of 'well-founded fear' before proceeding to examine the challenges surrounding the definition of the term 'persecution' (subchapter 2.2). As there is no standard definition of persecution within the existing refugee framework the subchapter attempts to find answers from scholarly writings and human rights informed interpretation of 'persecution' (subchapter 2.2.2.). After establishing what is meant by the term 'persecution' the thesis proceeds to consider the agents of

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<sup>44</sup> Michelle Foster 'The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments Relating to 'Membership of a Particular Social Group', UNHCR Division of International Protection' (2012) p. 48.

<sup>45</sup> Ibid.

persecution (subchapter 2.2.3.). Because a lot of the violence women face emanates from non-state actors such as spouses or family, the special focus here is on non-state actors of persecution. Furthermore, to a great extent, the evolution of interpretative tools, such as bifurcated nexus analysis, has been due to the developments and practice in national courts. Common law jurisdictions provide an ample of detailed discussion of the ‘particular social group’ category. The Courts have a tendency to read, analyse and refer to cases decided in other common law countries. In doing so, they contribute to the development of principles and interpretative tools that help other member states navigate in the international law realm and uphold consensus in an evolutionary manner. To demonstrate the interaction between the state jurisdictions this thesis shall undertake a review of cases from Australia, Canada, New Zealand, the United Kingdom, and the United States after chapter 2.3. The first three cases provide a trilogy of cases involving women refugees applying for asylum based on gender-related persecution at the hands of non-state persecutor, in a state with gender inequality and where the state was unable or unwilling to protect the applicants. These cases provide basis for discussion of particular issues relating to establishing nexus in gender-related cases, where the perpetrator is a non-state actor. In contrast to the bifurcated nexus analysis established in *Islam; Ex-Parte Shah, Refugee Appeal No. 71427/99* and *Khawar* chapter 2.3.4. reviews the inconsistent practice in the United States where the approaches vary from the requirement of cohesiveness to bifurcated nexus analysis. In chapter 2.4. the thesis will review national guidelines from Canada, the United Kingdom and the United States. The purpose of the overview is to identify similarities and differences in adoption of the UNHCR guidelines on national level and whether it is possible to identify problems arising from the administrative level that may affect the adjudication of gender-related cases.

Chapter 2 provides a platform for the next two substantial chapters analysing the most invoked grounds in women’s gender-related refugee claims: ‘membership of a particular social group’ (chapter 3) and ‘political opinion’ (chapter 4). To better understand the issues surrounding the funneling of women’s gender-related claims into ‘membership of a particular social group’ ground, chapter 3 draws from the case law and introduces the two approaches used in defining particular social groups: The protected characteristic approach (subchapter 3.1.1.) and the social perception approach (subchapter 3.1.2.). While the aim of chapter 3 is to understand why women’s gender-related claims are often adjudicated under the ‘particular social group’ ground, chapter 4 seeks to understand why women’s gender-related claims are so rarely discussed in the political context. Finally, before concluding the thesis, chapter 5 returns to the question of whether a gender-sensitive interpretation of the 1951 Convention and the 1967 Protocol sufficiently incorporates women’s experiences of refugee or whether there is a need to add gender as the sixth enumerated ground.

### 1.3. Methodology, Sources, and Limitations

This thesis has been inspired by the feminist critique surrounding the inclusion of women's experiences in the refugee discourse. The feminist critique of international human rights law contains many disparate strands of theories and many of them overlap. However, for the purposes of this thesis the focus is limited to the discussion between the liberal feminist (Kantian) approach and the radical feminist approach. The liberal feminists approach is largely in line with the human rights approach and assumes, that liberal states with democratically elected officials generally respect human rights and do not discriminate against individuals, including women.<sup>46</sup> According to the liberal feminist, illegitimate governments may not be embraced as members of liberal alliances.<sup>47</sup> This would mean, that States that fail their duty to protect their citizens should not be rewarded with membership to liberal alliances such as the UN. This opposition to statism brings the liberal and the radical feminist together criticizing the international law for overprotecting States through the doctrine of state sovereignty and non-interference.<sup>48</sup> However, while the radical feminist believe in deconstruction of the system, the liberal feminist believe in reforming it. In other words, arguably the radical feminist approach proposes that gender should be added as sixth Convention ground to the 1951 Convention, whilst the liberal feminist approach proposes gender-sensitive interpretation as means to better incorporate women's experiences to the refugee discourse.

Further, this thesis has also been influenced by scholars such as Hathaway, Haines, Foster, Greatbach, Spijkerboer and Musalo, who all have contributed greatly to the debate over women's gender-related violence within the context of the 1951 Convention. In addition to the scholarly input, the thesis adopts a comparative legal methodology in order to understand how different legal systems operate, interpret and apply the 1951 Convention and the UNCHR Guidelines. This thesis seeks common methods and trends of gender-sensitive interpretation of Convention grounds 'particular social group' and 'political opinion'. In doing so the thesis highlights the evolution of the Convention refugee definition within and across member states. The case study is limited to landmark cases from common law countries such as the United Kingdom, New Zealand, Australia and United States, that have contributed to the evolution of the interpretative mechanisms surrounding women's gender-related cases. By reviewing the landmark cases, the reasoning of the judges and scholarly writings, the thesis seeks pitfalls of the refugee definition and its interpretation that may exclude women's experiences of refugee. Similarly, to the case study, the national guidelines

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<sup>46</sup> Fernando R. Tesón, *Feminism and International Law: A Reply*, 33 *Va. J. Int'l L.* 647 (1993) p. 649.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* p. 656.

assessed in chapter 2.4. are limited to Canada, the United States and the United Kingdom. By limiting the assessment guidelines to these three common law states, the thesis attempts to shed light to three seemingly similar legal regimes, that however, have a very different administrative structures that affect the outcomes of the refugee cases.

The focus of this thesis is limited to the aspects of legal interpretation rather than the evidential and procedural issues; thus, it shall consider other means of protection (i.e., subsidiary protection or internal flight alternatives) only briefly. Furthermore, the aim is to keep the focus on the 1951 Convention and 1967 Protocol refugee definition. For the purposes of the study, it will not consider other Convention grounds than ‘particular social group’ and ‘political opinion’ in more detail.

#### 1.4. Definitions: Gender-based Persecution

Women’s gender-based persecution can be understood in two ways. A distinction must be made between women who are persecuted as women and women who are being persecuted because they are women (by woman, this thesis means persons who are biologically female and also identify themselves as females).<sup>49</sup> The first concept relates to the gender-specific forms of persecution such as rape, FGM, or domestic abuse. The second concept, women who are persecuted because they are women, relates to the causal relationship between gender and persecution. This two-pronged definition of gender-based persecution illuminates that a female may be persecuted both as and because she is a female.<sup>50</sup>

## 2. Gender-Sensitive Interpretation of Article 1A(2)

Considering the international refugee definition in the historical context, we can see that there have been conceptual barriers for women meeting the refugee definition. Under the 1951 Refugee Convention and its Protocol, a refugee is defined as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside of the country of his or her nationality and is unable or, owing to such

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<sup>49</sup> Andrea Binder ‘Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention’ (2001) p. 167; See also Gregory A. Kelson, Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins, 6 *Tex. J. Women & L.* 181 (1997) p. 184. where he argues that gender-based persecution encompasses forms of persecution that occur because a person is of a particular sex (i.e., woman).

<sup>50</sup> Binder (n. 49) p. 168.



fear, unwilling to avail himself or herself to the protection of that country.”<sup>51</sup> Thus, the refugee definition is understood to require proof of:

- (1) An objectively reasonable fear of harm that is serious enough to be considered ‘persecution’
- (2) which is causally linked or bears a “nexus” to race, religion, nationality, membership of a particular social group, or political opinion.

The barriers to women’s claims that arise from this definition are threefold. First, an issue arises from the definition and understanding of the term ‘persecution’. Often the harms inflicted on women were not considered to be persecutions because the harms these women suffered were often seen as cultural practices or religious norms instead of persecution (e.g., female genital mutilation), belonging to the private sphere. Alternatively, the harms suffered may have been different from men’s harms under similar circumstance (e.g., men may be beaten while women may be raped).<sup>52</sup> This understanding of the public/private dichotomy affects the reading of all aspects of the refugee definition from the notion of ‘persecution’ to the agents of persecution and to what constitutes ‘political opinion’. Because women’s experiences are labelled as ‘private’ or ‘non-political’, it denies them any systematic or societal meaning, as if they do not exist, making it difficult for the decision-makers to recognise women as deserving refugee protection.<sup>53</sup>

Second, the refugee Convention was constructed with State persecution in mind.<sup>54</sup> Often the persecution faced by women is the result of societal norms or is committed by non-state actors, such as husbands, fathers, or members of the applicant’s extended community. Although some Convention parties accept persecution by non-state actors as a basis for protection where the government cannot or will not control these actors, this recognition has been slow in coming.

Third, and most importantly, the international definition of refugee requires a *nexus* or connection between the harm or persecution and one of the five grounds (race, religion, nationality, political opinion, or membership in a particular group). Women are often persecuted because of their gender, and gender is not one of the five grounds in the Convention definition.<sup>55</sup> Arguably, as women must ‘fit’ their experiences of violence into existing male-defined grounds and criteria, they are subject to additional and unequal legal burdens.<sup>56</sup>

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<sup>51</sup> Refugee Convention (n. 2) Art.1A (2); the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).

<sup>52</sup> Karen Musalo ‘Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving Jurisprudence’ (2003) p. 782.

<sup>53</sup> Tvedt (n. 7) p. 32.

<sup>54</sup> Ibid.

<sup>55</sup> Musalo (n. 52) p. 782.

<sup>56</sup> Edwards (n. 25) p. 106.

Neither the refugee definition nor the 1951 Convention, in general, refers to sex or gender.<sup>57</sup> However, as Rodger Haines QC argues, sex and gender are already included in the 1951 Convention:

“The text, object, and purpose of the 1951 Convention require a gender-inclusive and gender-sensitive interpretation. Sex and gender are already included in the refugee definition. If the sight of this fact is lost, a misconceived interpretation can reflect and reinforce gender biases leading to the marginalization of women in the refugee context”.<sup>58</sup>

Indeed, given the ordinary meaning of Article 1A (2) of the 1951 Convention in the context and the light of the object and purpose of the Convention, it requires that the Convention protects both women and men and that it must therefore be given a gender-inclusive and gender-sensitive interpretation. Further, the UNHCR Gender Guidelines recognize the interpretation (and interpretative frameworks) as the source of the issues concerning gender, and the refugee definition, rather than the aspects of the law itself.<sup>59</sup> Historically, the refugee definition has been interpreted through a framework of male experiences, which is why the refugee cannot speak of gender and many claims of women have gone unrecognized.<sup>60</sup> Gender Guidelines can be read as creating framework in which the approach of gender-sensitive interpretation is favoured over that of altering the text of the refugee definition. It does so because it implies that even if the concepts of gender and gender-based persecution are formally introduced into the language of law, their meaning would still be unclear and subject to interpretation and differing definitions in any case.<sup>61</sup>

The UNHCR has confirmed that although gender is absent as a listed ground in the Refugee Convention itself, a gender-sensitive interpretation should be given with regard to the existing grounds.<sup>62</sup> As a direct response to the confusion and unpredictability surrounding gender-related cases, the UNHCR publication *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating*

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<sup>57</sup> Refugee Convention, Art. 3, refers only to race, religion and country of origin as prohibited grounds of discrimination.

<sup>58</sup> Crawley (n. 19) pp. 4-5; UNHCR Position Paper ‘Gender-related Persecution’ (January 2000) p. 2; Rodger Haines ‘Gender-related persecution’ (2003), p. 326.

<sup>59</sup> Gender Guidelines (n. 6) para. 5.

<sup>60</sup> Ibid.

<sup>61</sup> Tvedt (n. 7) p. 63.

<sup>62</sup> Gender Guidelines (n. 6) para. 22.

to the Status of Refugees<sup>63</sup> (Gender Guidelines) seeks to provide guidance to decision-makers on how to conduct a gender-sensitive interpretation of the refugee definition, define the problem and provide redress to the issue.<sup>64</sup> The Guidelines chooses to “specifically focus on the interpretation of the refugee definition from a gender perspective as well as propose some procedural practices”.<sup>65</sup> In the same instance, the UNHCR issued guidelines regarding the membership in a particular social group in the context of the 1951 Convention.<sup>66</sup>

The very first sentence of the Gender Guidelines recognise that “‘gender-related persecution’ is a term that has no legal meaning per se”<sup>67</sup> establishing that the framework for the discussion is one of legal terms and their meanings.<sup>68</sup> Additionally, it points towards the problem inherent in the relationship between gender and refugee law, namely that law does not have the terms to describe gendered persecution.<sup>69</sup> In other words, “gender inequality within refugee law is a question of recognition; of how to recognise gender-elements within a legal language where such terms have no meaning per se.”<sup>70</sup>

## 2.1. Well-founded Fear

The 1951 Convention refugee definition requires proof that the applicant owes a well-founded fear of being persecuted for a Convention reason. In other words, it must be likely that the person concerned will face persecution if returned to his or her country of origin. As a general rule, the concept has both a subjective (‘fear’) and objective (‘well-founded’) element, and they both must be taken into account when determining whether there is a well-founded fear of persecution. This view has, however, been criticised as historically indefensible and having no practical meaning.<sup>71</sup> Instead, Hathaway argues, the term ‘fear’ is intended to emphasise a future risk in the country of origin; not a subjective emotion of fear. Hence the test is an objective one in order to determine the present or future risk the applicant faces.<sup>72</sup>

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<sup>63</sup> UNHCR Guidelines on International Protection: “membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the status of refugees (7 May 2002) (hereafter: Social Group Guidelines) p. 2.

<sup>64</sup> Tvedt (n. 7) p. 45.

<sup>65</sup> Gender Guidelines (n. 6) para. 1.

<sup>66</sup> Social Group Guidelines (n. 63) p. 2.

<sup>67</sup> Gender Guidelines (n. 6) para. 1.

<sup>68</sup> Tvedt (n. 7) p. 63.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> J. C. Hathaway ‘The Law of Refugee Status’ (1991), p. 65.

<sup>72</sup> Ibid. pp. 65-9; See also *R v. Secretary of State for the Home Department, Ex-Parte Sivakumaran*, [1988] AC 985, 993-4.

Another question relates to the standard of proof to be applied in determining refugee status. The standards of proof as to when fear is well-founded applied by authorities in different countries vary (e.g., a reasonable degree of likelihood of persecution, clear probability of persecution, reasonable probability, persecution as more likely than not).<sup>73</sup> The appropriate starting point in determining whether the applicant's fear of persecution is well-founded is an examination of the general human rights record of the applicant's country. Human rights information is, however, not determinative of a claim to refugee status; the usefulness of human rights data is to establish a rebuttable presumption of risk of harm which then must be tested against the whole of the evidence presented, in particular claimant's own evidence and testimony.<sup>74</sup> The fear of persecution must not (necessarily) be based on the personal experiences of the applicant. Experiences of friends or relatives or other persons belonging to the same race or social group can indicate that the applicant's fear of being persecuted is well-founded. Further, a person is considered as having a well-founded fear of being persecuted if she or he has already been subject to harm amounting to persecution.<sup>75</sup> Past persecution, however, is not a prerequisite to recognition as a refugee.

The requirement that the claimant holds a 'well-founded' fear of being persecuted if turned to the country of origin requires a forward-looking objective assessment of the risk of persecution faced by the claimant.<sup>76</sup> This proposes major challenges for the adjudicators, where little is known of the actual conditions in the country of origin.<sup>77</sup> As the UNHCR handbook indicates:

“While the burden of proof in principle lies on the refugee claimant, the duty to ascertain and evaluate all the relevant facts is shared between the claimant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be Statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. The requirement of evidence should thus not be too strictly applied in view of

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<sup>73</sup> Goodwin-Gill 'The Refugee in International Law' (1996), pp. 35-40; Hathaway (n. 71) pp. 75-80.

<sup>74</sup> Hathaway, (n. 71), pp. 80-83.

<sup>75</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (Geneva 1979, reedited, January 1997) (hereafter: UNHCR Handbook) para. 196.

<sup>76</sup> Haines (n. 57) p. 338.

<sup>77</sup> Ibid.

the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.”<sup>78</sup>

As indicated by the Handbook, the burden of proof lies on the refugee claimant, although the duty to ascertain and evaluate the facts is shared with the claimant and the examiner. This proposes significant additional obstacles for many women to establish their claim for refugee status. Many may come from countries where they have been denied meaningful or any education and may be illiterate. These women may have been denied meaningful participation in life and may thus be inarticulate. In some countries, women live in seclusion. A little may be known about them or their status or their treatment, both in their society at large and in the home. Moreover, there may be little information as to their ability to access meaningful State protection. Therefore, the shared responsibility of the adjudicator to ascertain all the relevant facts and the benefit of the doubt principle in such cases must be given meaningful effect.<sup>79</sup>

## 2.2. ‘Persecution’ = Risk of Serious Harm and Failure of State Protection

To accurately determine a gender-specific case, it is fundamental to understand the nature of the concept of ‘persecution’. Unlike the criterion of ‘well-founded fear’, which focuses on evidentiary standards in assessing claims for refugee status, the term persecution refers to the substantive nature of the harm feared. As discovered earlier in this thesis, women often experience persecution differently from men.<sup>80</sup> The harms inflicted on women were often not considered to be persecutions because they were condoned or required by culture or religion (e.g. female genital mutilation, repressive social norm), disproportionately inflicted on women (e.g. domestic violence), or simply different from the harms suffered by men under similar circumstance.<sup>81</sup> This was demonstrated in the case of *Campos Guardado v. I.N.S.*<sup>82</sup> where it was found that a female asylum seeker who was forced to watch mutilation and murder of male family members and who was raped while perpetrators shouted political slogans did not meet the refugee definition. Beatings and torture inflicted in a political context were adjudicated as political persecution, while rape in the same context was not.<sup>83</sup>

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<sup>78</sup> UNHCR, Handbook, (n. 74) paras. 196–7.

<sup>79</sup> Haines (n. 57) p. 339.

<sup>80</sup> UNHCR ExCom Conclusion No. 73 (XLIV) ‘Refugee Protection and Sexual Violence’ (1993) paras. d. and e.

<sup>81</sup> Musalo (n. 52) p. 782.

<sup>82</sup> *Campos Guardado v. I.N.S.* 809 F.2d 285 (5<sup>th</sup> Cir. 1987)

<sup>83</sup> *Ibid.*

One of the challenges in placing gender-specific persecution within the existing refugee framework is that there is no standard definition of ‘persecution’.<sup>84</sup> Article 31 and 33 of the 1951 Refugee Convention refer to those whose life or freedom ‘was’ or ‘would be’ threatened. However, it must be emphasized that persecution cannot be defined only as threats to life and freedom.<sup>85</sup> It can be gathered from the Convention that persecution readily includes, but is not restricted to, threats to life, limb or liberty. In addition, it is indisputable that severe ill-treatment including torture, rape, genital mutilation, etc. as well as arbitrary detention amount to persecution.<sup>86</sup>

The Convention taken as a whole (text, object and purpose, *travaux préparatoires*) does not offer any clear-cut criteria to judge whether a host of ‘treatments’ amount to persecution. A traditional approach to the challenge of indeterminacy is to proceed on a case-by-case basis, defining the relevant test through very broad formulas intended to reflect the “true meaning” of the word. This view has been emphasized by the UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status which further draws from Article 33 of the 1951 Convention. While the Handbook voices that persecution is “a threat to life or freedom on account of race, religion, nationality, political opinion or membership to a particular social group”,<sup>87</sup> it emphasises that the list should not be seen as exhaustive. The Handbook continues by saying:

“Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances in each case, including subjective element to which reference has been made... the subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances in each case, the interpretations of what amounts to persecutions are bound to vary.”<sup>88</sup>

Therefore, persecution must be viewed case-by-case basis, considering the individual circumstances of each case. This view is supported by the feminist intersectional theory, which acknowledges that the woman refugee claimant is affected by multiple factors, such as the power structures in the country

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<sup>84</sup> Kelson (n. 49) p. 184.

<sup>85</sup> Atle Grahl-Madsen, ‘The Status of Refugees in International Law’, Vol. I, (1966-1972); UNHCR Handbook (n. 75) para. 51.

<sup>86</sup> UNHCR Handbook (n. 75) para. 51; see also Gender Guidelines (n. 6).

<sup>87</sup> UNHCR Handbook (n. 75) para. 51; Refugee Convention Art. 33.

<sup>88</sup> UNHCR Handbook (n. 75) para. 51.

of origin and in particular by the civil, political and economic position therein. The effects of gender and what it is to be a woman, or a man, varies through space and time. Women's experiences of persecution, and the asylum process, are shaped, inter alia, by differences in race, class, sexuality age, marital status, and history. Thus, making every woman's experience of persecution unique.<sup>89</sup>

As the concept of 'persecution' must be interpreted as a flexible, evolutionary concept<sup>90</sup> States are allowed a wide margin of appreciation when it comes to interpreting the term 'persecution', which has led to a practice that is neither coherent nor consistent.<sup>91</sup> While the approach provides flexibility to the concept of 'persecution' and thus enables it to expand and to adapt, it also endangers predictability, objectivity, and consistency within and across jurisdictions at large.<sup>92</sup> The liberal, case by case assessment of persecution provides little assurance to the future cases, as the outcomes depend on such a variety of factors and the individuals involved. In theory, while such a casuistic approach opens the door to very liberal interpretations of the concept of persecution, it often results in very restrictive interpretations.<sup>93</sup> The inconsistency, subjectivity, narrowness- more than justify the long-standing effort to find a more principled approach to the 'persecution' concept- an approach that would maintain certain flexibility, but at the same time guarantee a reasonably liberal interpretation, as well as more consistent and objective decision-making within and across States.

### 2.2.1. What Harm is Serious Enough?

To assess whether an individual faces a risk of persecution requires identification of the serious harms faced in the country of origin and an assessment of the State's ability and willingness to respond effectively to that risk.<sup>94</sup> Thus, persecution constructs two separate but essential elements, namely risk of serious harm and failure of State protection.<sup>95</sup> While persecution may be defined as the sustained or systematic violation of basic human rights demonstrative of a failure of State protection, the refugee definition does not require the perpetrator to be the State agent

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<sup>89</sup> Crawley (n. 19) pp. 6-7.

<sup>90</sup> Ibid.

<sup>91</sup> Goodwin-Gill (n. 73) p. 66; P. Kourula, 'Broadening the Edges - Refugee Definition and international protection Revisited' (1997) p. 91.

<sup>92</sup> Francesco Maiani, 'The Concept of 'persecution' in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach' (2011) para. 28.

<sup>93</sup> Ibid.

<sup>94</sup> Hathaway (n. 71) p. 125.

<sup>95</sup> Refugee Women's Legal Group (RWLG) 'Gender Guidelines for the Determination of Asylum Claims in the UK' (1998) (RWLG Gender Guidelines) para. 1.17; approved in *Islam v. Secretary of State for the Home Department*, and *Regina v. Immigration Appeal Tribunal, Ex-Parte Shah*. [1999] 2 A.C. 629. (*Islam; Ex-Parte Shah*); *Horvath v. Secretary of the State for the Home Department* [2001] 1 AC 489 (*Horvath*); *Refugee Appeal No. 71427/99* para. 67; and *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, [2002] 187 ALR (*Khawar*)

itself. Equally, persecution at the hands of non-state agents of persecution falls within the definition. It is the State's inability to protect an individual from persecution, which constitutes failure of local protection.<sup>96</sup> Therefore the question is whether the protection against persecution that is available in the country of his/her nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee.<sup>97</sup>

According to Haines, there are at least four situations in which it can be said that there is a failure of State protection, namely when:

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

Thus, according to Haines, State complicity is not always a prerequisite to a valid refugee claim.<sup>98</sup>

The purpose of refugee law is to identify those who have a well-founded fear of persecution for a Convention reason. A refugee claimant is not required to risk his or her life seeking ineffective protection of a State, merely to demonstrate that ineffectiveness.<sup>99</sup> Thus, the proper approach to the question of State protection is to enquire whether the protection available from the State of origin will reduce the risk of serious harm below the level of well-founded.<sup>100</sup> This does not mean that the State is required to eliminate the risk of harm,<sup>101</sup> however, the 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, before it can be said that the refugee claimant has access to State protection. In other words, the protection must be available in actual practice, not just in theory.

### 2.2.2. Human Rights Informed Interpretation of 'Persecution'

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<sup>96</sup> *Attorney-General v. Ward*, Supreme Court, [1993] 2 SCR 689 para. 733. (1993) 103 DLR (4<sup>th</sup> Circuit) para. 709; and paras. 716-717. (*Ward*); UNHCR Position Paper (n. 58), p. 5.

<sup>97</sup> *Horvath* (n. 95) para. 3.

<sup>98</sup> UNHCR, Handbook (n. 69) para. 65; UNHCR, 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', *European Series*, vol. 1, No. 3, (Sept. 1995) pp. 27-30; *Adan v. Secretary of State for the Home Department*, UK House of Lords [1999] 1 AC (*Adan*)

<sup>99</sup> *Ward* (n. 96) para. 724; *Refugee Appeal No. 71427/99* (n. 95) paras. 62-67.

<sup>100</sup> Haines (n. 57) p. 333.

<sup>101</sup> *Hathaway* (n. 71) p. 105.



As early as 1953, Jacques Vernant posited that the concept of ‘persecution’ should be equated to “Severe measures of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights” (UDHR).<sup>102</sup> Indeed, in order to truly grasp the notion of ‘persecution’, a comprehensive analysis today will require a fair assessment of the related developments within the broad field of human rights. With the decisive development of international human rights law, and with the contribution of scholars such as James Hathaway, the human rights informed approach to the concept of persecution has come to be accepted as the standard view to the question.<sup>103</sup>

Hathaway has defined persecution as “the sustained and systematic violation of basic human rights demonstrative of a failure of State protection.”<sup>104</sup> He has proposed a firm separation between the term ‘persecution’ on the one hand and the violation of the rights that are enshrined in the International Covenant on Civil and Political Rights (ICCPR)<sup>105</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>106</sup> on the other hand. For the purposes of this thesis, this chapter shall not consider all the nuances that Hathaway’s position takes into account when considering the diversity of the rights that are recognised by the ICCPR and the ICESCR, as it is far too sophisticated to be rendered in full here. However, a brief summary is necessary in order to understand the main characters of his concept. First, Hathaway posits that a violation of non-derogable civil and political rights is per se sufficiently severe to amount to ‘persecution’. These rights include, for example, the prohibition of torture, the right to life, and the right to legal personality. Second, a failure to respect and ensure other civil and political rights would amount to persecution unless the conditions for a derogation are met. Such rights include, for instance, freedom of expression as well as personal freedom. Third, the denial of economic, social and cultural rights amount to persecution when it is discriminatory in itself or when it is so complete that the State in question cannot be said to be taking ‘appropriate steps’ to realize those rights.

Hathaway’s position has been criticized for being both too restrictive and too generous at the same time.<sup>107</sup> Despite the criticism, the approach is widely accepted in the literature and followed by several jurisdictions.<sup>108</sup> The human rights informed approach is strongly supported by UNHCR. It has maintained that “While international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the

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<sup>102</sup> Jacques Vernant ‘The Refugee in the Post-War World’ (1993) p. 8.

<sup>103</sup> Maiani (n. 92) para. 33.

<sup>104</sup> Hathaway (n. 71), pp. 104-105.

<sup>105</sup> New York 16 Dec. 1966, 999 UNTS 171.

<sup>106</sup> New York 16 Dec. 1966, 993 UNTS 3.

<sup>107</sup> Maiani (n. 92) para. 36.

<sup>108</sup> Hathaway (n. 71) p. 105.

basis of serious or severe human rights violations”.<sup>109</sup> In addition, authors and jurisdictions that adhere to the human rights view are reluctant to see persecution in the violation of just any of the rights enshrined in the covenants. Thus, even after applying Hathaway’s carefully crafted qualifications, the concept of persecution does not implicate the full range of rights listed in the Covenants and requires consideration of the facts case by case basis.

Compared to Hathaway’s approach, the EU espouses a slightly more restrictive position. The human rights informed approach has been unambiguously endorsed by Article 9 of the EU Qualification Directive, which provides that:

“Acts of persecution within the meaning of Article 1 A of the Geneva Convention must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 1582 of the European Convention of Human Rights: or be accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)”<sup>110</sup>

Thus, only the grave violations of some fundamental human rights are per se an act of persecution. The violation of other human rights must be cumulated with other harmful measures in order to attain the requisite level of seriousness.<sup>111</sup> However, as not all jurisdictions have accepted this approach, noteworthy divergences in the interpretation of the concept of persecution remain.<sup>112</sup> Maiani argues that the divergences are rooted in different legal conceptions as to the proper role of human rights instruments in the interpretation of the concept of persecution. According to Maiani, there is either a loose reference or throughout “colonization” of refugee law by human rights law.<sup>113</sup>

The term persecution is closely linked with human rights, and human rights-based understanding of the concept of persecution is generally supported. The roots of the 1951 Convention are in the international community’s commitment to assuring the fundamental human rights<sup>114</sup> without

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<sup>109</sup> UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, Geneva.

<sup>110</sup> Directive 2011/95/EU (n. 20)

<sup>111</sup> Maiani (n. 92) para. 39.

<sup>112</sup> For example, Swiss and US judges continue to be unconvinced by the human-rights-approach.

<sup>113</sup> Maiani (n. 92) para. 40.

<sup>114</sup> The relevant core human rights are those in the so-called “International Bill of Rights”, namely: UNGA Res. 217 A(III) ‘Universal declaration of Human Rights’ (adopted 10 December 1948) (UDHR), ‘International Covenant on Civil and Political Rights’ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), UNGA Res. 34/180 ‘Convention on the Elimination of All Forms of Discrimination Against Women’ (CEDAW), (adopted 18 December 1979, entered into force 3 September 1981).

discrimination,<sup>115</sup> however, the Convention does not protect persons against all forms of serious harm.<sup>116</sup> Hathaway's linkage with the Covenants has been criticised for being too tight, and it has been argued that the concept of persecution does not directly implicate the full range of rights listed in the Covenants.<sup>117</sup> However, Hathaway's definition has been widely accepted both in case law and in State practice.<sup>118</sup> According to the dominant view, refugee law ought to concern itself with actions that deny human dignity in a key way and that the sustained or systematic denial of core human rights is the appropriate standard.<sup>119</sup> There must be a risk of a certain type of harm, which is inconsistent with the basic duty of protection owed by the State to its own population.<sup>120</sup> Thus, for the purposes of this thesis, persecution would be most appropriately described as "the sustained or systemic failure of State protection in relation to one of the core elements which has been recognised by the international community."<sup>121</sup>

### 2.2.3. Non-state Agents of Persecution

The fundamental principle behind refugee protection is that of 'surrogate protection', where international protection is provided where the applicant's State of nationality has failed their basic human rights duties owed to its population.<sup>122</sup> As emphasised earlier in this thesis, much of the violence faced by women is committed by non-state actors such as husbands, fathers, in-laws and sometimes even by the women in the local community. (i.e., in cases of female genital mutilation). In most common law countries, persecution at the hands of non-state actors has now been accepted in situations where the State is unable or unwilling to offer effective protection against such harm (the so-called 'protection view').<sup>123</sup> Under Australian jurisprudence, for example, this may include condoning or tolerating harm perpetrated by non-state agents, refusing or being unable to offer adequate protection.<sup>124</sup>

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<sup>115</sup> The preamble to the Refugee Convention; *Ward* (n. 96) para. 733.

<sup>116</sup> Hathaway (n. 71) p. 103.

<sup>117</sup> See Lord Bingham in *Sepet (FC) and Another (FC) v. Secretary of State for the Home Department* [2003] UKHL 15 para. 9.

<sup>118</sup> See, e.g., *Horvath* (n. 95); *Khawar* (n. 95); and UK IAA Gender Guidelines (n. 18) para. 2A3.

<sup>119</sup> Hathaway (n. 71) p. 108; approved in *Ward* (n. 96) para. 733.

<sup>120</sup> Hathaway (n. 71) pp. 103-104.

<sup>121</sup> *Ibid.* pp. 104-105 and 112; approved in *Horvath* (n. 95) paras. 495F, 501C and 517D; and *Khawar* (n. 95) per Kirby J; See also *Crawley* (n. 19) para 2.3.

<sup>122</sup> *Horvath* (n. 95) paras. 580-581; *Ward* (n. 96) paras. 716-717; *Khawar* (n. 95) para. 501.

<sup>123</sup> See, for instance, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, High Court of Australia, [2000] HCA 55, 26 Oct 2000; *Zalzali v. Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, [1991] 3 FC 605; *Ward* (n. 96); *Adan* (n. 98).

<sup>124</sup> Udara Jayasinghe, 'Women as Members of a Particular Social Group' (2006), p. 81.

The surrogate protection view is supported by the European Commission’s directive on standards for the qualification of third-country nationals or Stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.<sup>125</sup> Paragraph 14 States:

“Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or Stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the persons concerned is either a refugee within the meaning of Article 1 (A) of the Geneva Convention, or a person eligible for subsidiary protection.”<sup>126</sup>

Further, the directive proposes that persecution may originate from non-state actors, thus advancing the cause of gender-related claims.<sup>127</sup> Also, the UNHCR Handbook on Procedures and criteria for Determining refugee Status clarifies that while persecution is normally related to action by the authorities of a country, it may also emanate from sections of the population if the acts are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.<sup>128</sup>

Almost 20 years ago, the High Court of Australia in *Khawar*<sup>129</sup> reconfirmed the approach adopted by the House of Lords in *Horvath*,<sup>130</sup> in which the failure of the State to provide protection was seen as “the bridge between persecution by the State and persecution by non-state agents which is necessary for the interest of the consistency of the whole scheme”.<sup>131</sup> Here, the High Court of Australia reaffirmed the decision of the Federal Court of Australia to grant refugee status to Mrs. Khawar, who claimed that she was the victim of serious and prolonged domestic violence on the part of her husband and members of his family. The police in Pakistan refused to enforce the law against such violence or otherwise offer her protection. Such refusal was considered not only to be a mere inability to provide protection but also “alleged tolerance and condonation”.<sup>132</sup>

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<sup>125</sup> Directive 2011/95/EU (n. 20).

<sup>126</sup> *Ibid.* para. 14.

<sup>127</sup> Directive 2011/95/EU (n. 20) Art. 9(1).

<sup>128</sup> UNHCR, Handbook on Procedures and criteria for Determining refugee Status, (Geneva, 1979, re-edited 1992). Para. 65.

<sup>129</sup> *Khawar* (n. 95).

<sup>130</sup> *Horvath* (n. 95).

<sup>131</sup> *Ibid.*

<sup>132</sup> *Khawar* (n. 95) para. 13, per Gleeson CJ, at para. 30.

As established in *Khawar*<sup>133</sup> the refugee definition does not require a State to be the perpetrator, and persecution by ‘private’ or non-state agents may equally fall within the refugee definition. This supports the 1951 Convention refugee definition, which does not describe from whom persecution must originate. However, despite the positive development in common law jurisdictions, some of the civil law jurisdictions are more divided and tend to require some level of accountability of the State. Although substantial positive case law now exists on the question of claiming refugee status on the basis of domestic violence, it still remains the ultimate test of the durability of the surrogate protection approach.

#### 2.2.4. Agents of persecution and the ‘Internal Flight Alternative’ (IFA)

A person is a refugee if she or he is likely to face persecution for Convention reason if returned to his or her country of origin. Internal flight alternative (IFA) or internal relocation alternative (IRA) refers to “a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual would be expected to establish him/ herself and live a normal life.”<sup>134</sup> The concept of internal flight alternatives has formed in an ad hoc manner through jurisprudence, scholarly writings and policy Statements,<sup>135</sup> and there is no consistent approach to the concept, and consequently, divergent jurisdiction has emerged both within and across jurisdictions.<sup>136</sup> Although the Refugee Convention does not include any references to internal flight alternatives and the concept is not an independent test in the determination of refugee status,<sup>137</sup> some have interpreted the “well-founded fear of being persecuted” or “unwilling... or unable... to avail himself of the protection of that country” clause of the refugee definition to include the concept of IFA. This interpretation, however, is unnecessary as the 1951 Convention does not require (or even suggest) that the fear of being persecuted need always extend to the whole territory of the refugee’s country of origin.<sup>138</sup>

The IFA test does not in principle require a conceptual understanding of the notion but a consensus as to which facts justify the assessment that an IFA is available. Moreover, it must be considered whether the claimant could reasonably be expected to relocate and live safely there at the

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<sup>133</sup> *Ibid.*; see also *Adan* (n. 98).

<sup>134</sup> UNHCR ‘Guidelines on International Protection:” Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees,’ HCR/GIP/03/04, 23 July 2003, (hereafter UNHCR IFA Guidelines), para. 6.

<sup>135</sup> Marx Reinhard ‘The Criteria of Applying the Internal Flight Alternative Test in National Refugee Status Determination Procedures’ (2002) 14 *Int’l J Refugee L* 179, p. 179.

<sup>136</sup> UNHCR IFA Guidelines (n. 134) para. 1(1).

<sup>137</sup> *Ibid.* para. 1(2).

<sup>138</sup> *Ibid.* para. II(A)6.

time being and for the foreseeable future.<sup>139</sup> In order to assess these factors, State practice has evolved a four-step approach. First, the decision-maker must examine whether the claimant can genuinely access the proposed site. Second, risks of persecution for a Convention ground must be addressed. Third, applying the IFA test requires consideration of the risk of other forms of serious harm not related to Convention reasons, even if not rising to the level of persecution. Finally, the inquiry requires, by means of the reasonableness test, also the provision of basic human rights in the relocation area, which is a matter of great controversy.<sup>140</sup>

Where the risk of being persecuted emanates from State authority, the IFA test is not normally a relevant consideration as it can be presumed that the State is entitled to act throughout the country of origin.<sup>141</sup> The IFA was originally strictly linked to cases where the persecutory acts happened at the hands of a non-state actor. To date, it still is the most prominent example of the IFA test. Where the persecutor is a non-state actor, the feasibility of an IFA depends upon the likelihood of the persecutor to pursue the claimant to the area concerned and whether State protection from the harm feared is available there. In other words, the ability and willingness of the State to protect the claimant from the feared harm must be taken into account. Thus, the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the State protection available to the claimant in that area must be assessed.<sup>142</sup>

As illustrated above, there is a close link between the issue of the agent of persecution and the question of IFA. Gender-related persecution often emanates from non-state actors, such as partners, community or family, and it is easy for the decision-makers to resort to the use of an IFA test. The lack of uniform and principled application of the notion of IFA and its routine use to deny refugee status to a claimant who cannot produce enough evidence to negate the possibility of an internal flight alternative imposes an additional challenge to women who claim refugee based on gender-related violence.

### 2.3. Nexus with a Convention Ground

After establishing that the harm faced amounts to persecution, the claimant must be able to show that there is a nexus element between the feared harm and one or more of the enumerated Convention grounds. The word itself, *nexus*, derives from the Convention language *for reasons of* (e.g.,” well-

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<sup>139</sup> Reinhard (n. 135) p. 185.

<sup>140</sup> Ibid.

<sup>141</sup> UNHCR ‘Global Consultation on International Protection, San Remo Expert Roundtable, 6-8 September 2001, Summary Conclusions--- internal Protection/Relocation/ Flight Alternative,’ para. 2.

<sup>142</sup> UNHCR IFA Guidelines (n. 134) paras. 7(1)c and 15.

founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion”) if women are persecuted for their gender, rather than for reasons common to both women and men there are interpretative obstacles because gender is not one of the enumerated Convention grounds.<sup>143</sup> However, the Convention ground need not be the dominant ground for the persecution, but it must have a ‘relevant contributing factor’.<sup>144</sup> Although it is accepted that nexus requires proof of some relationship between the feared harm and the Convention ground, there is a great variance as to the nature of that relationship.<sup>145</sup>

In short, nexus analysis consists of a two-step process: the identification of the relevant Convention ground, followed by the establishment of the causal connection between this ground and the persecution.<sup>146</sup> However, the United States has taken the test further and adopted a test, which requires proof that the persecutor was motivated by a Convention reason (cohesion requirement).<sup>147</sup> Other States have left the question of the meaning open or have indicated that its meaning may vary depending on the context of the claim.<sup>148</sup>

The Guidelines on Social Group and Gender-Related Persecution adopt without reservation the bifurcated nexus analysis that characterized the decisions from the United Kingdom,<sup>149</sup> Australia,<sup>150</sup> and New Zealand.<sup>151</sup> The tribunals established that where the actions of the State or the non-state actor is related to Convention reason. The Social Group Guidelines express the rule as follows:

“The causal link may be satisfied:

- (1) Where there is a real risk of being persecuted at the hands of a non-state actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or

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<sup>143</sup> Musalo (n. 52) p. 806.

<sup>144</sup> Gender Guidelines (n. 6) Art. 20.

<sup>145</sup> Musalo (n. 52) p. 785.

<sup>146</sup> Musalo (n. 52) p. 806.

<sup>147</sup> Ibid.

<sup>148</sup> Musalo (n. 52), p. 786.

<sup>149</sup> *Islam; Ex-Parte Shah* (n. 95).

<sup>150</sup> *Khawar* (n. 95)

<sup>151</sup> *Refugee appeal no. 71427/99* (n. 95)

- (2) Where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.”<sup>152</sup>

The Social Group Guidelines adopt a broader application of the nexus analysis than the Gender Guidelines and implicates that the purpose of the bifurcated nexus analysis is to help resolve the controversy over nexus in gender cases.<sup>153</sup> The unequivocal adoption of bifurcated nexus analysis in both sets of Guidelines provide welcome clarity and harmony to the UNHCR’s position on the issue.<sup>154</sup> The UNHCR has made a standing contribution to the evolving jurisprudence on the issue of gender persecution by affirming the approach taken by the tribunals of the United Kingdom, Australia, and New Zealand, and implicitly by the United States in *Matter of Kasinga*<sup>155</sup>. Although the recommendations of the UNHCR are not binding on the States, the weight of authority supporting this interpretive approach provides a steady guidance for the States in cases where women are fleeing gender-related persecution. The adoption of this analytical approach has been praised by scholars such as Musalo, who emphasises that the key element for the nexus element in all four countries was namely the bifurcated analysis.<sup>156</sup>” The bifurcated approach does not limit the nexus consideration to an analysis of the motives of the individual perpetrator of the persecution but includes societal and State factors in the equation.”<sup>157</sup>

Traditionally, the nexus requirement has posed a substantial barrier to women’s gender-based claims because gender is not one of the existing Convention grounds. Thus, women’s claims must be adjudicated in relation to the existing grounds, which have been constructed from the male paradigm. Furthermore, adjudicators have been slow to accept a causal connection between an applicant’s gender and the harm inflicted upon her.<sup>158</sup> Especially where the persecutor is a non-state actor, and the motivation for the harm is presumed to derive from the private sphere; the difficulty is aggravated. The tribunals have developed the bifurcated interpretive framework, introduced briefly above, which allowed the requisite causal connection to be established in relation to either the non-

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<sup>152</sup> See Social Group Guidelines (n. 63), para 23.; Paragraph 21 of the Gender Guidelines (n. 6) which both articulate the same rule: “In cases where there is a risk of being persecuted at the hands of a non-state actor (e.g., husband, partner or other non-state actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.”

<sup>153</sup> Social Group Guidelines (n. 63) para. 22.

<sup>154</sup> Musalo (n. 52) p. 806.

<sup>155</sup> *In re Kasinga*, 21 I & N. Dec. 357 (B.I.A. 1996).

<sup>156</sup> Musalo (n. 52) p. 779.

<sup>157</sup> *Ibid.*

<sup>158</sup> Musalo (n. 52) p. 786.



state perpetrator or the state/society. The cases were initially rejected by the adjudicators who ruled that there was no causal link between the feared persecution and the gender of the asylum applicant. However, on appeal, the nexus issue was favourably resolved, and the approach adopted by the courts provides a positive precedent for future gender claims.

The following subchapters review the evolution of bifurcated nexus analysis in a trilogy of cases<sup>159</sup> from different jurisdiction that all encompass women's gender-related persecution at the hands of non-state persecutor, in a state that has gender inequality and where the state is unable or unwilling to provide protection to the applicants.

### 2.3.1. United Kingdom: *Islam; Ex Parte Shah*

The first case introduced in the trilogy of cases considering the issue of establishing nexus in gender-related cases is the famous *Islam; Ex Parte Shah*,<sup>160</sup> in which the House of Lords considered the conjoined appeals of two Pakistani women who fled marital violence. Although the individual circumstances of the two women were different in various respects, both claims involved feared harm at the hands of non-state actors in situations where the state failed to provide protection.<sup>161</sup> In order to decide the case, the House of Lords had to consider whether a particular social group could be defined by reference to gender and to determine if there was a requisite nexus between the feared persecution and the Convention ground. The House of Lords answered in the affirmative on both counts, employing a bifurcated analysis to resolve the next issue.<sup>162</sup>

The first one of the two appellants was a teacher named Shahanna Islam. Her husband had often been violent, but the catalyst for her flight was false accusations of infidelity, which arose from her efforts to intervene between rival political factions at the school where she taught. Due to these accusations, her husband assaulted her so brutally that she was admitted to the hospital twice. Her attempts to escape her husband within Pakistan by staying with her brother were unsuccessful. The second appellant, Syeda Shah, had been forced out of her family home by her husband. She gave birth shortly after arriving in the United Kingdom. Mrs. Shah feared that her husband would accuse her of adultery and either beat her himself or denounce her under Sharia law for immorality, which could result in "lashes in public or stoning to death."<sup>163</sup>

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<sup>159</sup> *Islam; Ex-Parte Shah* (n. 95); *Refugee Appeal No. 71427/99* (n. 95); *Khawar* (n. 95)

<sup>160</sup> *Islam; Ex-Parte Shah* (n. 95)

<sup>161</sup> *Ibid.* p. 1.

<sup>162</sup> *Ibid.* p. 11.

<sup>163</sup> *Ibid.* p. 3.

The evidence in the record documented institutionalized discrimination against women in Pakistan. Although the Pakistani Constitution prohibits discrimination on the basis of sex, “a woman’s place in society in Pakistan is low.”<sup>164</sup> Domestic abuse is prevalent, which is both “tolerated” and “sanctioned” by the State.<sup>165</sup> Women must submit to the wills of their husbands, and women who are forced to leave their marital home or who decide to leave are at special risk because they can be charged with adultery and sexual immorality.<sup>166</sup> In such cases, the statutory law discriminates against women by prohibiting their testimony or considering them guilty unless they can establish themselves to be innocent.<sup>167</sup>

The cases had been considered by special adjudicators, the Immigration Appeal Tribunal, and the Court of Appeal, where the adjudicators had not doubted that the fear of violence by the applicant’s husbands was well-founded. However, they rejected the argument that the applicants were members of a particular social group and that the persecution was linked to this membership.<sup>168</sup> In a four to one decision, the House of Lords disagreed, finding that the women were members of gender-defined social group, namely ‘Pakistani women’, and that although their husbands did not persecute them for this reason, the State failed to protect them because they were women. Finally, it was found in the case *Islam; Ex Parte Shah*, that the two Pakistani women satisfied the element of persecution after being found to be at risk of false accusations of adultery, an act punishable in Pakistan by flogging or stoning to death.<sup>169</sup> The issue remained, however, whether the claimants were at risk of being persecuted “for reasons of” their membership in a particular social group, namely “Pakistani women”. Relying heavily on the BIA’s decision in the *Matter of Acosta*,<sup>170</sup> as well as on principles of non-discrimination, three of the four Lords in the majority (Steyn, Hoffman, and Hope of Graighead) defined the relevant social group in terms of gender alone: “women in Pakistan”.<sup>171</sup> Lord Hutton, on the other hand, accepted a narrower subset described as “Pakistani women suspected of adultery and unprotected by State and public authorities”.<sup>172</sup> All four Lords rejected the government’s argument of “cohesiveness” as a requirement.<sup>173</sup>

After concluding that the women were within the scope of the words ‘particular

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<sup>164</sup> Ibid. p. 2.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid. p. 1. See also *Regina v. Immigration Appeal Tribunal, Ex-Parte Shah* [1998] 1 W.L.R. 74.

<sup>169</sup> Ibid. p. 5.

<sup>170</sup> *Matter of Acosta* [1985] 19 I&N Dec. 211 (U.S.B.I.A., Mar.1,1985) (*Acosta*)

<sup>171</sup> *Islam; Ex-Parte Shah* (n. 95) p. 9. The Lords were influenced by the *Acosta* decision in accepting a broad gender-defined formulation: “The idea so incisively put forward by Lord Hoffman (that the social group is women in Pakistan) is neither novel nor heterodox. It is simply a logical application of the seminal reasoning in *Acosta*’s case.”

<sup>172</sup> Ibid. p. 22.

<sup>173</sup> Ibid. pp. 8-9 (per Lord Steyn); p. 16 (per Lord Hoffman); p. 21 (per Lord Hope of Graighead); p. 24 (per Lord Millet)

social group’,<sup>174</sup> the Lords turned to the question of nexus between the persecution and membership in gender-defined social groups. Lord Millet found that, even if the wider group of “Pakistani women” did constitute a particular social group, the applicants did not fear persecution for reasons of membership of such group. His Lordship recognised the discrimination the women in Pakistan face but distinguished this from Convention-related persecution. Lord Millet argues that the appellants feared harm because they had transgressed social norms, not because they were women. In his opinion his Lordship stated:

“The evidence clearly established that women in Pakistan are treated as inferior to men and subordinate to their husbands and that, by international standards, they are subject to serious and quite unacceptable discrimination on account of their sex. But persecution is not merely an aggravated form of discrimination, and even if women (or married women) constitute a particular social group, it is not accurate to say that those women in Pakistan who are persecuted are persecuted because they are members of it. They are persecuted because they are thought to have transgressed social norms, not because they are women. There is no evidence that men who transgress the different social norms which apply to them are treated more favourably.”<sup>175</sup>

The Lords concluded that the “serious harm” of spousal violence was a “personal affair, directed against the applicants as individuals”<sup>176</sup> and therefore not causally linked to their gender-defined social group status. Furthermore, the Lords observed that persecution was not limited to the husband’s actions but was the result of the separate and combined elements of the husband’s violence and the failure of State protection. The recognition of two constituent elements allowed the bifurcated analysis; the Lords ruled that although the husbands’ actions were not linked to gender, the State’s failure to protect was, and on this basis, nexus to the Convention ground of particular social group could be established. According to Lord Hoffman, two elements were needed in cases involving a non-state agent of persecution in order to establish a social group nexus. First, there is the threat of violence to the claimant by her husband. This is a personal affair directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. The evidence was that the State would not assist them because they were women. It denied them protection against violence which it would have given to men. The combination of these

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<sup>174</sup> Ibid. p. 11.

<sup>175</sup> Ibid. p. 27 (per Lord Millet).

<sup>176</sup> Ibid. p. 17 (per Lord Hoffman).

two elements was held to constitute persecution within the meaning of the Convention.<sup>177</sup> Lord Hoffman expressed the bifurcated approach by the formula: Persecution = Serious Harm + Failure of State Protection. Pursuant to this formula, the required nexus is established if either of the constituent elements of persecution is causally related to a Convention reason. Alternatively expressed, Lord Hoffman's rule is: Persecution has two elements; nexus is established if either is linked to a Convention reason.

The case of *Islam; Ex Parte Shah* was historic in determining nexus in reference to the individual persecutor as well as the State. Traditionally, claims to the asylum by men involved a direct link between the action of the State to suppress, intimidate, or imprison the claimant and one or more Convention ground. This view would discriminate against women who are likely to be subject to indirect links between the persecution and the action of the State, through an inability or unwillingness of the State to protect them. Thus, the approach introduced in the case enhances the equitable treatment of men and women before the law. It established an analytical path around the barrier created by the characterization of domestic violence as "private" or "personal" rather than as a Convention ground.

Although praised, the view adopted by the Lords with regards to the characterization of spousal violence as a "personal affair, directed against the applicants as individuals" and therefore not causally linked to their gender-defined social group status,<sup>178</sup> has also been criticized by scholars such as Karen Musalo. According to Musalo, it is certainly possible that the Lords must have found a Convention reason inherent in both element of persecution: the spousal beatings and the failure of State protection."<sup>179</sup> She questions the Lords' assumption that spousal violence is not causally related to gender because it is traditionally seen as private. Thus, the analysis adopted in the case runs counter to the growing body of understanding of domestic violence in this regard.<sup>180</sup> Similar thoughts were emphasized by the honourable Justice Deirdre O'Connor (Federal Court of Australia), who voiced that "perhaps the major difference between the approaches of majority and minority truly lies in their assumptions about gender, and the extent to which each was prepared to conceptualise what is traditionally "private harm" (domestic violence) as serious harm which should be addressed in the public sphere, and for which the State must bear some responsibility".<sup>181</sup>

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<sup>177</sup> Ibid. p. 17 (per Lord Hoffman).

<sup>178</sup> Ibid.

<sup>179</sup> Musalo (n. 52) p. 791.

<sup>180</sup> Ibid.

<sup>181</sup> Deirdre O'Connor 'Contemporary Gender Issues in Refugee Law' (10 March 2000, IARLJ) available at: <<https://www.refugee.org.nz/IARLJ3-00OConnor.html#OPENING>> last accessed: 15.5.2021.

The case of *Islam; Ex Parte Shah* provided a steppingstone for further developments in the field for more gender-inclusive refugee discourse. However, it is not a ‘floodgates’ case. At several points of the case, the Law Lords note that the case turns upon facts, and although the claimants were successful as ‘women in Pakistan’, it does not mean that all Pakistani women will be successful in the future. Each case must be examined case-by-case basis on its merits. As each claim is constituted by a converge of all elements of the definition, differences in the individual matrix will inevitably produce a different result.

Moreover, the majority of the Law Lords provided support for moving towards breaking down the conceptual barriers of public-private dichotomy in the context of the Convention by attributing to the State responsibility for “private” harm. This shift of public/private has ramifications for other forms of “treatment” commonly categorised as “private”, such as forced marriage, female genital mutilation, and serious punishment for transgressing social mores (e.g., Sharia Law). The majority provided support to include these things as types of harm falling within the Convention, as opposed to acts that have always been acknowledged as falling within the Convention’s scope (e.g., torture, political opinion). Although the decision is arguably not consistent with the growing recognition of spousal beatings as persecution linked directly to a Convention ground, the approach provides to be more consistent with the growing recognition of States responsibility to provide protection to its nationals without discrimination.<sup>182</sup>

### 2.3.2. New Zealand: *Refugee Appeal No. 71427/99*

Several months after the house of Lord decision on *Islam; Ex Parte Shah*, the Refugee Status Appeals Authority (RSAA) of New Zealand, issued a decision in a gender claim that involved similar issues, namely persecution by a private actor (husband) in a country with gender inequality and failed State protection for women.<sup>183</sup>

The applicant, in this case, was a citizen of Iran whose husband was a member of the Revolutionary Guard.<sup>184</sup> The applicant’s husband began to violently abuse her almost immediately after their arranged marriage and escalated his abuse when she became pregnant.<sup>185</sup> After she gave birth, he arranged for the baby to be taken away from her, and he told her that the child had died.<sup>186</sup>

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<sup>182</sup> Musalo (n. 52) p. 790.

<sup>183</sup> *Refugee Appeal No. 71427/99* (n. 95).

<sup>184</sup> *Ibid.* para. 14.

<sup>185</sup> *Ibid.* para. 16.

<sup>186</sup> *Ibid.* para. 20.

He Stated that “there was no reason for her to continue living with him as he did not love her and there was no baby to look after.”<sup>187</sup> He divorced her, and it was only then that the applicant learned that her child had not, in fact, died.

Her subsequent efforts to obtain access to the child brought her further harassment from her husband, and from his friends in the Revolutionary Guard. Ultimately, the applicant obtained de facto custody of the child, which enraged her husband, who considered it as an “embarrassment to him both as her husband and as an official.”<sup>188</sup> After an incident in which the applicant’s ex-husband beat her mother in an attempt to find the applicant and the child, the applicant, decided to flee Iran.<sup>189</sup> About a year before she had made the decision to flee Iran, a childhood friend of the applicant had proposed marriage. Out of a fear that she would lose the de facto custody of her son, she entered into a “temporary”<sup>190</sup> as opposed to “permanent” marriage. Her second husband helped her and her child to escape and planned to join them afterwards. He was, however, unable to get out of Iran. The applicant later learned that he had been beaten, arrested, and otherwise harassed by the applicant’s first husband. Relying upon scholarly sources and human rights reports, the RSAA decision began with an “overview of the institutionalized and State-sanctioned discrimination against women in the Iranian family context.”<sup>191</sup> The RSAA’s decision noted that in every aspect of marriage, divorce, and custody, the woman is subservient to the man. Women cannot choose their spouses without the consent of their father or paternal grandfathers.<sup>192</sup> Men can divorce at will, while women can divorce only upon proof of “undue hardship.”<sup>193</sup> Men can have several permanent spouses and unlimited temporary spouses; women cannot.<sup>194</sup> Legal custody of children automatically belongs to the father and paternal grandfather, although the actual care of the child can be conferred on the mother.<sup>195</sup> After reviewing the inequalities relating to marriage, divorce, and custody rights, the RSAA decision examined penal provisions, as well as law and policy related to domestic violence. The RSAA concluded that “gender discrimination is the central feature of the Iranian penal code,”<sup>196</sup> and that “the attitude to domestic violence by the Iranian State is one of condonation, if not complicity.”<sup>197</sup>

The New Zealand tribunal explicitly followed the formula established in *Islam; Ex*

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<sup>187</sup> Ibid. para. 21.

<sup>188</sup> Ibid. para. 27.

<sup>189</sup> Ibid. para. 33.

<sup>190</sup> Ibid. para. 32.

<sup>191</sup> Ibid. para. 3.

<sup>192</sup> Ibid. para. 4e.

<sup>193</sup> Ibid. para. 4l.

<sup>194</sup> Ibid. para. 4j.

<sup>195</sup> Ibid. para. 4n.

<sup>196</sup> Ibid. para. 6.

<sup>197</sup> Ibid. para. 10.

*Parte Shah*<sup>198</sup>; Persecution = serious harm + failure of State protection. Like *Islam; Ex Parte Shah*, the applicant's husband was a source of serious harm in the form of "physical and psychological violence,"<sup>199</sup> and the State had failed to provide protection. The failure of protection was not only the result of State inaction but also the State of Iran had "condoned if not actively encouraged, non-state actors such as husbands and former husbands to cause serious harm to women"<sup>200</sup>

Similar to the Lords in *Islam; Ex Parte Shah*<sup>201</sup>, The tribunal found that the abuse and harassment by the ex-husband constituted serious harm, but there was no nexus to a Convention ground. However, the tribunal found nexus with the failure of State protection and Convention ground (gender social group, political opinion, and religion).<sup>202</sup> The reasoning behind the finding was that the tribunal found that the husband's actions were not "for reasons of " one of the Convention grounds, observing that it would be "artificial" to try fit them within that context in light of the multiple "causes of violence in the home."<sup>203</sup>

The most important distinction between the analysis in the analysis of the New Zealand tribunal and the analysis of the Lords in *Islam; Ex Parte Shah* is that the New Zealand tribunal found that considered cumulatively, the discriminatory measures against women in Iran constituted serious harm.<sup>204</sup> The significance of this finding is that now a woman in Iran under appropriate circumstances could qualify for refugee status, whether she is subject to spousal abuse or not, the discriminatory measures against women in Iran itself were sufficient to establish persecution.<sup>205</sup>

### 2.3.3. Australia: *Minister for Immigration and Multicultural Affairs v. Khawar*

This decision by the High Court of Australia constitutes the third case in the trilogy of decisions applying bifurcated nexus analysis and affirming that women who are the victims of domestic violence may qualify for protection under the Convention ground particular social group.

This case concerns a Pakistani asylum seeker, Naima Khawar, who claimed that she had been physically abused and threatened with death by her husband and members of her husband's family.<sup>206</sup> She had been hospitalized with injuries from beatings, and threatened by her husband and

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<sup>198</sup> *Islam; Ex-Parte Shah* (n. 95).

<sup>199</sup> *Refugee Appeal No. 71427/99* (n. 95). para. 79.

<sup>200</sup> *Ibid.* para. 118.

<sup>201</sup> *Islam; Ex-Parte Shah* (n. 95).

<sup>202</sup> *Refugee Appeal No. 71427/99* (n. 95) paras. 86-88.

<sup>203</sup> *Ibid.* para. 116.

<sup>204</sup> *Ibid.* para. 78: "Taking into account the cumulative effect of these breaches on the appellant, our conclusion is that the policy of gender discrimination and the enforcement of gender-based norms against women as a group in Iran is of nature which permits a finding of persecution."

<sup>205</sup> *Musalo* (n. 52) p. 794.

<sup>206</sup> *Khawar* (n. 95) para. 50

his family that she would be disfigured with acid or burned alive.<sup>207</sup> On one occasion, her husband and his brother “doused her with petrol” and only stopped when neighbours intervened.<sup>208</sup> Mrs. Khawar Stated that she had gone to the police on four occasions to report the violence, but the police never took her complaints seriously or acted on them. When she reported the dousing with petrol incident, the officer “told her that women always tried to blame their husbands for problems for which they themselves were the real cause.”<sup>209</sup>

Mrs. Khawar had submitted “substantial” evidence on the status of women in Pakistan: the document addressed gender discrimination in the legal system; the existence of widespread impunity in cases of killing or mutilation of women; and the failure of the police to act in cases of domestic violence.<sup>210</sup> She argued that her persecution was on account of various gender-defined social groups, including women, married women in Pakistan, married women in Pakistan without the protection of a male relative, married women in Pakistan suspected of adultery, or women who have transgressed the social mores of Pakistani society.<sup>211</sup>

Her claim for protection in Australia was denied in the first instance. When she appealed to the administrative body, the Refugee Review Tribunal, anonymous sources submitted information to the Refugee Review Tribunal accusing Ms. Khawar of fabricating her story. This did not cause the Refugee Review Tribunal to make a credibility determination. The tribunal ruled that even if the facts were correct, she would be denied refugee status because those alleged perpetrators (her husband and his family) were not motivated by her membership of any of the proposed particular social groups. According to the adjudicators the perpetrators were motivated purely by personal considerations related to the circumstances of her marriage and the fact that she brought dowry to the family and their dislike of her as an individual.<sup>212</sup> Thus, the Refugee Review Tribunal did not determine whether Ms. Khawar was a member of a particular social group, or whether in fact there was a failure of State protection.

When Ms. Khawar appealed to the federal Court, judge Branson ruled that the Refugee Review tribunal had erred in not deciding on these two issues. He stated that:

“Had the Tribunal made a finding that Mrs. Khawar was a member of a social group in Pakistan which was comprised of Pakistani women, or alternatively married

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<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid. para. 94.

<sup>210</sup> Ibid. para. 97.

<sup>211</sup> Ibid. para. 52.

<sup>212</sup> Ibid. para. 13.



Pakistani women, it may well have concluded, as Lord Steyn did in evidence in ...  
(Ex-Parte Shah) that:

“Given the central feature of State-tolerated and State-sanctioned gender discrimination, the argument that the appellants fear persecution not because of their membership of a particular social group but because of the hostility of their husband is unrealistic.”<sup>213</sup>

The decision by judge Branson was upheld by the federal Court following which the government (the Minister for Immigration and Multicultural Affairs) sought review of the case in the High Court of Australia. With the focus solely on the legal issues raised by Ms. Khawar’s claim, the high Court ruled four to one that a successful claim for protection could be established based on the gender-defined social group in a context of gender discrimination and resultant failed state protection. The four Justices in the majority (Justices Gleeson, McHugh, Gummow, and Kirby) issued three opinions, with McHugh and Gummow issuing a joint opinion. In each of the opinions, the Justices Stated that the relevant social group should simply be “women.”<sup>214</sup> Justice Gleeson observed in his opinion that “women in any society are a distinct and recognizable group.”<sup>215</sup> The Justices did not rule out that the appropriate social group could be defined as “gender+” other characteristics, which would result in a narrower group.<sup>216</sup>

With regards to the issue relating to the nexus element, the analysis of the Australian High Court was strikingly similar to that of the House of Lords and Refugee Status Appeals Authority. First, the High Court adopted the same bifurcated nexus approach, expressed by the formulation that “Persecution= Serious Harm + Failure of State Protection” and Stated that on this basis, the nexus requirement could be met when either the serious harm or failure of State protection is “for reasons of a Convention ground.”<sup>217</sup> Second, alike the other two tribunals, the High Court assumed that the motivation for the non-state actors (the husband and his family) was not related to Ms. Khawar’s membership in a gender-defined group, despite the specific formulation.<sup>218</sup> Third, the Court was less than definitive as to the particular test it employed to establish nexus or causation. Justice Kirby’s opinion commented most extensively on this element. He Stated that although some “singling” out

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<sup>213</sup> Ibid. para. 55.

<sup>214</sup> Ibid. paras. 35, 83, and paras. 127-129.

<sup>215</sup> Ibid. para. 35.

<sup>216</sup> Ibid. para. 81.

<sup>217</sup> Ibid. para. 120.

<sup>218</sup> Ibid. para. 123.

for a Convention reason is required to establish causation, the motivation or intention for this singling out need not arrive from enmity or malignant intentions.<sup>219</sup>

Finally, the Court referred to the “history and broad humanitarian object of the Convention”<sup>220</sup> in reaching its determination that the bifurcated nexus analysis, which considers serious harm and failure of State protection, is consistent with the multilateral treaty’s intent.<sup>221</sup> Since the High Court limited its review solely to the legal issues at hand, the high Court did not make a ruling on Ms. Khawar’s specific claim for protection. The case was remanded back to the Refugee Review Tribunal to make the required factual finding and apply the articulated framework to the facts.<sup>222</sup>

With Khawar Australia stands with the United Kingdom, Canada, New Zealand and other States that recognise gender violence as grounds for asylum. It provides a strong example and a way out of the complex issue of the nexus in gender-related asylum claims.

#### 2.3.4. United States: From *Matter of Kasinga* to *Matter of A-B-*

The *Matter of Kasinga*<sup>223</sup> involved a claim of a young woman from Togo fleeing FGM and forced polygamy. In a landmark decision, which accepted a gender-defined social group and applied a bifurcated nexus analysis the Board of Immigration Appeals (BIA) ruled eleven to one to grant asylum. The decision was a very positive step forward and many advocates and scholars saw the rationale used in *Matter of Kasinga* as opening the door to other claims of gender-related persecution, not just FGM.<sup>224</sup>

The BIA decided *Matter of Kasinga* in 1996. In the same year, a Guatemalan woman named Rody Alvarado applied for asylum protection.<sup>225</sup> She was fleeing ten years of brutal domestic violence by her husband, who was known for killing women and children during Guatemala’s civil

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<sup>219</sup> Ibid.

<sup>220</sup> Ibid. para. 110.

<sup>221</sup> Ibid. para. 91: The Court Stated: “The Convention is one of several important international treaties designed to redress “violations of basic human rights demonstrative of a failure of State protection.” It is this recognition of the failure of State protection so often repeated in the history of the past hundred years, that led to the exceptional involvement of international law in matters concerning individual human rights. In that context, the International Covenant on Civil and Political Rights and the Elimination of All Forms of Discrimination against Women are obviously important in expressing the concept of women’s equality before the law and the unacceptability of the State and its agencies discriminating unjustly against women solely by reason of their sex.”

<sup>222</sup> Karen Musalo ‘The Struggle for Equality: Women’s Rights, Human Rights, and Asylum Protection’ (2019) p. 535.

<sup>223</sup> *Matter of Kasinga*, 21 I & N. Dec. 357 (B.I.A. 1996)

<sup>224</sup> Musalo (n. 222) p. 535.

<sup>225</sup> *Matter of Rodi Adali Alvarado-Pena*, United States Board of Immigration Appeals (20 September 1996) decision overturned by *Matter of R-A-*, Int. Dec. 3403 (BIA 1999), vacated (A.G. 2001) (*Matter of R-A-*),

war.<sup>226</sup> Despite the similarities of the cases between *Matter of Kasinga* and the *Matter of R-A-*, the majority of the BIA rejected a gender-defined social group and refused to apply any form of bifurcated analysis. The BIA's decision in *Matter of R-A-* was widely criticized as inconsistent with precedent, as well as with the developing gender norm, including the immigration and naturalization Service's (INS) own guidelines.<sup>227</sup> This criticism appeared to be taken seriously by former Attorney General Janet Reno, who took the unusual step of exercising her authority to review and vacate *Matter of R-A-*<sup>228</sup> remanding it back to the BIA to reconsider the case under a set of proposed amendments to the asylum regulations that had been drafted by the INS and published December 7, in the Federal Register.<sup>207</sup> The case of Rody Alvarado went on for 13 years and she was finally granted asylum in 2009.<sup>229</sup> However, the decision was at the level of immigration judge, meaning that it did not constitute a binding precedent.<sup>230</sup> Between the 1999, when the BIA reversed her grant for asylum, and 2009, when she was finally granted asylum, three separate Attorney Generals intervened in her case: Janet Reno, John Ashcroft, and Michael Mukasey.<sup>231</sup> Their intervention shows the level of controversy over the concept, not only gender-based asylum, but specifically of domestic violence as a basis for asylum.<sup>232</sup>

It was not until August 2014, 18 years after the BIA decided *Matter of Kasinga*, that the BIA issued a precedent decision in a *Matter of A-R-C-G*,<sup>233</sup> another case involving domestic violence. Essentially it was held that victims of domestic violence can qualify for asylum based on their particular social group of "married women in Guatemala who are unable to leave their relationship."<sup>234</sup> However, the victory did not last long, as in 2018 the Trump administration took a case called *Matter of A-B-*,<sup>235</sup> which raised the same set of issues as *Matter of A-R-C-G*, a case involving domestic violence. The claimant, Ms. A-B-, was a Salvadoran woman who was fleeing domestic violence. She had been denied asylum by an immigration judge in Charlotte, North Carolina.<sup>236</sup> After her appeal to the Board of Immigration Appeals (BIA), the BIA reversed the case and relied upon *Matter of A-R-C-G* deciding that Ms. A-B- met the standard of asylum.<sup>237</sup> In order to do a background check before granting her asylum, the BIA remanded the case to the immigration

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<sup>226</sup> Ibid.

<sup>227</sup> Binder (n. 49) p. 184.

<sup>228</sup> *Matter of R-A-* (n. 225).

<sup>229</sup> Musalo (n. 222) p. 535.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> *Matter of A-R-C-G* (n. 233).

<sup>234</sup> Ibid. paras. 329-94.

<sup>235</sup> *Matter of A-B*, 27 I. & N. Dec. 321 (A.G. 2018).

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

judge. Unlike planned, the immigration judge refused to grant her asylum, and instead sat on the case. One reason for this may have been the miscommunication between the Attorney General Jeff Sessions and the immigration judge. Sessions had used his power to take a decision of the BIA, to take authority over it, and to issue new decision.<sup>238</sup> The decision he issued reversed the grant of asylum to Ms. A-B- and vacated *Matter of A-R-C-G*, the precedent decision which was a result of 18 years of protracted legal struggle.<sup>239</sup>

When Attorney General Sessions issued his decision in *Matter of A-B-*, not only did he reverse the *Matter of A-R-C-G*, but he also made some broad Statements such as: “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”<sup>240</sup> The broad language, which was intended to serve as a blanket exclusion of these claims, actually plummeted the asylum claims after *Matter of A-B-*.<sup>241</sup> Every case is supposed to be decided on its own merits, and on its own facts. However, these general Statements made by the Attorney General Sessions sent the message that these cases should be denied. What *Matter of A-B-* actually does as a legal matter, is it reverses the decision in *A-R-C-G-*, and it has some specific holdings that make it much harder for these domestic violence cases to prevail.<sup>242</sup>

The development of the jurisprudence in the United States on these key issues has been somewhat unusual, with issuance of two seemingly inconsistent opinions, *Matter of Kasinga*<sup>243</sup> and *Matter of R-A-*,<sup>244</sup> followed by the intervention of then- Attorney General, Janet Reno, who vacated the latter of the two. While *Matter of Kasinga* was praised for opening the door for women’s gender-based claims,<sup>245</sup> the *Matter of R-A-* and *Matter of A-B-*, was just roundly condemned for slamming it shut.<sup>246</sup> Even in the wake of the Attorney General’s vacating of the offending *Matter of R-A-* decision, commentators have characterized the U.S. position on gender claims a being out of step with evolving jurisprudence and inconsistent with international norms.<sup>247</sup> While the tribunals in the United Kingdom, New Zealand, and Australia have adopted the *bifurcated nexus analysis* in order to

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<sup>238</sup> David Hausman ‘How Jeff Sessions is Attacking Immigration Judges and Due Process Itself’ (2018)

<sup>239</sup> Musalo (n. 222) pp. 536-537.

<sup>240</sup> Hausman (n. 238) p. 320.

<sup>241</sup> Musalo (n. 222) p. 537.

<sup>242</sup> Ibid.

<sup>243</sup> *Matter of Kasinga* (n. 223).

<sup>244</sup> *Matter of R-A-* (n. 225)

<sup>245</sup> Melanie Randall ‘Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approached to Recognizing Asylum Claims Based on Gender Persecution’ (2002); Megan Annitto ‘Asylum for Victims of Domestic Violence: Is Protection Possible after In re R-A-?’ (2000)

<sup>246</sup> Binder (n. 49) p. 184.

<sup>247</sup> Musalo (n. 52) p. 778: see also Stephen Knight ‘Seeking Asylum from Gender Persecution: Progress Amid Uncertainty’ 79 interpreter releases 689, 696 (2002): “Discretionary decisions that have been made since control of the Department of Justice passed to Attorney General Ashcroft... are not positive and indicate a heightened level of opposition and resistance to recognizing gender-based human rights violations as a basis for asylum.”

include the women's experiences in the refugee discourse, the development of U.S. jurisdiction has gone backwards. The lack of clear and concise guidelines and ambiguous practice of the decision-makers, demonstrated in the *Matter of A-B-*, leaves the women applicants in a disadvantaged position where the jurisdiction is unpredictable and inconsistent with the development of the rest of the international community. It is difficult for an individual to challenge the decisions on appeal, and it provides very little guidance for future applicants with similar claims.

## 2.4. National Guidelines

While the Refugee Convention provides a definition to a refugee and standards for their protection, it remains silent about the procedures surrounding the determination of refugee status. UNHCR has considerable authority when it comes to interpreting the Refugee Convention and the guidelines aim to provide legal interpretative guidance to governments and officials. In addition, many States accept direct or indirect participation by UNHCR in procedures for the determination of refugee status. However, the refugee Convention leaves States the choice of means regarding implementation of the Convention at the national level. Some countries acknowledge the principle of asylum for refugees expressly in the constitution, while in other countries the ratification of the Refugee Convention and Protocol has direct effect in national law. In 1993, UNHCR EXCOM issued a Conclusion<sup>248</sup> which became the catalyst for States to develop guidance on gender asylum for their refugee status determination procedures. Since then, many States have issued their own national guidelines to help better understand the gender dimensions of asylum process and for adjudicating gender-related claims. The Guidelines and administrative features of three seemingly similar legal regimes (Canada, the United Kingdom and the United States) are briefly introduced in the following subchapters. By reviewing the way these member states have adopted the guidance of the UNHCR this thesis attempts to understand better the different interpretations of the refugee definition, and the possible pitfalls they may propose to women in different regimes.

### 2.4.1. Canada

Canada was the first country to issue national guidelines for gender claims in 1993.<sup>249</sup> The Immigration and Refugee Board (IRB) Chairperson's Guideline 4 – Women Refugee Claimants

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<sup>248</sup> EXCOM 'Conclusion on Refugee Protection and Sexual Violence' EXCOM Concl. No.73 (XLIV), 8 Oct. 1993.

<sup>249</sup> Immigration and Refugee Board of Canada 'Guidelines on Women Refugee Claimants Fearing Gender-Related

Fearing Gender-Related Persecution (Gender Guidelines) provide assistance to the decision-makers in deciding gender-related refugee claims and offer options for procedural accommodations and analytical guidance in the evaluation of gender-related claims. The Gender Guidelines are organized in four sections and the first two situate gender-related claims in the context of the refugee definition. Section A, Determining the Nature and the Grounds for Persecution, addresses how gender-related harms can qualify as persecution under the 1951 Refugee Convention.<sup>250</sup> The guideline also addresses other critical aspects within women's gender-related refugee claims, namely the issue of nexus with one or more of the enumerated grounds,<sup>251</sup> evidentiary matters, and the special problems women may face when providing evidence at the hearings. Section B, Assessing the Feared Harm, focuses on the question of "whether the violence is a serious violation of a fundamental human right for a Refugee Convention ground result from a failure of state protection."<sup>252</sup> Considering the framework for analysis, and for the determination of what kinds of treatment are considered persecution, the guideline encourages decision-makers to rely on an objective standard provided by international human rights instruments.<sup>253</sup>

The Canadian guideline treats the particular social group nexus as a default in gender-related cases. While the guideline only briefly mentions "grounds other than membership in a particular social group"<sup>254</sup> it devotes a whole chapter to the Convention ground "membership in a particular social group". Referring to the Supreme Court decision in *Ward*<sup>255</sup> the chapter focuses on the three authoritative categories of "particular social group" (innate or unchangeable characteristics, characteristics fundamental to human dignity, and former status). Although the Court in *Ward* held that the first category (groups defined by an innate or unchangeable characteristic) would include individuals fearing persecution on such grounds as gender, linguistic background and sexual orientation, there has been only few cases where the group has consisted purely of gender alone.<sup>256</sup>

Further, the Gender Guideline emphasises that women may face persecution as the consequence of failing to conform to, or for transgressing social mores (i.e., FGM). When considering

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Persecution' (March 1993); Immigrant and Refugee Board Of Canada. 'Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution' (Update November. 13. 1996), 'Guideline 4: Women Refugee Claimants Fearing Gender-related Persecution' (Update February 2003) (Canadian Gender Guideline).

<sup>250</sup> Gender Guidelines, (n. 6) Section A.

<sup>251</sup> Ibid. Section A II.

<sup>252</sup> Ibid. Section B.

<sup>253</sup> These instruments include, but are not limited to UDHR, ICCPR, ICESPR, CEDAW, Convention on the Political Rights of Women, Contention on the Nationality of Married Women, Declaration on the Elimination of Violence Against Women.

<sup>254</sup> Gender Guidelines, (n. 6) Section A. II.

<sup>255</sup> *Ward* (n. 96) para. 689.

<sup>256</sup> See for example CRDD T93-05935/36, Liebich, Larke, December 31, 1993, where the Refugee Division found that a woman who was a divorced mother living under the jurisdiction of Sharia law had a well-founded fear of persecution by reason of her membership in a particular social group "women."

the application of the statutory ground, the guideline encourages the decision-makers to consider women claiming asylum based on gender-related persecution for reasons of transgression of religious or social norms under the grounds of religion or political opinion, even though UNHCR Conclusion no.39 contemplates the use of “particular social group” as an appropriate ground. This deviation from the views of the UNHCR reminds that the views of the UNHCR are merely suggestions, and not binding on States. Moreover, this specific note provides a welcome acknowledgement to actions of women as political and taking place in the public sphere instead in the private.

#### 2.4.2. The United Kingdom

In 1998, the UK Gender Guidelines for the Determination of Asylum Claims in the UK addressed to first instance decision-makers in the Home Office.<sup>257</sup> On 5 December 2000, the United Kingdom Immigration Appellate Authority (the immigration and asylum tribunal) launched its Asylum Gender Guidelines,<sup>258</sup> for the use in the determination of asylum appeals in the UK. The aim of the guideline is to assist the judiciary at the Immigration Appellate Authority (IAA) in fully considering all aspects of asylum seekers’ claims to international refugee protection. The guideline acknowledges that traditionally it has been viewed that a ‘real refugee’ is a man and therefore women asylum seekers in the UK may not benefit equitably from the protection offered by the Refugee Convention. The reasons for this are twofold: first, the case law has not fully considered the specific issues raised by women’s needs for protection or has considered them from a framework of male experiences. Two, procedural and evidential requirements of the asylum status determination procedures may not be equally accessible to women as men.<sup>259</sup> In addition to the UN Guidelines, the UK guideline draws from other national guidelines and forms a comprehensive collection for the decision-makers.

#### 2.4.3. The United States

Even within jurisdictions the adjudicators adopt conflicting interpretations.<sup>260</sup> There has been two distinct lines of analysis for ‘particular social group’ cases in the United States due to the peculiar administrative structure of the American system.<sup>261</sup> Asylum cases are heard by the USCIS asylum

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<sup>257</sup> Published by Refugee Women’s Legal Group (1998).

<sup>258</sup> United Kingdom Asylum and Immigration Tribunal/ Immigration Appellate Authority, ‘Immigration Appellate Authority (UK): Asylum Gender Guidelines (1 November 2000).

<sup>259</sup> Ibid. Section 1 (1.1.).

<sup>260</sup> See chapter 2.3.4. for analysis of differing interpretations in the United States.

<sup>261</sup> T. Alexander Aleinikoff ‘Membership in a “Particular Social Group”: Analysis and Proposed Conclusions’ (Background Paper for “Track Two” of the Global Consultations, 2001)p. 275; See also The Homeland Security Act of

officers, and if not granted, they may be raised before immigration judges in a removal proceeding and then appealed to the Board of Immigration Appeals located within the Department of Justice. From the BIA the decisions may be appealed to a federal circuit court of appeals.<sup>262</sup> These decisions by the court of appeals are binding on the BIA. The reason this administrative system is introduced here, is that the Ninth Circuit<sup>263</sup> hears considerably more asylum cases than any other circuit. Therefore, its decisions play a crucial role in the development of asylum law in the United States.<sup>264</sup>

The B.I.A. and the Ninth Circuit have construed different interpretations of ‘particular social group’. The other federal circuit courts of appeals have largely adopted the B.I.A.’s approach.<sup>265</sup> Thus there is a different standard for cases brought in the Ninth Circuit and cases heard by the B.I.A. and appealed to other circuit courts.<sup>266</sup> There has been attempts to unify the practice, and in 1995, the former United States Immigration and Naturalization Service (INS) provided guidelines concerning asylum claims of women.<sup>267</sup> Although the Immigration Judges’, the BIA and the Circuit Courts could have taken note of these considerations, the non-binding document was directed at to asylum officers, who form the first tier of decision-making in the United States system.<sup>268</sup> The considerations refer to the significant developments which preceded their issuance and cite the UNHCR document as well as the Canadian Guidelines. The guideline acknowledges the importance of human rights informed approach and analyzing gender claims within “the framework provided by the existing international human rights instruments.”<sup>269</sup> Like the Canadian guideline, the considerations provide examples of gendered harms that could constitute persecution,<sup>270</sup> and identify the “nexus issues” as one of the most difficult issues arising in gender claims.<sup>271</sup> The focus in the considerations was on ‘political opinion’ and ‘particular social group’ as possible grounds for gender claims.

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2002, Pub. L. No. 107-296, 11 Stat. 2135. During the Bush administration the United States asylum system went through changes when March 1, 2003, the INS ceased to exist under that name. Most of the agency’s functions were transferred to three new entities- U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration Customs Enforcement (ICE), and Customs and Border Protection (CBP). The USCIS processes asylum and refugee applications and makes adjudicative decisions performed at the service centers. The Refugee, Asylum and International Operations Directorate (RAIO) working under the USCIS is responsible for the adjudication of asylum and refugee applications.

<sup>262</sup> The applicant files in the circuit in which his or her case originated.

<sup>263</sup> The Ninth Circuit covers California and other Western U.S. states

<sup>264</sup> Aleinikoff (n. 261 ) p. 275

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Office of International Affairs. U.S. Immigrant and Naturalization Services ‘Consideration for Asylum Officers Adjudicating Asylum Claims for Women’ (May 26. 1995); See also: ‘Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys’ (May 2014) p. 20.

<sup>268</sup> In the US, asylum-seekers who are not in removal proceedings can affirmatively apply for asylum, and have their cases adjudicated in a non-adversarial forum before an Asylum Officer. If they are in removal proceeding, claims for asylum are adjudicated by IJ’s and may then be appealed to the BIA, and then to the federal circuit courts of appeal.

<sup>269</sup> US DOJ, Gender Considerations para. 2.

<sup>270</sup> Ibid. para. 9.

<sup>271</sup> Ibid. para. 10.



Since the groundbreaking decision in *Matter of R-A*<sup>272</sup> there has been attempts to further clarify issues relating to the refugee definition, particularly regarding the membership in a particular social group. Since 2019 the RAI0 has provided a very comprehensive training module for its officers on gender-related claims and factors they must take into consideration when interviewing and adjudicating claims related to gender.<sup>273</sup> Again, the training was directed at the officers of the first tier of the proceedings rather than the IJ's, BIA or the Circuit Courts.

As demonstrated by the cases *Matter of Kasinga*,<sup>274</sup> *Matter of R-A*,<sup>275</sup> *Matter of A-R-C-G*,<sup>276</sup> and *Matter of A-B*<sup>277</sup> in chapter 2.4.3. of this thesis, the policy positions and absence of clear national guidance has resulted in contradictory and arbitrary outcomes and the failure of protection.<sup>278</sup> After the decision of *A-B* came out the U.S. Citizenship and Immigration Services (USCIS) issued guidance about how these cases should be denied.<sup>279</sup> Arguably the *Matter of A-B* and the USCIS Guidance were being applied as a blanket preclusion of cases involving domestic violence or fear of gangs in the expedited removal process. The holdings of *Matter of A-B*, and the aspects of the USCIS guidance have been criticized to be unlawful.<sup>280</sup>

The division within the United States asylum system and the two differing standards prove to pose additional challenges for women asylum seekers. The BIA's approach relies upon the protected characteristics approach from *Acosta*<sup>281</sup> while the Ninth Circuit Court of Appeals has relied upon the 'cohesiveness' requirement from *Sanchez-Trujillo*<sup>282</sup>. Thus, depending on the instance adjudicating the case, the outcomes tend to vary.

#### 2.4.4. Problems with the Gender Guidelines

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<sup>272</sup> *Matter of R-A* (n. 225).

<sup>273</sup> RAI0 Combined training Program, Gender-Related Claims (USCIS) 20 Dec 2019 available at: [https://www.uscis.gov/sites/default/files/document/foia/Gender\\_Related\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Gender_Related_Claims_LP_RAIO.pdf) last accessed: 16.5.2021.

<sup>274</sup> *Matter of Kasinga* (n. 223).

<sup>275</sup> *Matter of R-A* (n. 225)

<sup>276</sup> *A-R-C-G*, 26 I.& N. Dec. 388, 388-89 (BIA 2014)

<sup>277</sup> *A-B*, 27 I. & N. Dec.321 (A.G. 2018)

<sup>278</sup> The US Government does not maintain statistics on gender claims, and thus there is no way to reliably analyse how the landmark decisions have affected- and continue to affect- the outcomes of gender claims. See also Karen Musalo 'Short history of gender asylum' (2010) for analysis.

<sup>279</sup> Memorandum from U.S. Citizenship & Immigration Services (USCIS), 'Guidance for Processing Reasonable fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*', U.S. Deputy of Homeland Security' (July 11, 2018).

<sup>280</sup> Judge Emmett Sullivan in *Grace v. Whitaker*, 344 F. Supp. 3d96, 105 (D.D.F.C.2018), Musalo (n. 222) p. 537.

<sup>281</sup> *Acosta* (n. 170).

<sup>282</sup> *Sanchez-Trujillo v. I.N.S.* 802 F.2d 1571 (9<sup>th</sup> Cir. 1986)

In 2011, an Australian study found that even years after the implementation of the gender guidelines, there is a lack of systematic and consistent application of the guidelines.<sup>283</sup> According to the researchers the mere fact that the guidelines existed led some decision-makers to conclude that the “gender issue” was taken care of. At the same time there was clear evidence that gender-related claims were not given fair consideration by decision-makers.<sup>284</sup> Some Canadian Scholars also raise concerns that gender-related aspects of claims may be either misunderstood by some decision-makers or discounted in comparison to other Convention grounds.<sup>285</sup> Moreover, the United Kingdom’s asylum system has some identified issues of inconsistent treatment by decision-makers in gender-related claims. In 2011, the United Kingdom advocacy group Asylum Aid, studied the way the UK Border Agency officials (UKBA) analysed the cases of women refugee claimants.<sup>286</sup> The researchers found that the UK decision-makers in the study sample<sup>287</sup> had a poor understanding of the nature of gender-based persecution. In addition, the decision-makers did not use available resources, such as government-produced country reports, to help augment their understanding of the issue.<sup>288</sup> These studies demonstrate the issue that, although the national Gender Guidelines provide an array of possible gender-related claims, the decision-makers have the tendency to dismiss the intersectional nature of women’s oppression. The narrow understanding of gender arguably endangers the fair and equitable evaluation for all gender-related claims as the decision-makers interpret the notion of gender too narrow.<sup>289</sup>

### 3. Funneling Women’s Claims Under the ‘Particular Social Group’ Nexus

There has been a steady increase in women’s refugee claims based on “membership in a particular social group” within the past 20 years. The ambiguity of ‘particular social group’ nexus makes it a flexible vehicle for women’s claims that may not easily fit within other Convention grounds. In many jurisdictions, it has become the default ground for women’s claims, although one or more of the other

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<sup>283</sup> Melinda McPherson; Leah Horowitz, Dean Lusher, Sarah Di Giglio, Lucy Greenacre ‘Marginal Women, Marginal Rights: Impediments to Gender-Based Persecution Claims by Asylum-seeking Women in Australia’ (2011) 24 J of Refugee Studies p. 323.

<sup>284</sup> Ibid. p. 325.

<sup>285</sup> Audrey Macklin ‘A comparative Analysis of the Canadian, US and Australian Directives on Gender Persecution and Refugee Status’ in Doreen Indra, ed. ‘Endangering Forced Migration’ (Providence: Berghahn Books, 1999) p. 279.

<sup>286</sup> Asylum Aid ‘Unsustainable: the quality of initial decision-making in women’s asylum claims’ (January 2011) p. 6.

<sup>287</sup> The study consisted of a random sample of 147 case files.

<sup>288</sup> Asylum Aid ‘Unsustainable: the quality of initial decision-making in women’s asylum claims’ (January 2011) p. 6.

<sup>289</sup> For a review of Canadian and Australian legislation and practice see: Catherine Dauvergne & Jenni Millbank ‘Burdened by Proof: How Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers’ (2003) 31 Fed L Rev 299 p. 299.

grounds may be equally or more applicable.<sup>290</sup> The adjudicators have adopted a range of construction of the Convention language to fulfil the gaps of the interpretative materials provided by the UNCHR.<sup>291</sup> The balancing act between providing protection to victims of persecutions and respecting state sovereignty without imposing obligations that they do not consent, has made 'particular social group' a vexing category. In other words, time to time Courts and administrative agencies may introduce a standard that adequately resolves the case before them only to later conclude that the rule must be modified because of subsequent claims.<sup>292</sup>

Scholars, such as Bosi and Chan, argue that the absence of any clear academic or legal definition of what constitutes a particular social group makes it a "theoretically vexing category,"<sup>293</sup> whose definition is "ambiguous, narrow and contrived."<sup>294</sup> Moreover, according to Bosi, the strategy of evoking a particular social group nexus in order to frame gender-related claims has "created an often mechanistic and reductive classification problem by creating artificial subcategories that are arbitrarily either denied or granted asylum."<sup>295</sup> Furthermore, Tvedt, emphasises that the main issue with funnelling women's claims for refugee under the particular social group nexus ground leaves intolerable room to adjudicators to apply interpretations that exclude women's experiences. This view has been supported by Schenk, who has voiced his concerns with regards the problematic nature of the particular social group ground, which runs the risk of either excluding gender-related groups through a too narrow definition on the other hand, or "subsuming the entire framework of asylum law" on the other, rendering the remaining grounds superfluous.<sup>296</sup> On the contrary, some scholars, such as Bahl, argues that the interpretation of persecution that recognises violence against women as grounds for asylum in addition to an understanding that women can constitute particular social group within the meaning of the Convention, are necessary in order to include women claimants. She says that "the present legislation, both in the United States and internationally, can only accommodate these claims within the existing infrastructure."<sup>297</sup>

The arbitrariness of Courts accepting various gender-related groups as particular social group makes this strategy an unpredictable one.<sup>298</sup> Funnelling women's claims under the particular

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<sup>290</sup> Edwards (n. 23) p. 28.

<sup>291</sup> The See McHugh J. in *Applicant A* (at 259):

Courts and jurists have taken widely differing views as to what constitutes "membership in a particular social group" for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.

<sup>292</sup> Aleinikoff (n. 261) p. 265.

<sup>293</sup> Tvedt (n. 7) p. 40.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Tvedt (n. 7) p. 41.

<sup>297</sup> Tvedt (n. 7) p. 42.

<sup>298</sup> Tvedt (n. 7) p. 40.

social group nexus requires a balancing act between excluding gender-related groups through too narrow definition on the one hand and too inclusive on the other. The danger with the latter one being, that it would finally render the other grounds superfluous. To better understand why the “particular social group” nexus is used as a default for women’s gender-related refugee claims, this chapter provides an overview of the Convention ground and means to include gender to the discourse.

### 3.1. Defining ‘Particular Social Group’

The absence of any clear academic or legal definition of what constitutes a particular social group was noted by the UNHCR in 2002, when as a part of its process of Global Consultations,<sup>299</sup> it issued guidelines on both membership in a particular social group<sup>300</sup> and gender-related persecution.<sup>301</sup> The Guidelines are significant for affirming gender-defined social group and expressly adopting the bifurcated nexus analysis introduced in chapter 2.3. The Guidelines overlap in their areas of coverage and are mutually reinforcing. The Social Group Guidelines recommend and expand the definition of social group, incorporating the following two principal approaches adopted for example by the State tribunals in Australia,<sup>302</sup> Canada,<sup>303</sup> and the United States<sup>304</sup>:

- (1) The “Protected characteristic approach,” which recognises groups united by immutable and fundamental characteristics.
- (2) The “social perception” approach, which recognises groups perceived by society as being cognizable group.

In order to properly understand the nature of these two principal approaches, the following subchapters of this thesis assess protected characteristics approach (*eiusdem generis*) and the social perception approach in more detail. It shall do so by examining the practice of the tribunals of the United States, Canada.

#### 3.1.1. Protected Characteristic Approach (*eiusdem generis*)

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<sup>299</sup> The Global Consultations marked the fiftieth anniversary of the drafting of the U.N. Refugee Convention and included a process of research and dialogue regarding key aspects of the refugee definition and contemporary refugee issues.

<sup>300</sup> Social Group Guidelines (n. 63) para 19.

<sup>301</sup> Gender Guidelines (n. 6).

<sup>302</sup> *Applicant A* v. *MIMA* (1997) 190 CLR 225 (*Applicant A*).

<sup>303</sup> *Ward* (n. 96).

<sup>304</sup> *Acosta* (n. 170).

First adopted by the United States Board of Immigration Appeals (BIA) in *Matter of Acosta*<sup>305</sup>, the protected characteristic approach has become the leading approach in the common law realm.<sup>306</sup> The formulation stems from the well-established doctrine of *eiusdem generis* which is used to interpret generally written statutes. Where law lists specific classes of persons for example, and then refers to them in general, the general Statements only apply to the same kinds of persons or things specifically listed.<sup>307</sup> In *Matter of Acosta* the BIA emphasised that “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership...Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.”<sup>308</sup> Thus, the approach examines whether a group is united by an immutable characteristic or a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.<sup>309</sup>

This approach was also adopted by the Supreme Court of Canada in *Ward*.<sup>310</sup> In this case the Court went further in its analysis, exploring the objectives of the Convention’s drafters. The Supreme Court of Canada found that underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.<sup>311</sup> The Convention drafters included race, religion, nationality, and political opinion because they constituted clear examples of status and beliefs deserving protection under international norms of non-discrimination.<sup>312</sup> The particular social group ground should, therefore, be interpreted to embrace groups similar to the other four specifically Stated categories, and to reflect the non-discriminatory principle.<sup>313</sup> The Supreme Court of Canada in *Ward* defined three authoritative categories of “particular social group” concept, namely:

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<sup>305</sup> *Ibid.*

<sup>306</sup> James C. Hathaway; Michelle Foster ‘Membership of a Particular Social Group’ (2003), p. 480.

<sup>307</sup> John Bouvier ‘A Law Dictionary, Adapted to the Constitution and Laws of the United States’ (10 Nov. 2018) available at: <<https://legal-dictionary.thefreedictionary.com/Eiusdem+generis>> last accessed 16.5.2021.

<sup>308</sup> *Acosta* (n. 170) para. 13.

<sup>309</sup> Gender Guidelines (n. 6) paras. 2-3.

<sup>310</sup> *Ward* (n. 96)

<sup>311</sup> *Ward* (n. 96) para. 733.

<sup>312</sup> *Ward* (n. 96) para. 734: “The Supreme Court in *Ward* quoted from Guy Goodwin-Gill as follows: “The references to race, religion, nationality, membership of a particular social group, or political opinion illustrate briefly the characteristic of individuals and groups, which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights”

<sup>313</sup> *Ward* (n. 96) para. 734: “In distilling the content of ... ‘particular social group’, therefore, it is appropriate to find inspiration in discriminatory concepts.”

- 1) groups defined by an innate or unchangeable characteristic;
- 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- 3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>314</sup>

The Canadian Supreme Court further elucidated the categories in *Ward* stating that “The first category (innate or unchangeable characteristics) would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second (characteristic fundamental to human dignity) would encompass, for example, human rights activists. The third branch (former status) is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.”<sup>315</sup> By this definition, “groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights”<sup>316</sup> are excluded from the protected characteristics approach.

Adopting the *eiusdem generis* approach provides “a firmly principled framework, with the determination of whether a group qualifies as a “particular social group” being made on the basis of the same kinds of non-discrimination concerns that underpin the other four Convention grounds”.<sup>317</sup> It also “promotes consistency in decision-making, because it relies on clear external standards of reference which are of universal applicability; allows for the automatic, responsible evolution of the particular social group category, since the norms by which qualification is assessed are continually adjusted through the State-sanctioned human rights law-making process.”<sup>318</sup> Moreover, it has provided the basis for important decisions extending protection to such groups as women and homosexuals. Whether women can constitute a particular social group based on their gender was confirmed by the UNHCR in its Gender Guidelines which State that “It follows that sex can properly be within the ambit of the social group category, with women being a clear example of social subset defined by innate and immutable characteristic.”<sup>319</sup>

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<sup>314</sup> *Ward* (n. 96) para. 739.

<sup>315</sup> *Ibid.* paras. 689, 739.

<sup>316</sup> *Ibid.* at 737-738 (Forest J)

<sup>317</sup> Hathaway, Foster (n. 297) pp. 481-482

<sup>318</sup> *Ibid.* p. 482.

<sup>319</sup> Gender Guidelines (n. 6) para. 15.

### 3.1.1.1. Cohesion Requirement

The ejusdem generis framework has been widely accepted by the member states and the UNHCR. However, it has also been criticised to unnecessarily complicate the refugee inquiry in a way that could be avoided by simply giving the phrase its ordinary meaning. The interpretive challenges were demonstrated in the United States case of *Sanchez-Trujillo v. I.N.S.*<sup>320</sup>, which concerned two men, Sanchez and Escobar. The threshold question in this case was whether the petitioners' class of young, urban, working class males constitutes that type of "particular social group," membership in which should be regarded as indicative of refugee status under the applicable immigration statutes.<sup>321</sup> The Immigration Judge held, that such a large division of the population could not constitute a cognizable "social group" within the meaning of 8 U.S.C. Sections 1101(a)(42), 1253(h) and that "mere group membership, without evidence of persecution directed at the individual petitioner, was not sufficient to maintain a claim for asylum or prohibition of deportation."<sup>322</sup>

The court developed a four-part test for evaluating a social group claim which, if used in a balanced fashion, is capable of producing a fair result. First, the distinguishability of the group had to be established. Second, petitioners needed to show they were members of that group. Third, the group in question must have been the target of persecution on account of its characters. Finally, the court had to determine if "special circumstances" existed which warranted granting asylum on the basis of social group membership alone.<sup>323</sup> The court focused on the first part of the test (distinguishability of the group) and disposed the case on that basis.<sup>324</sup> Although the court looked to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, for a definition of "particular social group" it did not find the Handbook's discussion helpful.<sup>325</sup> Ultimately the court relied upon its own interpretation of the statutory language,<sup>326</sup> finding that "the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of voluntary associational relationship among the purported member, which imparts some common characteristic that is fundamental to their identity."<sup>327</sup> Thus, the Court held that a voluntary associational relationship between group members, rather than innate or fundamental characteristics, was necessary to establish

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<sup>320</sup> *Sanchez-Trujillo* (n. 282).

<sup>321</sup> *Ibid.* para. 22.

<sup>322</sup> *Ibid.* para. 4.

<sup>323</sup> *Ibid.* para. 20.

<sup>324</sup> *Ibid.* paras. 21–30.

<sup>325</sup> *Ibid.* paras. 24–25.

<sup>326</sup> *Ibid.* paras. 26–27.

<sup>327</sup> *Ibid.* para. 27.

a particular social group. According to the court's example immediate family members provided a "prototypical example" of a particular social group, which consists of people voluntarily associated to each other. In contrast a "statistical group" such as "males over six feet tall" would not qualify as a particular social group even if it experienced greater general risk of persecution.<sup>328</sup> The court concluded that the social group defined by the petitioners in this case was closer to the "statistical group" and went no further in its analysis.<sup>329</sup>

The approach arising from Sanchez-Trujillo, also known as "cohesion", requirement has been rejected in number of tribunals.<sup>330</sup> Arguably the courts use of the test was not balanced and in determining cognizability of the social group the standard used by the court was overly narrow. While the requirement of close affiliation and common interest together may imply voluntary associational relationship, it also suggests a much broader type of group than an individual family, which the court brought up as an example. Based on this criterion the people who belong to associations (e.g., Zonta International) who have a voluntary associational relationship would amount to a particular social group. However, at the same time it is far from the prototype given by the court (family). The conflict creates confusion and thus fails to achieve what the court ought to do- provide a clear and rational outcome. Furthermore, rather than utilizing other sources in defining the term "particular social group" the court relied on the ambiguity of the words "social group" to achieve its result. The court used no citations and arrived at a definition based on what it interpreted to be the plain meaning of the words.<sup>331</sup> The "plain meaning" definition could also have implied a broader group than outlined by the court in this case. Were the court to turn to international sources such as the *travaux preparatoires* of the Refugee Convention and Protocol, cases from other countries party to the Refugee Convention, or the UNHCR Handbook, there could have been much more needed depth to the analysis of the meaning of "particular social group".

As the cohesion framework requires knowledge of non-discrimination and related areas of human rights law, it may pose challenges when applying. It is possible that some of the concerns relating to non-discrimination and other human rights principles have not come up for adjudication within the human rights system and thus may force the decision-makers to defer to a standard that may not exist. There is no predictability as to whether women facing gender-related violence would fall into the category of particular social group if the cohesion requirement were to be applied.

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<sup>328</sup> Ibid. para. 28.

<sup>329</sup> Ibid.

<sup>330</sup> See *Islam; Ex-Parte Shah* (n. 95) p. 4. (per Lord Steyn)

<sup>331</sup> *Sanchez-Trujillo* (n. 282) para. 30.



### 3.1.2. Social Perception Approach

The social perception, also known as the sociological approach, focuses on the external perception of a given group in the context of the country of origin. It asks whether or not a group shares a common characteristic which makes them cognizable group or sets them apart from society at large.<sup>332</sup> The aim of the concept is to give ordinary meaning to the concept and define a “particular social group” for the purposes of refugee law on sociological basis.<sup>333</sup>

In *Applicant A v. MIMA*<sup>334</sup> the High Court of Australia took the view that the phrase “membership of a particular social group” should be given a broad interpretation to “encompass all those who fall fairly within its language and should be construed in light of the context in which it appears”<sup>335</sup> and emphasized that exhaustive definition of the phrase would not only be impossible, but also pointless.<sup>336</sup> In the case *Dawson J* explained:

“A “group” is a collection of persons (...) the word “social” is of wide import and may be defined to mean “pertaining, relating, or due to (...) society as a natural or ordinary condition of human life”. “Social” may also be defined as “capable of being associated or united to others” or “associated, allied, combined”. The adjoining of “social” to “group” suggests that the collection of persons must be of a social character, that is to say, the collection must be cognizable as a group in society such that its members share something which unites them and sets them apart from society at large. The word “particular” in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large.”<sup>337</sup>

This approach places the significance upon the external perception of the group, including the perception of the persecutors.<sup>338</sup> *McHugh J.* in his concurring judgment emphasised that the “existence of such a group depends in most, perhaps all, cases on external perceptions of the group”, and that the group ‘must be identifiable as a social unit.’<sup>339</sup> Thus, the question is whether the group

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<sup>332</sup> Social Group Guidelines (n. 63) para. 7.

<sup>333</sup> Hathaway, Foster (n. 306) p. 482.

<sup>334</sup> *Applicant 'A' v. MIMA* (1997) 190 CLR 225 (*Applicant 'A'*).

<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid.*

<sup>337</sup> *Ibid.* at. 241

<sup>338</sup> Hathaway, Foster (n. 306) p. 483.

<sup>339</sup> *Applicant 'A'* (n. 334) para. 264.

is perceived by people in the country of origin as a distinct social group “by reason of some characteristic attribute, activity, belief, interest or goal that unites them.”<sup>340</sup>

The meaning of ‘social perception’ approach was further explored by the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs*<sup>341</sup> where the Court established three steps in determining whether group is a particular social group for the purposes of the Convention:

“First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.”<sup>342</sup>

Although the Court demonstrated in *Applicant S* that there is no pre-requisite that society should recognise or perceive the existence of a particular social group for it to exist,<sup>343</sup> it did elaborate on the third requirement. The question is whether the group is objectively cognizable,<sup>344</sup> or distinguished from the relevant society at large, with evidence of societal perception being highly relevant, indeed ‘usually compelling’,<sup>345</sup> in this inquiry. From evidentiary perspective the test could be satisfied by drawing information from the usual source of fact-finding in refugee hearing, namely from “country-information” gathered by international bodies and Nations other than the applicant’s nation of origin.<sup>346</sup>

The social perception approach has been praised for the fact that it stems from the words “membership of a particular social group” and needs no references to external legal standards; it takes a pragmatic approach in the recognition of the absence of completely settled and authoritative set of external standards of reference; it provides wider judicial discretion than *eiusdem generis* approach, allowing judges to consider the political and cultural realities in the applicant’s country of origin; and because it is so open-ended there is a possibility that it will embrace more groups as “particular social group” (especially groups in which membership is voluntary and the purpose of which cannot be readily linked to non-discrimination or other human rights principles).<sup>347</sup>

However, as there is no “ordinary meaning” of the concept of “membership of a

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<sup>340</sup> *Ibid.*

<sup>341</sup> *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 (*‘Applicant S’*)

<sup>342</sup> *Ibid.* para. 400 (per Gleeson CJ, Gummow and Kirby JJ).

<sup>343</sup> *Ibid.* paras. 398 and 400.

<sup>344</sup> *Ibid.* paras. 410-411.

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.* para. 400.

<sup>347</sup> Hathaway, Foster (n. 306) p. 484.

particular social group” it seems illogical to defer to such notion. In addition, the test has been criticised to be overly broad. The New Zealand RSAA emphasised that: “the difficulty with the “objective observer” approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group. The Refugee Convention, however, was not intended to afford protection to every such persecuted group. Furthermore, the decision-makers may face evidential difficulty in assessing the “societal perceptions” of other societies, especially those differing from their own societies. Thus, the social perception test in practice amounts to little more than “licence for subjective assessment of merit.”<sup>348</sup>

Jurisdictions applying the social perception test and those relying predominantly on the protected characteristics approach have acknowledged that women can constitute particular social group under the 1951 Convention.<sup>349</sup> Many jurisdictions have included gender or sex as explicit ground for refugee status in domestic legislation, including some European jurisdictions. The European Qualification Directive States that “gender-related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.”<sup>350</sup> While in many cases the selection of one test over another makes no difference to the outcome of an individual refugee status determination, there are some situations where the choice of test will be determinate.<sup>351</sup> Notably, under the UNHCR Guidelines, there is a clear implication that “social perception” is more positive to lead to the recognition of refugee status than the “protected characteristics” approach.<sup>352</sup> The question remains, whether the outcome depends on the tests applied cumulatively or separately and whether some jurisdictions provide more exclusive protection than others? Although the cases discussed in this thesis have primarily relied upon the protected characteristics approach, the Guidelines observe that a number of States have recognised women as constituting a particular social group under the protected characteristics and social perception approaches.<sup>353</sup> The standard resulting from a merger of the protected characteristics and social perception approach has been articulated by the Guidelines as follows:

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<sup>348</sup> Hathaway, Foster (n. 306) p. 484.

<sup>349</sup> *Khawar* (n. 95); *Islam*; *Ex-Parte Shah* (n. 95); *K v Secretary of the State for the Home Department* (2007) 1 AC 412.

<sup>350</sup> Directive 2011/95/EU (n. 20) Article 10(1)(d).

<sup>351</sup> Foster (n. 44), p. 40.

<sup>352</sup> Baroness Hale in *Fornah* (2007) 1 AC paras. 412, 463; Foster (n. 44) p. 40.

<sup>353</sup> Musalo (n. 52), p. 805.

“A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”<sup>354</sup>

Noted by the Guidelines, women meet the social group definition because of their “innate and immutable characteristics” and because of the fact that in society women are “frequently treated differently than men.”<sup>355</sup> The Guidelines expressly State that the size of the group is not a relevant criterion,<sup>356</sup> and reject the “cohesion” requirement arising from the Sanchez-Trujillo<sup>357</sup> decision. Moreover, the Guidelines State that “women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.”<sup>358</sup>

The Guidelines on Gender-Related Persecution recognise that, although any of the five enumerated grounds may be implicated to women’s claims, women’s claims often come within the social group ground “making proper understanding of this term paramount importance.”<sup>359</sup> Furthermore the Gender Guidelines expressly adopt the standard established in the social Group Guidelines, reiterating its applicability to women.<sup>360</sup> Both of the Guidelines repudiate factors relied upon to negate gender-defined social groups, such as the size of the group and the requirement of cohesiveness or voluntary association.<sup>361</sup>

### 3.2. EASO Guidance on membership of a particular social group

The mission of the European Asylum Support Office (EASO) is to support European Union Member States and Associated Countries (Member States) through common training, common quality standards and common country-of-origin information, among other things. Therefore, it has developed common practical tools and guidance. The purpose of the EASO Practical Guide on Qualification for International Protection is to provide guidance to provide further assistance in applying the reason for persecution of ‘membership of a particular social group’, and more generally

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<sup>354</sup> Social Group Guidelines (n. 63) para. 11.

<sup>355</sup> Ibid. para. 12

<sup>356</sup> Ibid. para. 18

<sup>357</sup> *Sanchez-Trujillo* (n. 282).

<sup>358</sup> Social Group Guidelines (n. 63) para. 15.

<sup>359</sup> See Gender Guidelines (n. 6) para 28.

<sup>360</sup> Ibid. paras. 29-30.

<sup>361</sup> Ibid. para. 31.

in applying same legal criteria and common standards when determining who qualifies for international protection.<sup>362</sup> Although the guide is only a soft convergence tool, and not legally binding, it does offer basis for more unified practice and language in the context of Common European Asylum System (CEAS).

Article 10(1)(d) of the Qualification Directive (QD) provides that a group shall be considered to form a particular social group where the members of the group share an innate characteristic, or a common background that cannot be changed, or share a characteristics or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Furthermore, where a group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society, it shall be considered to form a particular social group.<sup>363</sup> This cumulative approach requires that the two criteria, namely ‘common characteristics’ and ‘distinct identity’, both need to be met in order to establish belonging to a particular social group. Thus, it is not sufficient alone that the group share certain characteristics or background beliefs, but it must also be visible to others to identify the group as being different.<sup>364</sup> Although the surrounding society should have some general awareness that a particular group exists among society and perceives its members differently, an individual who is a member of a particular social group can be ‘invisible’ or ‘unnoticeable’ by the surrounding society. The mere fact of sharing the common characteristics of that particular social group may make him or her a member of that group. For example, a victim of harmful traditional practices (FGM) may conceal the harm from the surrounding society. However, sharing the common characteristics with other young women in the area may make her a member of that group. There is no need for cohesiveness among the members of the group, nor need they be connected in any way.<sup>365</sup> In addition, the size of the group is irrelevant, when assessing the existence of a particular social group.

The EASO Guide acknowledges that there is a need for a common concept of persecution ground ‘membership of a particular social group’ which takes into account issues arising from applicants’ gender (including gender identity and sexual orientation), that may arise from certain legal traditions and customs, resulting for example FGM, forced sterilization or forced

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<sup>362</sup> European Asylum Support Office ‘EASO Guidance on Membership of a Particular Social Group’ (March 2020)

<sup>363</sup> Directive 2011/95/EU (n. 20) Art. 10(1)(d).

<sup>364</sup> EASO Guidance (n. 362) p. 11; See also the CJEU Judgment *X, Y and Z v. Minister voor Immigratie en Asiel*, C-199/12 - C-201/12 [2013] para. 45, where it was confirmed that a group is regarded as a ‘particular social group’ where, inter alia, the two conditions are met cumulatively.

<sup>365</sup> EASO Guidance (n. 362) p. 16.

abortion.<sup>366</sup> Moreover, the guide confirms that “Acts of persecution as qualified in paragraph 1 can inter alia take the form of:(...) acts of gender-specific or child specific nature”.<sup>367</sup>

Like in other guidelines assessed in this thesis, the EASO guide also emphasises that a mere existence of a discriminatory law or practice in itself is not sufficient to establish a persecution based on a gender-defined particular social group. However, it may indicate that there is a need to further assess these gender-based discriminatory practices in the country of origin and see how it is being applied and how does it affect women differently.<sup>368</sup> Often other characteristics will be needed to establish the criterion of ‘distinct identity’ such as region of origin, ethnicity and social situation.

The guide requires applicant to establish the ‘protected characteristics’ test and the ‘social perception’ test cumulatively. According to the guide, depending on the context in the concerned country of origin, a particular social group can be established when the women and girls share the common characteristics. The characteristics can be either innate characteristics (age, gender, ethnicity), common background, and a characteristic of belief that is fundamental to one’s identity or conscience. This type of gender-related particular social groups include for example women and girls who refuse to undergo FGM, women who have been victims of rape or other forms of sexual violence and who face stigmatisation by surrounding society, or women who were formerly prostitutes and who face ostracism or other forms of discrimination, punishment or ill-treatment. Moreover, in addition to sharing common characteristics the ‘distinct identity’ aspect requires that the group has a distinct identity in the relevant country of origin and that it is perceived differently by the surrounding society (‘social perception’ test). For example, in some countries women who have not undergone FGM might be considered different from females who have undergone the practice, resulting in social ostracism.<sup>369</sup> This type of ostracism or severe forms of discrimination may be enough to establish nexus between the particular social group ground and well-founded fear of persecution, or an absence of protection against such persecution.

Already at the draft stage, the guide and its cumulative approach have been criticised due to the requirement of both the ‘protected characteristics’ test and the ‘social perception’ test. Hathaway has argued that this unfortunate formulation may be related to a misunderstanding of the UNHCR social group guidelines, which does not apply a ‘cumulative approach’ by any means.

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<sup>366</sup> Directive 2011/95/EU (n. 20) Recital 30. Also see Art 10(1)(d) second paragraph which says: “(...) Gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristics of such a group;”

<sup>367</sup> Directive 2011/95/EU (n. 20) Article 9(2)(f).

<sup>368</sup> EASO Guidance (n. 362) pp. 21-22.

<sup>369</sup> Such ostracism may arise from the fact that these women are perceived as ‘unclean’ or ‘morally questionable’ by their local community. This may even be demonstrated by the men in this society who refuse to marry a woman who has not undergone FGM.

Arguably this misconception of the UNHCR Social Group Guidelines and the current text particularly in relation to gender-based groups, represents a standard lower than the existing standard in the national laws of some EU member States. As a result, groups defined by sexual orientation or gender are no longer recognised as clear examples of particular social groups but may qualify only depending on the circumstances in the country of origin.<sup>370</sup>

## 4. Gender and Political Opinion Nexus

Early decisions had the tendency to view gender-specific claims of women within the “particular social group” ground, due to the failure of decision-makers to recognise actions of women as political.<sup>371</sup> The acts of women such as transgression of social customs, or young women refusing to undergo female genital mutilation, are still not recognised as political dissidents, although they are acting to break the fundamental customs in their society.

Although there have been subsequent judgments that have found that gender-related persecution can be characterized as racial, ethnic, or political in nature, or in combination of one or more of these grounds, the decision-makers more consistently rely on the “social group” ground.<sup>372</sup> As seen in the cases reviewed in this thesis, sometimes claimants attempt to raise “political opinion” or “religion” as a valid ground for asylum, yet decisions rarely analyse them in depth. As important as the “social group” ground is to gender-related claims, a full application of the refugee definition requires an all-encompassing and equal utilization of the other Convention grounds

### 4.1. Defining ‘Political Opinion’

The UNHCR guidelines on gender-related persecution voice that political opinion must be understood in the broad sense, to “incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.”<sup>373</sup> Such opinions may include an opinion relating to gender roles as well as non-conformist behavior leading the persecutor to impute a political opinion to the person concerned. Furthermore, the guidelines emphasize that it depends on the context of the case, whether an opinion or activity is political in nature. In general, a claim for refugee status on the

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<sup>370</sup> James Hathaway, ‘*What’s in a label?*’, 5 *European Journal of Migration and Law* 1 (2003) p. 17.

<sup>371</sup> Edwards (n. 26) p. 68.

<sup>372</sup> Crawley (n. 19) p. 21.

<sup>373</sup> Gender Guidelines (n. 6) para 32; See also *Ward* (n. 96).

basis of political opinion nexus requires the claimant to hold or be assumed of holding opinions not tolerated by the authorities or society which are critical of their traditions, policies or methods.<sup>374</sup>In short, the meaning of “political opinion” can be defined to include “opinions contrary to or critical of the policies of the government or ruling party.”<sup>375</sup>

This view has been challenged by Goodwin-Gill, who supports a broader definition of “any opinion on any matter in which the machinery of State, government, and policy may be engaged.”<sup>376</sup>Based on the UNHCR definitions, for example, a young girl from Togo, refusing to be subject to harmful traditional practices such as female genital mutilation, imposed on her by her family, community, or village leaders, would struggle to demonstrate that she was expressing “political opinion” of dissent or opposition to the machinery of State, government, or policy.<sup>377</sup> However, even the Goodwin-Gill’s broader definition requires that the “State, government, or policy” be engaged in order to see a particular opinion or action as “political”.

Edwards proposes even wider definition and posits that the concept of ‘political opinion’ should apply to any thought, opinion, action, or inaction that can be seen as questioning or opposing the views of authority or society in large, whatever the type of authority in place.<sup>378</sup> By authority, she means “any form of authority that has the power to impose laws or social rules, or to punish or discriminate against those refusing to participate in accepted social or cultural practices or rites, including tribal leaders, and village chiefs.”<sup>379</sup> This definition of authority provides a more inclusive insight to the multiple forms of societies and cultures we live in and to the power structures that define women’s role in a community. However, jurisprudence in Western countries often fail to see such practices as political in nature due to its inherent bias towards non-Western political structures, and has thus, ignored the political apparatus in non-Western countries. Furthermore, Edwards argues that the definition given to ‘political opinion’, as with the refugee definition, “need to be individualized to take account of the situation in different countries of origin.”<sup>380</sup> This is especially true in countries, where the authority devolves to regional or village levels,<sup>381</sup> or where women otherwise face oppressive and discriminatory practices. When interpreting the term “political” it would seem correct to examine the context in which the human rights abuse or persecution took place.<sup>382</sup>

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<sup>374</sup> Gender Guidelines (n. 6) Para 32

<sup>375</sup> Edwards (n. 32) p. 68; A. Grahl Madsen *‘The Status of Refugees in International Law’* (1972), p. 220.

<sup>376</sup> G.S. Goodwin-Gill *‘The Refugee in International Law’* (1996), p. 49.

<sup>377</sup> Edwards (n. 32) p. 68.

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

<sup>381</sup> Edwards (n. 32) p. 69.

<sup>382</sup> *Ibid.*



Although the ‘political opinion’ nexus would accurately reflect the reality of a woman’s gender-related claim, often the case tends to be funneled under the particular social group nexus. Arguably the issue lies not in the definition of the “political opinion” ground, but in the acknowledgement of women’s activities and the gendered means of persecution as political. In some societies women are less likely to directly involve in political activities, rather they may be involved in political activities that reflect dominant gender roles (i.e., nursing or cooking for rebel soldiers, communications and public relations). If the activities of women themselves are not recognised as political, women may be targeted because of the political activities of their husband or family.<sup>383</sup> Another reason for dismissing women’s gender-related asylum claims falling under the political opinion nexus is arguably the overuse of the particular social group ground, which has become an all-encompassing ground for women’s asylum claims.

#### 4.2. Actual and Imputed Political Opinion

Scholars, such as Heaven Crawley have emphasized that “nowhere are the effects of the public/private dichotomy on the understanding of women’s experiences more evident...than with regard to the concept of “politics””.<sup>384</sup> This has been demonstrated by cases such as *Matter of R-A-*<sup>385</sup> where the applicant, Ms. Rodi Alvarado Pena applied for refugee status under the particular social group and political opinion nexus. In the UNHCR advisory opinion<sup>386</sup> the Attorney General deemed the political opinion ground relevant in the case and voiced that “Political opinion should be understood in the broad sense, to incorporate any opinion or any matter in which the machinery of State, government, society, or policy may be engaged.”<sup>387</sup> He further clarified that this matter may include opinion as to gender roles.<sup>388</sup> A claim on the basis of political opinion ( gender roles), would presuppose that the opinions held by the claimant are not tolerated by the authorities or society, which are critical of their policies, traditions or methods. The authorities or relevant parts of the society ought to be aware of these opinions. However, the claimant is not required to directly express her opinion, nor is she required to have already suffered from any form of discrimination or

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<sup>383</sup> See Canadian Gender Guidelines (n. 249)

<sup>384</sup> Crawley (n. 19) p. 21.

<sup>385</sup> *Matter of R-A-* (n. 225)

<sup>386</sup> UNHCR, *RE: Matter of Rodi Alvarado Pena (A73753922) Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion”* 9 Jan 2004

<sup>387</sup> *Ibid.*

<sup>388</sup> *Ibid.*

persecution.<sup>389</sup> When Ms. Alvarado sought help against the abuse by her husband the local authorities criticised her for complaining and protesting. Thus, Ms. Alvarado's responses to her husband's attempts to dominate and abuse her could be seen as transgression of social mores. In conclusion, the UNHCR held that Ms. Alvarado should be recognised as a refugee under the particular social group and political opinion ground.<sup>390</sup>

Ms. Alvarado's case is an ample example of dismissing the actions of women as political. Here, Ms. Alvarado had actively rebelled against the social norms where women were to obey their husbands and submit to subordinate role. However, her attempts to transgress the social mores was not seen as political by the Board of Immigration Appeals. In their two-step analysis the majority held that Ms. Alvarado did not hold a political opinion, but only "the common human desire not to be harmed or abused" which did not qualify as a political opinion.<sup>391</sup> Moreover, the majority did not find nexus between the persecution Ms. Alvarado faced or the failure of State protection. The dissent cited a plethora of cases and asserted that "opposition to male domination and violence against women, and support for gender equity, constitutes a political opinion."<sup>392</sup> While the majority argued that Ms. Alvarado's husband's action was not in any ways motivated by his wife's actual or imputed political opinion, the dissent found that the husband's escalating abuse was a demonstration of his increasing attempts to "stifle and overcome". Although the initial motivation for persecutory actions were not to punish Ms. Alvarado for her resistance, that became his motivation as the time passed.<sup>393</sup>

Gendered roles, beliefs, and attitudes can shape the forms and impact of political violence, even if the perpetrators are not centrally motivated by preserving hegemonic men's control or political power. However, it might be difficult to prove, that the actions taken by the perpetrators are motivated by the political opinion of the woman or an imputed political opinion of the woman. For example, in Canadian case *Kaur, Biba v. Canada*<sup>394</sup> a woman, who was a member of the Democratic Action Party (DAP), had been detained multiple times because of her participation in the DAP. In April 1989 she was detained, raped and severely beaten by three or four policemen. The Refugee Division concluded that the rape was a "random act of violence with no nexus to the Convention Refugee definition." However, the Court held that this view was mistaken, as the evidence showed that the claimant had been detained due to her participation in the DAP and had

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<sup>389</sup> Ibid.

<sup>390</sup> Ibid. para. 13.

<sup>391</sup> *Matter of R-A-* (n. 225) para. 12.

<sup>392</sup> Ibid. para. 48.

<sup>393</sup> Ibid. para. 54

<sup>394</sup> Minister of Citizenship and Immigration (F.C.T.D., no. IMM350-96) January 17, 1997

been actively sought by the police in number of activities. The claimant had been questioned about her political activities and raped while detained. Thus, the rape “was a direct consequence of her detention for political reasons” and the application of political opinion nexus was allowed.<sup>395</sup> Had the rape happened without reference to any demonstrations or political activities, there would not have been a nexus between the political opinion and the persecution.

It is important not to disregard the political dimensions of a woman’s experiences of persecution even if a woman is not regarding herself as making a political statement. Non-conforming behaviour or opinions may be seen as expression of a political opinion or lead to a woman having political opinion attributed to her. Arguably, mainstreaming women’s claims only to “particular social group” ground excludes the women’s experiences from becoming “public” or “political”. At the same time, it strengthens the practice of using “particular social group” as all-encompassing and unpredictable ground.

## 5. Gender-Sensitive Interpretation or Textual Addition

Considering that Article 2 of the Universal Declaration of Human Rights specifically prohibits discrimination on the grounds of “sex” or “gender”, it may be questioned why gender is not added to the refugee Convention as a ground of its own. Although the existing guidelines provide for legal interpretive guidance, inconsistencies continue to occur, with unfavourable outcomes for women.<sup>395</sup> The feminist engagement has provided multiple perspectives as to how to include women’s experiences in the refugee discourse. Within the literature reviewed for the purposes of this thesis, however, two diverging approaches emerge. On the one hand, some scholars and activist argue that the refugee definition, as it appears in the Convention, can and should be interpreted in new and creative ways in order to ensure proper gender sensitivity in the ways we understand the conditions of an asylum claim (Gender-sensitive interpretation). On the other hand, scholars also hold that women’s point of view can only be sufficiently incorporated through modification of the language and definition itself, mainly in the form of adding gender as an additional sixth enumerated ground for persecution (textual addition).<sup>396</sup>

Some proponents for the textual addition argue that only by adding gender as a sixth

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<sup>395</sup> CRDD decision U93-02012, August 13, 1993.

<sup>396</sup> *Ibid.* p. 38.

enumerated ground to the Convention can the built-in male bias existing in law be redressed.<sup>397</sup> Chan argues that the lack of such a category subjects women claimants to a higher burden of proof, as their gender-related claims must be brought and formulated “through” one of the five existing grounds—even in cases where the claimants were abused solely on the basis of their gender. Indeed, some proponents for a freestanding gender nexus argue that without gender as a separate category, women are forced to classify and formulate their claims based on ‘political opinion’, ‘particular social group’, or other existing Convention grounds, which in turn downplays or misrepresents the gender component of their claim.<sup>398</sup>

Furthermore, Greatbatch argues that simply adding gender nexus would not amend the interpretive challenges involved in determining refugee status.<sup>399</sup> According to her, this strategy “assumes consensus on the nature of gender-based persecution.”<sup>400</sup> As women’s experiences of persecution are not homogenous, but rather affected by the power relations between men and women in the country of origin, the implications of these relations for women’s identity, status, roles and responsibilities, inter-relationships of various “social divisions” (such as gender, class, sexual orientation, race, and physical ability) and other factors that intersect and form unique identities, it would be extremely difficult to remove the interpretative aspect from women’s claims inconsistency that arises from interpretation, as the claims would still require interpretative practice.<sup>401</sup> Furthermore, scholars such as Haines, Greatbatch and Bahl, hold that gender-sensitive interpretation of the already existing definition is the preferable way to include women’s experiences. Haines implicates that there is room within the existing legal structures to incorporate gender-based claims,<sup>402</sup> stating that “neither the refugee definition nor the 1951 Convention, in general, refers to sex or gender. This omission is, however, without significance. The ordinary meaning of Article 1A(2) of the 1951 Convention in its context and in the light of the objects and purpose of the Convention requires the conclusion that the Convention protects both women and men and it must therefore be given a gender inclusive and gender-sensitive interpretation.”<sup>403</sup> This has been supported by Greatbatch, who voices that greater gender-sensitivity can in fact be achieved within the existing structure of the Convention. She emphasises that “a human rights-based approach to defining persecution, the recognition of women as a particular social group, documentation of discriminatory and repressive measures aimed at or particularly affecting women, access to dull and fair determination procedures, and a liberal reading

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<sup>397</sup> Ibid.

<sup>398</sup> Tvedt (n. 7) p. 44.

<sup>399</sup> Tvedt (n. 7) p. 42.

<sup>400</sup> Jacqueline Greatbatch ‘The Gender Difference. Feminist Critiques of Refugee Discourse’ (1989) pp. 518-527.

<sup>401</sup> Ibid.

<sup>402</sup> Tvedt (n. 7) p. 41.

<sup>403</sup> Haines (n. 57) pp. 323-324.

of the Convention definition, would provide the basis for the development of a profile of gender-based refugee claims, and for recognition of the difference gender makes.”<sup>404</sup> Echoing the intentions of gender mainstreaming as method,<sup>405</sup> Haines further argues that adding gender as a sixth enumerated ground to the 1951 Convention, may have negative impact for women claimants as “the argument in favour of a sixth ground may have the unintended effect of further marginalizing women if misinterpreted as an implicit concession that sex and gender have no place in refugee law at the present”<sup>406</sup>

As demonstrated above, Haines has voiced support for the approach of gender-sensitive interpretation of the existing grounds to include women’s experiences in the refugee discourse. According to him, “the approach of gender-sensitive interpretation seems to place a greater emphasis on the intentions of the Convention in extending protection indiscriminately, and that insight in these intentions should guide its reading and interpretation. This locates the problem not as an issue of the formulation of the law itself, but rather of it being read from a partial perspective.”<sup>407</sup> The purpose of the 1951 Convention is not to provide protection to all persons that are victims of persecution. Adjudicators in number of states identify anti-discrimination as an underlying norm of the 1951 Convention and rely on the preamble of the Convention in search for interpretative guidance.<sup>408</sup> The anti-discrimination approach provides a starting point, where persons who are persecuted for at least one of the enumerated Convention grounds (race, religion, nationality, membership of a particular social group, or political opinion), are the persons whose human rights are already being violated for discriminatory reasons.<sup>409</sup> As voiced by Lord Hoffman in *Islam;Ex-Parte Shah*:

“The inclusion of ‘particular social group’ recognised that there might be different criteria for discrimination, in *pari materiae* with discrimination on other grounds, which would be equally offensive to principles of human rights... In choosing to use general term ‘particular social group’ rather than an enumeration of specific groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.”<sup>410</sup>

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<sup>404</sup> Tvedt (n. 7) p. 42.

<sup>405</sup> Tvedt (n. 7) p. 42: “gender should be understood as all-encompassing concept, present within all aspect of policy and law, and not addressed separately”

<sup>406</sup> Haines (n. 57) pp. 326-327.

<sup>407</sup> Ibid.

<sup>408</sup> the preamble of the 1951 Convention states: “Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.”

<sup>409</sup> Aleinikoff (n. 261) p. 291.

<sup>410</sup> *Islam;Ex-Parte Shah* (n. 95 ) para. 511.

Therefore, having a flexible ground, such as ‘particular social group’, arguably provides a limited ‘safety net’ for those persons who face actions that “deny human dignity in any key-way.”<sup>411</sup> Thus, the question remains as to whether the exclusion of women’s experiences from the refugee discourse is due to too much freedom at the hands of decision-makers, who hold the final word when it comes to interpreting the law. The UNHCR Guidelines recognise the interpretation (and interpretative frameworks) as the source of the issues concerning gender and the refugee definition paragraph 5 says:

”Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognised.”<sup>412</sup>

Arguably it is not the aspects of the law itself that constitute the problems, but rather the historical male-centric way of reading of the law. Paragraph 5 can be read as creating a framework in which the approach of gender-sensitive interpretation is favoured over that of altering the text of the refugee definition. It does so because it implies that even if the concepts of gender and gender-based persecution are formally introduced into the language of the law, their meaning would still be unclear and subject to interpretation and differing definitions in any case.<sup>413</sup> Further, the Guidelines also address the question of whether to add gender as a sixth enumerated ground for persecution in paragraph 6 where it states:

“even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition.”<sup>414</sup>

Whether gender-sensitive interpretation of the existing grounds or adding gender as the sixth enumerated ground would better incorporate women’s experiences to the refugee discourse depends

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<sup>411</sup> *In Re G.J.*, New Zealand Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 1312/93, 1 NLR 387 [1995] Para. 26.

<sup>412</sup> Gender Guidelines (n. 6) para. 5.

<sup>413</sup> *Ibid.* p. 63.

<sup>414</sup> Gender Guidelines (n. 6) para. 6.

on various aspects. Even if the textual addition would bring some redress to the built-in male bias of the Convention refugee definition, adding gender as the sixth ground would not amend the interpretative challenges involved in determining refugee status. The textual addition assumes consensus on the nature of gender-based persecution, but as examined in the cases of this thesis, this is not, *de facto*, the case. Supported by the intersectionality theory, women's experiences are multifaceted and complex. They comprise layers of different personal, cultural, societal, and political aspects, which all contribute to their claims.

Moreover, whether gender-sensitive interpretation or the textual addition will more correctly incorporate women's gender-based claims for asylum depends on the interpretation and adoption of guidelines and harmonization of practice. Were gender to be added as a sixth ground to the 1951 Convention, it would not harmonize the realities of these women, which are all unique and layered. The cases would still need to be decided case-by-case basis which means that every aspect of the claims would still be prone to interpretation. It is this room for interpretation, which allows the law to adapt to the challenges at hand. In sum, were gender to be added as a sixth enumerated ground, there would still be need a to adjudicate women's claims to refugee on a case-by-case basis, in order to ensure their protection under international law. These two approaches do not necessarily exclude each other. Adding gender as a sixth enumerated ground could provide a platform for women's experiences of persecution in the refugee discourse, in situations where women are being persecuted as women or because they are women. Gender nexus could stop the funnelling of women's claims into 'particular social group' or 'political opinion' ground. Bifurcated nexus analysis could finally acknowledge women's claims on the grounds of gender-based persecution, not only because of the failure of state protection. However, as the incorporation of a new Convention ground is slow, gender-sensitive interpretation of the existing grounds and the evolving jurisprudence of the States provide a timelier redress to the challenges of women's claims for refugee under the 1951 Convention.

## 6. Advantage of Indeterminacy

Francesco Maiani argues that the indeterminacy of the concept of persecution provides the refugee definition with an indispensable element of flexibility. With reference to Atle Grah-Madsen: "The term persecution has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as

they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.”<sup>415</sup>

The purpose of the Geneva Convention is not to repress crimes of persecution. Unlike in criminal law, the requirement for accuracy is absent here. Instead, the refugee definition caters to the needs of persons in an intolerable position in their countries of origin, and the evolving means of persecution.<sup>416</sup> Indeed, the indeterminacy of the Geneva Convention can be seen as a strong indication in favour of an evolutionary and context-sensitive application of the term.<sup>417</sup> Scholars such as Maiani and Martin have emphasized the advantages of the indeterminacy by pointing out that in practice “the concept of ‘persecution’ has expanded to include forms of harm that were certainly not present to the Convention’s drafters, such as domestic abuse. Thus, indeterminacy has allowed the concept to evolve in response to both the “changing nature of persecution”, and to the changing sensibilities of our own societies.”<sup>418</sup>

On the contrary, Hathaway has voiced that the open-endedness of the refugee definition on this crucial point makes it vulnerable to restrictive interpretation, or even to manipulation.<sup>419</sup> The way in which the term ‘persecution’ is interpreted and applied has had compelling impact. For example, in the 1980’s and 1990’s, when the forced migrants escaping breakdown of State organizations and triggering the civil card, the authorities of asylum countries started to enforce strictly a requirement of “individualized” persecution. This followed that the asylum seeker has to show that he or she has been “singled out” for persecution, or of being “more at risk” than similarly placed persons.<sup>420</sup> Maiani has voiced that this reading of the refugee definition is clearly unusual. The Convention’s requirement that persecution be linked to factors such as race, or religion makes no numerical distinctions: the affected group can be made up of handful of individuals of a whole population- like the European Jews, who were the Convention drafters model refugee population.<sup>421</sup>

This rather radical example shines light on how the doctrines are easily dictated by an intent to stem refugee flows. The fear of “flood gates” can and does- insensibly invite national authorities to reduce the concept of persecution to its semantic minimum: the threat to life, limb or freedom. While the indeterminacy of the 1951 Convention allows its member states margin of

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<sup>415</sup> Grahl-Madsen (n. 366) p. 193.

<sup>416</sup> Maiani (n. 92) para. 10.

<sup>417</sup> UNHCR Handbook (n. 75) paras. 52-53; See also UNHCR, *Interpreting Article 1 of the 1951 Convention on Refugee Status*, Geneva, April 2001, para. 16.

<sup>418</sup> Majani (n. 92) para. 12; See also David Martin ‘Gender Cases: Doubts and Questions’ in IARLJ ‘The Changing nature of Persecution’ (2000) 102-116, p. 102.

<sup>419</sup> Hathaway (n. 71) pp. 231-233.

<sup>420</sup> Maiani (n. 92) para. 14.

<sup>421</sup> *Ibid.*



appreciation to better account for the changing forms of persecution and individual circumstances the applicants face, the concept of protection also entails a drawback, namely the inconsistency within and across different jurisdictions.

The UNHCR guidelines, evolving case law and guidance in the member States and the scholarly writings have clarified the refugee definition considerably. The concept of persecution does not suffer from a feeble lack of definition in refugee law, the opposite. It is clear that persecution may emanate from the authorities and from non-state actors, if the authorities are unable or unwilling to provide effective protection from the actors of persecution. Persecution can be aimed at an individual, group, or population, as long as it is connected to a common defining characteristic such as race, religion or political opinion.

However, the issue of how to adopt a hermeneutic approach that leads to consistent jurisprudence within and across the States and adopts the virtues of flexibility at the same time remains.<sup>422</sup> Maiani argues that the reluctance of legislators judges, and some authors around the world to take the step, and give an unequivocal meaning to ‘persecution’ in refugee law, is not necessarily due to a conceptual reluctance, but rather to the need to retain some discretion in order to steer asylum policies in a rapidly changing world.<sup>423</sup> He goes on saying that “within limits, indeterminacy is almost inherent feature of the ‘persecution’ concept in refugee law. Woeful or not, its root cause is not (only) an intellectual inability to agree on essentials of the concept, but rather the hard political tension between the universalist commitment to give protection, on the one hand, and the task to control migration that is implied in our understanding of Statehood, on the other hand”.<sup>424</sup>

## 7. Conclusions

The exclusion of women’s experiences from the refugee discourse is inherent in the 1951 Convention refugee definition. As the language itself does not speak of gender there has been unnecessary conceptual barriers to women’s claims. However, today, seventy years after establishing the 1951 Convention it is generally accepted that the Convention refugee definition as a whole should be interpreted with an awareness of possible gender dimensions and that it is essential to define and

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<sup>422</sup> Ibid. para. 23.

<sup>423</sup> Ibid. para. 45.

<sup>424</sup> Ibid. para. 46.

distinguish between the terms “gender” and “sex”.<sup>425</sup> The evolution of the notion of gender-related violence has had a positive impact on breaking the barriers to women’s gender-related asylum claims. Notions of rape are no longer excused as an act of lust, FGM is no longer tolerated as harmless cultural practice and domestic violence is no longer just a private matter. It has been recognised that gender (rather than sex) may have an impact in the form of persecution, while the reasons for persecution may arise from the construction of gender in the society.

This thesis has provided a gender-sensitive overview of the existing refugee discourse and assessed the barriers to women’s claims for asylum under the 1951 Convention and its 1967 Protocol grounds ‘particular social group’ and ‘political opinion’. Furthermore, it has examined scholarly writings and interpretative guidelines to find answers to the question of, whether women’s claims for asylum will be better incorporated to the refugee discourse by adopting gender-sensitive interpretation or by adding ‘gender’ as independent ground to the Convention. In doing so, it has analysed the 1951 Convention refugee definition elements that have deemed most problematic in gender-related cases: definition and understanding of the term ‘persecution’, non-state actors of persecution, and ‘nexus’ between persecution and one of the enumerated Convention grounds. The thesis has turned to common law jurisdiction from Australia, Canada, New Zealand, the United Kingdom, and the United States in search for in depth analysis and reasoning in gender-related cases.

Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status.<sup>426</sup> It must be proved that the applicant is subject to reasonable fear of harm amounting to ‘persecution’ and the ‘persecution’ must bear nexus to at least one of the enumerated Convention grounds, namely race, religion, nationality, membership of a particular social group, or political opinion. While there is no standard definition of the term ‘persecution’ it has been generally approved to include the risk of serious harm combined with failure of state protection. The concept of ‘persecution’ must be interpreted as an evolutionary concept and the states are allowed a wide margin of appreciation. Thus, persecution must be viewed case-by-case basis, considering individual circumstances. While the liberal case-by-case approach is praised by the supporters of intersectional theory, it also endangers the predictability, objectivity, and consistency within and across jurisdictions at large. Although states are encouraged to turn to international human rights instruments for guidance, there is still room for differing interpretations as to what constitutes ‘persecution’.

As to the matter of agents of persecution, the thesis acknowledges that much of the violence faced by women is committed by non-state actors such as husbands, fathers, in-laws and

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<sup>425</sup> Gender Guidelines (n. 6) Sections I (1), I(2), and I(3).

<sup>426</sup> *Ibid.* Section I(4).

sometimes even by the women in the local community. It has been established that the refugee definition does not require a state to be the perpetrator, and that 'private' or non-state agents may equally fall within the refugee definition when the State fails to provide protection to the individual.

The issue of 'nexus' between persecution and a Convention ground has posed substantial barriers to women's gender-related claims because gender is not one of the existing Convention grounds. In chapter 2.3. this thesis demonstrates the evolution of *bifurcated nexus analysis* by examining some common law cases developing the bifurcated nexus analysis. This trilogy considers cases from different states, where women applied for asylum based on gender-related violence at the hands of non-state actor in a state where gender equality was evident and the state was unable or unwilling to protect the applicants. In the United Kingdom case of *Islam; Ex Parte Shah* the House of Lords considered two conjoined appeals of Pakistani women who fled marital violence. Although the individual circumstances of the two women were different in various aspects, both claims involved feared harm at the hands of non-State actors in situations where the State had failed to provide protection. Pursuant to Lord Hoffman's formula (Persecution= Serious Harm + failure of State Protection) the required nexus is established if either of the constituent elements of persecution are causally related to a Convention reason. Employing bifurcative nexus analysis, the House of Lords answered affirmative on both counts. The decision established an analytical path around the barrier created by the characterization of spousal violence as a "personal affair directed against the applicants as individuals" and recognized that States have the responsibility to provide protection to its national without discrimination to gender.

After the decision of *Islam; Ex Parte Shah*, the thesis assesses the New Zealand case *Refugee Appeal No. 71427/99* in subchapter 2.3.2. The claim involved similar issues, namely persecution by a non-State actor (husband) in a country with gender inequality and failed state protection of women in Iran. Adopting Lord Hoffman's formula in *Islam; Ex parte shah* (Persecution= Serious Harm + failure of State Protection) the tribunal found that the abuse and harassment by the ex-husband constituted serious harm, but there was no *nexus* to a Convention ground. However, the *nexus* was found with the failure of state protection and a convention ground. The additional value this case provided was that the tribunal found that considered cumulatively, the discriminatory measures against women in Iran constituted serious harm.

The next case considered in the thesis was the case of *Minister for immigration and Multicultural Affairs v. Khawar* affirming that women who are victims of domestic violence may

qualify for protection under the convention ground particular social group. Here the four justices stated that the relevant social group should simply be "women" as "women in any society are a distinct and recognizable group". After adopting the same formula for bifurcated nexus analysis as *Islam; Ex parte shah* and *Refugee Appeal No. 71427/99* (Persecution= Serious Harm + failure of State Protection) the tribunal stated that the *nexus* element could be established when either the serious harm or the failure of State protection is for reasons of Convention ground. Alike in the other cases herein, the court ruled out the *nexus* between the non-State actor and the Convention ground and finally established nexus between the failure of State protection and the Convention ground. The additional value of the case arose from the opinion of Justice Kirby, who stated that although some singling out is required to establish causation, the motivation or intention for this need not arise from enmity or malignant intentions.

After reviewing the three consistent cases and the evolution of bifurcated nexus analysis, the thesis turns into the judicial practice of United States in chapter 2.43. Here, the thesis reviewed the unfortunate events occurring after *Matter of Kasinga* in the *Matter of R-A-*. In a landmark decision *Matter of Kasinga* the BIA ruled eleven to one to grant asylum to accept a gender-defined social group as grounds for asylum after applying the *bifurcated nexus analysis*. In the same year the majority of BIA rejected a gender defined social group and the application of any form of *bifurcated nexus analysis* in the case of *Matter of R-A-*. The decision of BIA was inconsistent with the precedent and the Immigration and Naturalization Service's (INS) own guidelines. The case took 13 years and intervention of three different Attorney Generals (Reno, Ashcroft, and Mukasey) until it was finally decided on the level of immigration judge, not constituting a binding precedent. 18 years after the case of *Matter of Kasinga* the BIA issued a precedent decision in a *Matter of A-R-C-G-*, involving domestic violence. However, the victory did not last long, when the administration took a similar case, *Matter of A-B-*, in 2018 and reversed the long-awaited precedent established by the *Matter of A-R-C-G-*. This chapter demonstrated the unpredictable and unequal development of jurisdiction in United States placing woman asylum seekers in a disadvantaged position in comparison to asylum seekers in other States. While the *Matter of Kasinga* was praised for opening doors for women's claims for asylum the *Matter of R-A-* and *Matter of A-B-*, slammed it shut.

Drawing from some of the landmark cases developing bifurcated nexus analysis the thesis establishes that the nexus requirement could be met when either the serious harm or failure of state protection is "for reasons of a Convention ground". This development recognises gender violence as grounds for asylum and provides a way out of a complex issue of *nexus* in gender-related asylum

claims. The analysis has been widely recognized and the trilogy of cases provides an example of how the national jurisdictions interact with each other by referring to cases and opinions from other states. By doing so, they contribute to the evolution of the 1951 Convention and ensure that it is interpreted in manner that takes into account the realities of the societies we live in. While the United Kingdom, New Zealand, Australia and Canada adhere to the UNHRCR's approach to the *nexus* issue, the United States (Ninth Circuit) approach differs from the trend. The United States posits that a causal link must be established to the persecutors. However, as there has been differing interpretations, it is yet to be seen whether the United States will bring their understanding of nexus in line with the UNHCR approach.

The thesis further analysed the current judicial practice from United Kingdom, Australia, New Zealand, Canada, and United States to see how consistent the guidelines in the studied countries was with the UNHCR and with each other. Review of the national gender guidelines established that there are multiple issues with regards to the national gender guidelines. One of the main problems in the refugee status determination is the differing interpretation of the standards in different countries and even within jurisdictions. The outcome of the decision may depend on the state the applicant ends up applying asylum in. Thus, there should be a common standard for applying the refugee definition that would not cut below the existing standards. Moreover, another issue arises from the non-binding nature of the guidance. Some states adhere to the UNHCR gender-sensitive interpretation of the refugee definition in relation to most elements of the refugee definition (Canada) while some states attribute gender only to some aspects of refugee definition. For example, where most of the guidelines refer gender-related cases to the 'particular social group' ground as a default, Canada seems to be the only state to recognize women's claims as political. In addition, although states adhere to the UNHCR and issue gender guidelines to the decision makers, they are easily dismissed due to their non-binding nature.

Gender being absent from the Convention grounds, poses additional burden to women's claims, as they must fit their experiences of violence into existing male defined grounds and criteria. Chapter 3 and 4 of the theses addressed the issues arising from the funnelling of women's gender-related claims into existing Convention grounds, starting with the most invoked ground 'membership of a particular social group' (chapter 3). Here, the thesis examined the evolution of the Protected characteristics approach (*eiusdem generis*) by assessing the BIA case of *Matter of Acosta* and Canadian Supreme Court case *Ward*. The approach established in *Acosta* examined whether a group is united by an immutable characteristic or a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The Supreme Court in *Ward* took the analysis further and defined three authoritative categories of "particular social group" (innate or unchangeable

characteristics, characteristics fundamental to human dignity, and former status). It was found in this chapter, that although adopting the *ejusdem generis* approach may promote consistency in decision-making, it may also complicate the refugee inquiry in a way that could be avoided by giving the phrase its ordinary meaning. The protected characteristics approach was followed by the examination of the social perception approach (chapter 3.1.2). The approach focuses on the external perception of a given group in the country of origin. It has been praised for the fact that it stems from the words “membership of a particular social group” and because it provides wider judicial discretion than *ejusdem generis* approach. However, it is also overly broad and makes the societal attitudes determinative of the existence of the social group. Not only does this pose an evidential difficulty in the country of origin, but also in other societies. After discussing the differences between the approaches and the possibilities of a merger, the chapter concludes that women may constitute a particular social group based on common characteristics of sex, whether or not they associate with one another based on that shared characteristics.

Chapter 4. examines the issues arising from adjudication of women’s gender-based claims under the Convention ground ‘political opinion’. The discussion in this chapter focuses on the issue of public/private dichotomy and the underlying understanding that women’s experiences belong to the “private” sphere and are therefore not “political”. It points out the problem where the adjudicators do not see the actions of women (such as opposition to harmful traditional practices upheld by the society they live in (FGM) or refusal for oppressive State practice) as political, but rather they adjudicate these claims under artificial social group grounds. It was established here that mainstreaming women’s claims only to “particular social group” ground excludes the women’s experiences from becoming “public” or “political”. At the same time, it strengthens the practice of using “particular social group” as all-encompassing and unpredictable ground.

There is no straightforward answer to the question of whether gender-sensitive interpretation of the existing grounds or adding gender as sixth enumerated ground would better incorporate women’s experiences to the refugee discourse. Arguably the drafters of the 1951 Convention left the indispensable element of flexibility on the concept of persecution on purpose to ensure that it can be applied to circumstances as they might arise. The indeterminacy has allowed the concept to evolve to the ‘changing nature of persecution’ and include forms of harm, that may not have been seen as relevant to the drafters 70 years ago, such as FGM or domestic violence.

Even if the textual addition would bring some redress to the built-in male bias of the Convention refugee definition, adding gender as sixth ground would not amend the interpretative challenges involved in determining refugee status. The textual addition assumes consensus on the nature of gender-based persecution. Supported by the intersectionality theory, women’s experiences

are multifaceted and complex. They comprise of layers of different personal, cultural, societal, and political aspects which all contribute their claims. Were gender to be added as a sixth enumerated ground, there would still be a need to adjudicate women's claims to refugee on a case-by-case basis, in order to ensure their protection under international law. Adding gender as a sixth enumerated ground could, however, provide a platform for women's experiences of persecution in the refugee discourse, in situations where women are being persecuted as women or because they are women. Gender nexus could stop the funnelling of non-political women's claims into "particular social group" or "political opinion" ground. Through bifurcated nexus analysis, the decision makers could finally acknowledge women's claims to refugee on the grounds of gender-based persecution, not only because of the failure of State protection. Furthermore, the two approaches do not necessarily exclude each other. Gender-sensitive interpretation of the existing grounds and the gender inclusive evolution of the State jurisprudence may provide a timelier redress to the challenge's women face in the refugee discourse. The challenge that remains is the States balancing act between universalist commitment to give protection, on the one hand, and the political pressure to control migration on the other hand.

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