Gender-related Persecution as Basis for Refugee Status: Comparative Perspectives

Katja Luopajärvi

Institute for Human Rights
Åbo Akademi University
December 2003

TABLE OF CONTENTS

TIIVISTELMÄ i

ABBREVIATIONS vii

1 INTRODUCTION...1

1.1 WOMEN, REFUGEE STATUS AND LACK OF PROTECTION: RECENT DEVELOPMENTS AND THE PROBLEM OF DIFFERING INTERPRETATIONS 1

1.2 THE AIM AND STRUCTURE OF THE STUDY 4

2 A GENDER-SENSITIVE INTERPRETATION OF THE REFUGEE DEFINITION 8

2.1 INTRODUCING THE ELEMENTS OF THE REFUGEE DEFINITION 8

2.1.1 'Well-founded fear'...9

2.1.2 'Persecution' = Serious harm + lack of state protection 11

2.1.2.1 What harm is serious enough? 11

2.1.2.2 Lack of state protection and agents of persecution.........................13

2.1.2.3 Non-state persecution and 'Internal Flight Alternative' (IFA)........15

2.1.3 'For reasons of…' or the nexus to a persecution ground...................17

2.1.4 Grounds for persecution 18

2.2 GENDER, SEX AND GENDER-RELATED PERSECUTION: SOME TERMINOLOGICAL REMARKS 19

2.3 GENDER-SPECIFIC FORMS OF PERSECUTION..21

2.3.1 Gender-specific harm as persecution 21

2.3.2 Persecution by non-state actors and lack of state protection..............22

2.4 GENDER AND THE GROUNDS FOR PERSECUTION 24

2.4.1 Gender and the category of 'particular social group'........................24

2.4.1.1 Defining a 'particular social group' 24

2.4.1.2 Women as a particular social group..28

2.4.2 Political opinion and religion..29

2.5 SUMMARY...32

3 INTERPRETATION OF THE REFUGEE DEFINITION IN GENDER-RELATED CASES BY NATIONAL COURTS 35

3.1 INTRODUCTORY REMARKS 35

3.1.1 Gender considerations in national asylum policies and procedures...35

3.1.2 Determination of refugee status by States 39

3.2 GENDER-SPECIFIC HARM AS PERSECUTION--IS IT 'SERIOUS ENOUGH'?..........45

3.2.1 Discrimination or persecution? 45

3.2.2 Rape and other sexual violence 48

3.2.3 Violence within the family..50

3.2.4 Female genital mutilation (FGM)..57

3.2.5 Forced family planning..63

3.2.6 Summary 65

3.3 PERSECUTION BY 'NON-STATE ACTORS' AND FAILURE OF STATE PROTECTION 66

3.3.1 Non-state actors and forms of failure of state protection....................66

3.3.1.1 Unwillingness of the state to provide protection 67

3.3.1.2 State inability to provide protection: the 'protection approach' vs. the 'accountability approach'..68

3.3.2 What is the standard of state protection in the country of origin?......74

3.3.3 The duty to seek protection 79

3.3.4 'For reasons of': The link to a persecution ground in cases of non-state persecution in cases of non-state persecution..82

3.3.5 Summary 86

3.4 COMPARISON OF CONSTRUCTIONS OF A 'PARTICULAR SOCIAL GROUP' 87

3.4.1 The Ward legacy in Canadian jurisprudence 87

3.4.2 Islam and Shah and 'particular social group' in the UK....................89

3.4.3 Evolving constructions of 'membership of a particular social group' in the USA 91

3.4.4 'Political persecution' and sparse use of the 'particular social group' ground in Germany..93

3.4.5 Finland, Sweden and differing views on women as a 'particular social group' 95

3.4.6 The EU refugee status directive and membership of a social group...98

3.4.7 Summary *100*

4 GENDER-RELATED PERSECUTION: CONCLUSIONS, TRENDS AND RECOMMENDATIONS **102**

4.1 CONCLUSIONS 102

4.2 TRENDS AND RECOMMENDATIONS 107

LITERATURE **112**

Tiivistelmä

Tämän tutkimuksen tarkoituksena on selvittää kuinka suuressa määrin pakolaismääritelmän soveltaminen eroaa eri maiden välillä suhteessa kahteen pakolaismääritelmän elementin, 'tietyn yhteiskunnallisen ryhmän' ja ei-valtiollisen vainon, tulkintaan. Tutkimus koostuu kahdesta pääosasta, joista ensimmäinen (luku 2) pyrkii tunnistamaan oikean, sukupuolisensitiivisen tulkinnan pakolaismääritelmästä. Tutkimuksen varsinainen pääosa (luku 3), taas kostuu vertailevasta analyysistä pakolaismääritelmän tulkinnasta sukupuoleen liittyvissä turvapaikkahakemuksissa kuudessa maassa (Suomessa, Ruotsissa, Saksassa, Iso-Britanniassa, Kanadassa ja Yhdysvalloissa) suhteessa kahteen yllämainittuun pakolaismääritelmän elementtiin. Tutkimuksen tavoitteena on siis analysoida kuinka pitkälle pakolaismääritelmän kansallinen tulkinta on yhdenmukainen kansainvälisesti hyväksytyn, sukupuolisensitiivisen pakolaismääritelmän tulkinnan kanssa.

Naisten kokemien ihmisoikeusloukkausten ja vainon näkökulmasta vuoden 1951 Geneven Pakolaissopimuksen pakolaismääritelmä on ongelmallinen erityisesti suhteessa ns. ei-valtiolliseen vainoon ja vainon perusteisiin, lähinnä koska sukupuoli ei ole sopimuksen mukainen vainon peruste. Koska sukupuolta ei ole sisällytetty vainon perusteeksi, Pakolaissopimusta on perinteisesti tulkittu ilman että naisten kokemukset vainosta on otettu huomioon. Vaikka naiset ja miehet usein kokevat samankaltaisia ihmisoikeusloukkauksia ja vainoa, ja heitä vainotaan usein samoista syistä, naiset kohtaavat myös sellaisia väkivallan ja vainon muotoja, jotka ovat ominaisia heidän sukupuolelleen ja heitä voidaan myös vainota heidän sukupuolensa perusteella. Koska niitä eroja, joita on naisten ja miesten kokemissa vainon muodoissa, sekä naisten ja miesten erilaisia kokemuksia vainosta ei ymmärretä, naisten kokemia (sukupuolispesifisiä, *gender-specific*) väkivallan muotoja ei tunnusteta vainoksi, tai (sukupuoleen liittyviä, *gender-related*) vainon perusteita ei ymmärretä vainoperusteiksi. Myös sellaisissa tapauksissa, joissa naiset pelkäävät vainoa samankaltaisista syistä kuin miehet (esim. etnisen alkuperän tai uskonnon perusteella), mutta heidän pelkäämänsä vaino on sukupuolispesifiä (esim. raiskaus tai muu seksuaalinen väkivalta), tätä ei välttämättä herkästi tunnisteta pakolaissopimuksen mukaiseksi vainoksi. Vaihtoehtoisesti, pelätty vainon muoto voi

olla sukupuolineutraalia (esim. kivitys) mutta vainon syitä (esim. poikkeaminen uskonnollisista normeista) ei tunnusteta sopimuksen mukaiseksi vainon perusteeksi. Lisäksi, naiset, etenkin sellaiset, jotka ovat kokeneet seksuaalista väkivaltaa, kokevat usein hyvin vaikeaksi kertoa kokemuksistaan, varsinkin miespuoliselle haastattelijalle, tai voivat olla niin häpeissään etteivät halua tai voi määritellä vainon tai väkivallan todellista laajuutta.

Sukupuoleen perustuvaan vainoon ja pakolaisasemaan liittyvät kysymykset ovat saaneet yhä enemmän huomiota tutkijoilta ja järjestöiltä sekä myös joiltain valtioilta. Tästä johtuen sukupuolen ja sukupuolisuuden analysointi ja ymmärtäminen pakolaiskontekstissa on edistynyt huomattavasti, varsinkin 1990-luvun loppupuolella. Näin ollen voidaan sanoa, että on yleisesti hyväksyttyä, että sukupuoli voi määrittää niin vainon muotoja kuin syitäkin tai vaikuttaa niihin. YK:n pakolaispäävaltuutetun (UNHCR) mukaan oikein tulkittuna Pakolaissopimuksen pakolaismääritelmä kattaa myös sukupuoleen perustuvat turvapaikkahakemukset, eikä tarvetta uudelle vainoperusteelle ole. Vastikään (vuonna 2002) hyväksytyt UNHCR:n sukupuoleen perustuvaa vainoa sekä tiettyyn yhteiskuntaryhmään kuulumista koskevat suuntaviivat tarjoavat kansainvälisen viitekehyksen pakolaismääritelmän tulkintaan sukupuoleen liittyvissä turvapaikkahakemuksissa. Suuntaviivat selventävät tulkintaa etenkin koskien kolmea pakolaismääritelmän elementtiä, jotka ovat usein erityisen ongelmallisia sukupuoleen liittyvissä tapauksissa.

Ensinnäkin, suuntaviivat vahvistavat että kansainvälisten ihmioikeusnormien tulisi ohjata tulkintaa siitä, mikä on vainoa. Suuntaviivat toteavat että naisiin voi kohdistua myös sukupuolispesifiä vainoa ja että ei ole mitään epäselvyyttä siitä, että sukupuoleen liittyvä väkivalta, kuten raiskaukset, sukupuolielinten silpominen tai perheväkivalta voi olla vainoa—riippumatta siitä, ovatko syylliset yksityishenkilöitä vai viranomaisia—jos valtio joko hyväksyy kyseiset teot, tai jos viranomaiset kieltäytyvät tarjoamasta, tai eivät kykene tarjoamaan, tehokasta suojelua. Myös ankarat rangaistukset naisille, jotka ovat rikkoneet yhteiskunnallisia tai uskonnollisia normeja, voivat olla vainoa, kuten myös perheensuunnittelupolitiikan täytäntöönpano pakkoabortteja tai sterilisointeja tekemällä—vaikka tällaisen politiikan päämäärät olisivatkin oikeutettuja ja lakiin perustuvia.

Toiseksi, suuntaviivat ottavat kantaa syy-yhteyteen (*nexus*) vainon ja vainon perusteiden välillä. UNHCR:n kanta on, että vainon perusteen tulee olla relevantti (osa)tekijä, muttei ainoa, tai määräävä tekijä. Edelleen, sellaisissa tapauksissa, joissa hakija pelkää vainoa ei-valtiolliselta taholta mutta vainon syy ei liity vainoperusteeseen, on UNHCR:n mukaan kuitenkin olemassa syy-yhteys vainoperusteeseen, jos valtion suojelun puute (haluttomuus tai kykenemättömyys) liittyy vainoperusteeseen. Toisaalta, syy-yhteys muodostuu myös sellaisessa tapauksessa, jossa valtion suojelun puute ei liity vainoperusteeseen, mutta itse (ei-valtiollinen) vaino liittyy vainoperusteeseen.

Kolmanneksi, UNHCR:n suuntaviivat vahvistavat että jokainen pakolaismääritelmän vainoperuste on tulkittava sukupuolisensitiivisesti. On myös huomattava, että naiset tulevat usein vainotuksi koska tietty vainoperuste tai ominaisuus liitetään heihin. Lisäksi varsinkin sukupuoleen liittyvissä tapauksissa pelätty vaino liittyy usein useaan eri vainoperusteeseen. Esimerkiksi sellaisissa tapauksissa, joissa nainen ei halua mukautua uskonnon naisille antamiin rooleihin, tai kun hän kieltäytyy noudattamasta uskonnollisia normeja, käytös- tai pukeutumiskoodeja ja häntä rangaistaan sen vuoksi, hänellä voi olla perustellusti aihetta pelätä tulevansa vainotuksi uskontonsa perusteella. Toisaalta mielipiteet sukupuolirooleista, tai (sopimaton) käytös, joka johtaa vainoajan liittämään hakijaan tiettyjä mielipiteitä tai ominaisuuksia (joita henkilöllä ei välttämättä ole), voivat muodostaa poliittisen mielipiteen. Näin ollen, poliittiselle mielipiteelle on annettava laaja tulkinta, ja konteksti on aina ratkaisevaa sille, onko tietty mielipide poliittinen vai ei. Poliittinen mielipide kattaa siten kaikentyyppiset mielipiteet koskien mitä tahansa asiaa, jossa valtiovalta, hallinto, politiikka tai yhteiskunta voi olla osallisena. Mikä ehkä vielä tärkeämpää, UNHCR on esittänyt oman määritelmänsä tiettyyn yhteiskuntaryhmään kuulumisesta, ja vahvistanut että naiset ovat selvä esimerkki yhteiskunnan osasta, joka määrittyy yhteisten synnynnäisten ja muuttumattomien piirteiden perusteella, ja joita usein kohdellaan eri tavalla kuin miehiä.

Pakolaissopimuksen lopullinen soveltaminen tapahtuu kuitenkin kansallisella tasolla.* Tästä johtuen Pakolaissopimusta ja sen eri elementtejä sovelletaan hyvinkin eri tavoin eri maissa. Mitä tulee sukupuolispesifisiin vainon muotoihin, voidaan silti sanoa, että raiskaukset ja muut seksuaaliväkivallan muodot nähdään vainon muotoina kaikissa tutkimuksen kohteena olevissa maissa. Myös naisten sukupuolielinten silpominen on periaatteessa tunnustettu vainoksi kaikissa maissa. Suomi ja Ruotsi muodostavat kuitenkin poikkeuksen. Suomi siksi, että yhdessäkään tapauksessa turvapaikkaa ei ole myönnetty, ja Ruotsi siksi, että Ruotsin ulkomaalaislain erityispykälän perusteella silpomistapauksissa myönnetään oleskelulupa suojelun tarpeen perusteella. Muiden vainon muotojen suhteen on kuitenkin suurempia eroja. Voidaan sanoa, että Iso-Britannia, Kanada ja Yhdysvallat pitävät miltei kaikkia muitakin yleisimpiä sukupuolispesifisen väkivallan muotoja (esim. perheväkivallan eri muodot, rangaistukset syrjivien yhteiskuntasäännösten rikkomisesta, pakkoabortit ja –sterilisoinnit) vainona. Myös Saksassa on ollut useita tapauksia, joissa turvapaikka on myönnetty naisille, jotka ovat kieltäytyneet noudattamasta islamilaisia pukeutumisnormeja, ja naisille, jotka ovat pelänneet kunniamurhaa kotimaassaan. Ruotsissa ja erityisesti Suomessa tämänkaltaisia tapauksia on ollut vähän ja siksi on vaikeaa tehdä johtopäätöksiä laajemmista linjauksista. Voidaan kuitenkin todeta, että Suomessa ei koskaan ole annettu turvapaikkaa perheväkivaltatapauksessa. Silti, on huomattava, että yleensä näissäkään tapauksissa ongelmallista ei niinkään ole loukkauksen riittämätön vakavuus, vaan muu jokin seikka, kuten vainoperusteen puuttuminen.

Sellaisissa tapauksissa, joissa valtio ei ole *halukas* tarjoamaan suojelua ei-valtiollisten tekijöiden aiheuttamaa vakavaa haittaa vastaan, on suhteellisen laaja konsensus siitä, että tällaisten tekojen pelko voi oikeuttaa pakolaisasemaan. Näin ollen kaikki tässä tutkimuksessa käsitellyt maat, myös Saksa, tunnustavat myös yksityishenkilöiden aiheuttaman vakavan haitan vainoksi kun valtio kieltäytyy tarjoamasta suojelua. Kuitenkin on huomattavia eroja siinä, minkä katsotaan olevan riittävää tai riittävän

---

* Haluan kiittää Suomen Ulkomaalaisvirastoa mahdollisuudesta saada tutkia turvapaikka-asiakirjoja, sekä UVI:n Pakolais- ja turvapaikkalinjan henkilökuntaa ja erityisesti tulosalueen johtaja Arja Kekkosta avusta ja mielenkiintoisista keskusteluista.

tehokasta suojelua, ja mikäli tai miten hakijan tulee näyttää, että valtio kieltäytyy antamasta suojelua.

Koskien vainoperusteita ja tietyn yhteiskunnallisen ryhmän tulkintaa voidaan todeta että tutkimus paljasti kaksi eri lähestymistapaa. Common law-maissa 'yhteiskunnalinen ryhmä'-käsitteen tulkinta on hyvin kehittynyt oikeuskäytännössä, ja sekä Iso-Britanniassa että Kanadassa käsite on selvästi määritelty. Yhdysvalloissa käytäntö on ollut sekavampaa, eri tuomioistuimet ovat edustaneet eri tulkintatapoja, mutta tämä on kuitenkin muuttunut viime vuosina. Kaikkien kolmen maan tulkinta käsitteestä vastaa pääkohdittain UNCHR:n tulkintaa. Toisaalta, Ruotsia, Saksaa ja Suomea yhdistää lähinnä se, ettei vakiintunutta määritelmää käsitteestä ole ja että tätä vainoperustetta käytetään suhteellisen harvoin. Lisäksi on mainittava, että Ruotsi ainoana maana ei edes periaatteessa hyväksy sukupuolta osaksi tietyn yhteiskunnallisen ryhmän määritelmää. Ruotsi on kuitenkin perustanut työryhmän, jonka tehtävänä on tarkistaa tätä kantaa. Yleisesti voidaan todeta, että sukupuoleen perustuvat yhteiskuntaryhmät määritellään yleensä viitaten sukupuolen lisäksi myös toisiin piirteisiin, kuten ikään, kansallisuuteen, siviilisäätyyn, sukulaissuhteisiin tai klaanijäsenyyteen. Joissain tapauksissa myös pelätty vaino on ollut osa määritelmää.

Voidaan siis sanoa, että common law-maat ovat omaksuneet laajemman tulkinnan pakolaismääritelmästä, niin vainokäsitteestä kuin tietyn yhteiskunnallisen ryhmän käsitteestä, sekä (Yhdysvallat poislukien) syy-yhteydestä vainoperusteeseen suhteessa ei-valtiolliseen vainoon. Edelleen vaikuttaa siltä, että common law-maissa on analyyttisemmin ja laajemmin käsitelty pakolaismääritelmän eri elementtejä, niin oikeuskäytännössä kuin laajemmissa linjauksissakin. Varsinkin pohjoismaiset turvapaikkapäätökset ovat usein niin ylimalkaisesti ja lyhyesti perusteltuja, että ulkopuolisen on vaikea ymmärtää millä perustein päätös on tehty. Common law- ja civil law-maiden välillä näyttää siis olevan selkeä ero pakolaismääritelmän soveltamisessa. Lisäksi vaikuttaa myös siltä, ettei voida erottaa yhtenäistä Eurooppalaista lähestymistapaa pakolaismääritelmään—ainakaan vielä. Jää nähtäväksi mitä vaikutuksia EU:n pakolaisaseman määrittelydirektiivillä tulee olemaan, kun se hyväksytään. On myös mainittava, että Suomen hallituksen esitys uudeksi ulkomaalaislaiksi (HE 28—2003) esittää selkeästi että naisia voidaan vainota myös syistä, jotka eivät liity rotuun, uskontoon, kansallisuuteen tai poliittiseen

mielipiteeseen. Tällaisissa tapauksissa vainon syynä voidaan pitää kuulumista tiettyyn yhteiskunnalliseen ryhmään. Tämä on nähtävä myönteisenä kehityksenä. Jää hieman epäselväksi mitä on tarkoitettu sillä, että naisiin sukupuolen perusteella kohdistuva vaino mainitaan nimenomaan yhteiskunnallisen ryhmän yhteydessä. Olisi hyvin valitettavaa jos tämä vainoperuste nähtäisiin ainoana mahdollisena perusteena sukupuoleen liittyvää vainoa koskevissa tapauksissa. Esityksessä ei myöskään määritellä termiä sukupuoleen perustuva vaino. Vaikka esityksen voi nähdä antavan paremmat edellytykset pakolaisaseman myöntämiseksi sukupuoleen perustuvissa turvapaikkahakemuksissa, olisi toivottavaa että pakolaismääritelmän eri käsitteiden tulkintaa Suomessa selvennettäisiin esim. suuntaviivoja laatimalla.

Abbreviations

BAF	*Bundesamt für die Anerkennung ausländischer Flüchtlinge* (Federal Office for the recognition of foreign refugees, Germany)
BIA	Board of Immigration Appeals (USA)
BVerwG	*Bundesverwaltungsgericht* (Federal Administrative Court, Germany)
BverfG	*Bundesverfassungsgericht* (Federal Constitutional Court, Germany)
CA (UK)	Court of Appeal (United Kingdom)
CA (US)	Court of Appeal (United States)
ECHR	(European) Convention on Human Rights and Fundamental Freedoms (1950)
ECOJ	Official Journal of the European Communities
ECtHR	European Court of Human Rights
FCTD	Federal Court Trial Division (Canada)
FGM	Female genital mutilation
HC	High Court (Australia)
HHAO	*Helsingin Hallinto-oikeus* (*Helsingfors Förvaltningsdomstol*, Helsinki Administrative Court, Finland)
HL	House of Lords (United Kingdom)
IAA	Immigration Appeals Authority (United Kingdom)
IAT	Immigration Appeals Tribunal (United Kingdom)
ICCPR	International Covenant on Civil and Political Rights (1966)
IFA	Internal Flight Alternative (alt. IPA—Internal Protection Alternative)

INS	Immigration and Naturalization Service (USA)
IRB	Immigration and Refugee Board (Canada)
KHO	*Korkein Hallinto-oikeus* (*Högsta Förvaltningsdomstolen*, Supreme Administrative Court, Finland)
MEI	Minister for Employment and Immigration (Canada)
MIG	*Migrationsverket* (Migration Board, Sweden)
MIMA	Minister of Immigration and Multicultural Affairs (Australia)
MIEA	Minister of Immigration and Ethnic Affairs (Australia, precedes MIMA)
SC (CA)	Supreme Court (Canada)
SC (US)	Supreme Court (United States)
SSHD	Sectary of State for the Home Department (United Kingdom)
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UN (SE)	*Utlänningsnämnden* (Aliens Appeals Board, Sweden)
UVI	*Ulkomaalaisvirasto* (*Utlänningsverket*, Directorate of Immigration, Finland)

1 Introduction

1.1 Women, refugee status and lack of protection: Recent developments and the problem of differing interpretations

The 1951 Convention Relating to the Status of Refugees[1] is the only universal treaty that provides for protection of refugees. The Refugee Convention not only provides for certain rights for persons recognised as refugees but also for a definition of who is a refugee. According to the Refugee Convention a refugee is 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 the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality or being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it."[2]

Persons who for some reason or another do not fulfil the criteria in this definition do not qualify as refugees and are therefore not entitled to the protection provided by the Convention. A large part of the people in the third world commonly referred to as "refugees" are thus excluded from the refugee protection regime established by the 1951 Convention as natural catastrophes, war, or economic or political chaos are not considered persecution for the purposes of obtaining refugee status. Another large

---

[1] Geneva, 28 Jul. 1951, 189 *UNTS* 150 (hereafter 'Refugee Convention' or '1951 Convention'); *Protocol Relating to the Status of Refugees*, New York, 31 Jan. 1967, 606 UNTS 267. In addition to the universal definition of a refugee found in the Refugee Convention, the *OAU Convention of the Specific Aspects of Refugee Problems in Africa* (Addis Ababa, 10 Sept 1969, 1001 UNTS 46, Article 1) and the *Cartagena Declaration on Refugees* (Cartagena, 1984, OAS/Ser.L/V/II.66, doc. 10, rev. 1, 190-93) provide for regional refugee definitions applicable in Africa and (South/Central) America respectively. Both definitions include as refugees also persons who have fled, *i.a.*, because of external aggression, or events seriously disturbing the public order. In Asia the Bangkok Principles Concerning the Treatment of Refugees was adopted in 1966 and amended 1970 and 1987 respectively. Within the European Union the efforts to harmonise asylum procedures have included a joint position on the harmonised application of the refugee definition in the 1951 Convention within the EU. 96/196RIF; ECOJ L063, 13 March 1996, pp. 2-7.

[2] Article 1(A)2. See also the similar definition provided for in the *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA res 428(V), 14 Dec. 1950, para. 6(ii). The UNHCR determines refugee status under the Statute and State Parties to the Refugee Convention and Protocol under those instruments. The discussion in this study is concerned mainly with determination of refugee status by States Parties to the Refugee Convention.

category excluded from the refugee protection regime are Internally Displaced Persons, that is, persons who have fled, e.g., human rights abuses or civil war but are still within their country of origin.[3]

From the perspective of violations of women's human rights and persecution of women two issues are particularly problematic when it comes to fulfilling the criteria in the refugee definition; first, the fact that gender is not included among the grounds of persecution in the Convention, and second, the requirement of lack of state protection in relation to abuses committed by non-state actors. The fact that gender is excluded as a persecution ground has traditionally led to interpreting the refugee definition without having regard to women's experiences of persecution. Even though women and men often experience similar types of persecution and are often persecuted on similar grounds, women are also subject to both types of violence and persecution that are specific to their gender and are persecuted because of their gender. The failure to appreciate the differences between the nature and experiences of persecution faced by women and men respectively often results in not recognising (gender-specific) violence faced by women as persecution or misunderstanding the (gender-related) grounds of persecution. Even where women fear persecution for the same reasons as men, the form of persecution may be specific to their gender (e.g., rape or other sexual violence) and not as readily recognised as 'persecution' within the meaning of the Convention. Alternatively, the persecution may be gender-neutral (e.g., stoning or beatings) but the reasons (e.g., failure to comply with social mores) are not recognised as grounds for persecution. Further, women, especially those who have experienced sexual violence, may find it difficult to talk about their experiences to a male interviewer, or are reluctant to identify the true extent of the persecution or harm suffered because of shame.[4]

---

[3] See *The Guiding Principles on Internal Displacement*, UN doc. E/CN.4/1998/53/Add.2 (11 Feb. 1998), Introduction, para. 2.

[4] See, e.g., *Guidelines on international protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HRC/GIP/02/01, 7 May 2002 (hereafter UNHCR Gender Guidelines), para. 35-37; N. Kelley, 'The Convention refugee definition and gender-based persecution: A decade's progress', 13 *IJRL* 4 (2002), 559, at 561.

The questions relating to women, gender-related persecution and refugee status have received an increasing amount of attention from academics and also more lately from international organisations and some governments. As a result of this increased attention the analysis and understanding of gender in the refugee context has advanced considerably, particularly during the 1990s. Thus, it is now "widely accepted" that gender can influence or dictate the type of persecution or harm suffered as well as the reasons for such treatment.[5] The calls for the addition of gender as a persecution ground[6] are no longer heard, and the United Nations High Commissioner for Refugees (UNCHR) has concluded that the refugee definition, as "properly interpreted", covers gender-related claims and that there thus is no need for an additional persecution ground.[7]

Even though the UNCHR is a considerable authority when it comes to interpreting the Refugee Convention, its guidelines are intended to provide "legal interpretive guidance"[8] for governments, and many states accept direct or indirect participation by UNHCR in procedures for the determination of refugee status,[9] the Refugee Convention leaves states the choice of means regarding implementation of the Convention at the national level. This results in varying interpretations of the refugee definition and its different elements. For example, some states have accepted that women may constitute a 'particular social group' under some circumstances, whereas other states are firmly of the opinion that gender does not fall under the ground 'particular social group'. Another issue where states have come to completely opposing interpretations of the refugee definition is the issue of persecution by non-state actors, where the common law systems as a rule do not have a problem with accepting violations committed by non-state actors as persecution but some civil law systems quite consistently deny that such treatment may constitute persecution.

---

[5] UNHCR Gender Guidelines, supra n. 4, para. 6.

[6] See, e.g., L. Cipriani, 'Gender and persecution: protecting women under international refugee law', *7 Georgetown Immigration Law Journal* (1993), 511; G. A. Kelson, 'Gender-based persecution and political asylum: The international debate for equality begins', 6 Texas Journal of Women and the Law (1996), 181.

[7] UNHCR Gender Guidelines, supra n. 4, para. 6.

[8] See, e.g., *ibid*.

[9] Goodwin-Gill, *The refugee in international law*, 2nd ed., Clarendon Press, 1996, 33.

Therefore, even though there seems to be consensus on part of academics, NGOs and IGOs on a "proper", gender-sensitive interpretation of the refugee definition and the issues relating to persecution and persecution grounds, it seems that state practice does not reflect such a consensus. Furthermore, it appears that the variations in interpreting the refugee definition particularly concern issues that are central in the gender-related claims for refugee status; that is, the grounds for persecution and the status of non-state actors.

1.2 The aim and structure of the study

The primary aim of this study is to conduct a comparative study of the interpretation of the refugee definition in gender-related cases and to draw conclusions as to the current status of state practice in relation gender-related persecution. It should be emphasised that this study focuses on the question whether women meet the refugee definition of the 1951 Refugee Convention; any other ways to afford (subsidiary) protection will be left outside the scope of the study. Studying the issues relating to gender and refugee status from a comparative perspective brings a welcomed additional element to the discourse. First, as the position of some authorities, such as the UNCHR, seems to be that a consensus on these issues has been reached, and second, as comparative views on gender-related persecution are quite scarce.[10] As the differences in interpretation seem to be most significant in relation to gender and 'particular social group' and persecution by non-state actors, these are the two issues the comparative part of the study will focus on.

In addition to the comparative part analysing the state practice in relation to gender-related persecution the study will also include a part focused on the developments concerning the understanding of gender-related persecution and gender in refugee context within the academic discourse and within international bodies, such as the

---

[10] On of the few studies in the area is M. Fullerton, 'A comparative look at refugee status based on persecution due to membership in a particular social group', *26 Cornell Journal of International Law 3* (1993), 505-564. General comparative studies include G. Coll & J. Bhabha, *Asylum law and practice in Europe and North America: A comparative analysis*, Federal Publ., 1992; H. Lambert, *Seeking Asylum—Comparative Law and Practice in Selected European Countries*, Martinus Nijhoff Publ., 1995; J-Y. Carlier, D. Vanheule, K. Hullmann & C. Peña Galiano (eds.), *Who is a Refugee? A Comparative Case Law Study*, Kluwer Law International, 1997; and M. R. von Sternberg, *The Grounds of Refugee Protection on the Context of International Human Rights and Humanitarian Law—Canadian and United States Case Law Compared*, Martinus Nijhoff Publ., 2002.

UNHCR. This part of the study will aim at identifying what the above mentioned "proper", gender-sensitive understanding of the refugee definition entails and at providing some conclusions as to, amongst others, the issues relating to women as a 'particular social group'.

The study will thus be divided in two main parts, the first part identifying the issues concerned and providing for a discussion and an analysis of the debate relating to gender-related persecution (chapter 2). The second, comparative, part of the study will be divided into two main sections, the first analysing case law and other state practice relating to what types of harm are considered persecution (section 3.2) as well as the central issue of agents of persecution (section 3.3). The second main section of this part of the study will compare and analyse the case law in relation to the grounds of persecution, focusing on 'particular social group' (section 3.4). The comparative part of the study will encompass analysis of case law (and other relevant information, such as gender guidelines and legislation) from the United Kingdom, the USA, Canada, Germany, France, Sweden, and Finland.[11] These states have been chosen for the purpose of identifying eventual trends and tendencies in the asylum practice on (at least) two dimensions; Europe—North America and Common Law—Civil Law countries. In addition, the analysis of Finland and Sweden aims at providing an additional dimension to the discussion through the Nordic perspective. Finally, the study aims at identifying any tendencies or trends in the current application of the refugee definition and discussing the consequences of such application for the protection female asylum seekers. It should be mentioned already at the outset that a number of legislative initiatives that will affect the position as to gender-related persecution are currently under consideration on the European level. The perhaps most notable development is the proposed EC directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM/2001/0510). On the national level the Finnish Government Bill for a new Aliens Act (HE 28—2003) includes references to gender-related persecution, and in Germany a debated legislative proposal includes provisions on both non-state persecution and gender-related persecution. In Sweden again, the established position on gender-based social

[11] Of course, also the practice and policy in other states will be discussed where it is relevant.

groups is being revised by a committee. These proposals will be discussed at more length in various parts of the study.

The Canadian guidelines on gender-related persecution sought to address four central questions raised by gender-related claims for refugee, namely; first, to what extent can women rely on any one, or a combination of the five Convention grounds, second, under what circumstances does sexual violence or other prejudicial treatment of women constitute persecution, third, what are the key evidentiary elements when considering gender-related claims, and fourth, what special problems do women face during refugee determination hearings.[12] Posed almost ten years ago, the same questions are still being discussed. This study will aim at contributing to the discussion on the two first mentioned questions, that is, the substantial issues relating to the Convention refugee definition. Although equally important, the questions as to evidence and gender-sensitivity in gender-related claims will only be briefly mentioned here. In order to delimit the study, also the substantial issues relating to exclusion from and cession of refugee status (in accordance with Articles 1 C (1)-(6), D, E, and F) will be left outside the scope of the study. Also, despite their importance, the questions relating to 'Internal Flight Alternatives' (IFA) will only be discussed briefly in this study (sub-section 3.2.3), and persecution in situations of armed conflict, breakdown of government authority, or de facto authorities will only be referred to cursorily, as these questions is not considered to be specific to gender-related claims. The elements of the Convention refugee definition will be introduced in section 2.1, but the main analysis of the study will focus on application of the two above-mentioned elements in gender-related cases. Thus, the other elements of the refugee definition, such as issues relating to the 'well-founded fear' standard (section 2.1.1), and the other Convention grounds of persecution (sub-sections 2.1.4 and 2.4.2), will be considered only briefly. In addition, it should be kept in mind that the study does not attempt to provide an exhaustive overview of the national practice, and particularly the national case law, on the issue of gender-related persecution. Rather, the study aims at providing an illustrative overview of national policy and practice

[12] *Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act*, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993 (hereafter CIRB *Gender guidelines* 1993), reprinted in 5 *IJRL* 2 (1993), 278, at 279.

regarding the topic. The discussion in chapter 2 of the study does, however, aim at identifying the current, gender-sensitive understanding of gender-related persecution, and hopes to provide a comprehensive discussion of the current state of academic discourse and international policy.

2 A gender-sensitive interpretation of the refugee definition

2.1 Introducing the elements of the refugee definition

Before venturing into the questions relating to application of the Convention refugee definition in gender-related cases, some introductory remark should be made about the refugee definition itself and its different elements.

The Refugee Convention is the only universal treaty relating to the protection of refugees. The Convention has, however, a regional equivalent in Africa,[13] which has its own definition of a refugee[14] and in South America the so-called Cartagena Declaration is widely applied.[15] With the exception of *Common Position 96/196*,[16] a common refugee definition has been lacking in Europe. However, within the framework of the common European asylum system agreed at the Tampere European Council in 1999 the Commission has prepared a proposal for a directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.[17] The proposed directive includes a definition of a refugee based on the Refugee Convention. Once adopted, member states of the EU are obliged to transpose the provisions of the directive in their respective national legislation. The discussion in this study is, however, confined to interpretation and application of the refugee definition in the 1951 Refugee Convention.

---

[13] *OAU Convention on the Specific Aspects of Refugee Problems in Africa*, supra n. 3.

[14] Ibid., Article I.

[15] *Cartagena Declaration on Refugees*, supra n. 3. A refugee definition is found in section III, para. 3. See also the *1966 Bangkok Principles Concerning Treatment of Refugees*, Article 1, Collection Vol. II, 10-14, AALCC, The Rights of Refugees: Report of the Committee and Background Materials, New Delhi 1966, 207-210. Subsequently reiterated and expanded in 1970 and 1987. Text reprinted in Goodwin-Gill, supra n. 9, 521-527.

[16] 96/196, ECOJ L063, 13 Mar. 1996, p. 2-7.

[17] The proposed EC directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection. *COM/2001/0510 final – CNS 2001/0207*, *ECOJ* C 050 E, 26 Feb. 2002, p. 325-34; latest (available) version *10576/03 (ASILE 40)*, 19 Jun. 2003 (hereafter EU draft refugee status directive).

The definition of a refugee found in the Refugee Convention[18] is divided into four components; 1) 'well-founded fear of persecution', 2) 'for reasons of race, religion, nationality, membership of a particular social group or political opinion', 3) 'outside of the country of his nationality/habitual residence', 4) 'unable or unwilling to avail himself the protection of that country'. Each of these components can in turn be divided into different elements. The different elements will here be briefly introduced in order to provide for a background to the more detailed discussion concerning a gender-sensitive interpretation of the refugee definition/in particular the elements lack of protection and Convention grounds. The component of 'being outside of the country of nationality' will not be considered here. Throughout the whole of this study it should be kept in mind that the "refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status."[19]

2.1.1 'Well-founded fear'

It can be said that there is a well-founded fear of persecution when it is likely that the person concerned will face persecution if returned to his or her country of origin. It is generally held that the concept has both a subjective ('fear') and an objective ('well-founded') element and to determine whether there is a well-founded fear of persecution both elements must be taken into account.[20] This view has, however, been criticised as historically indefensible and having no practical meaning.[21] Rather, 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.[22] 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

---

[18] Article 1(A)2, see supra n. 1.

[19] UNHCR Gender Guidelines, supra n. 4, para. 2.

[20] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (hereafter UNHCR Handbook), Geneva, 1979, para. 37-8.

[21] J. C. Hathaway, *The Law of Refugee Status*, Butterworths, 1991, 65.

[22] Ibid., 65-9. See also *R v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] AC 985, 993-4.

(e.g., reasonable degree of likelihood of persecution, clear probability of persecution, reasonable probability, persecution as more likely than not).[23] For example, in the US a 'reasonable possibility' test is applied,[24] and in Canada a 'reasonable chance' (or 'good grounds for fearing persecution') standard;[25] whereas a (arguably somewhat more restrictive) 'reasonable degree of likelihood' or 'real and substantial danger of persecution' test is applied in the UK[26] and a 'reasonable likelihood' test in Germany.[27] It seems, however, that most jurisdictions recognise a standard of proof, which requires degrees of likelihood far short of any balance of probability test (that is, persecution is more likely than not).[28]

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 applicant's country. Human rights information is, however, not determinative of a claim to refuge 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 the claimant's own evidence and testimony.[29] The fear of persecution must not (necessarily) be based on 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 is she or he has already been subject to harm amounting to persecution.[30] Past persecution is, however, not a prerequisite to recognition as a refugee.

---

[23] Goodwin-Gill, supra n. 9, 35-40; Hathaway, supra n. 21, 75-80.

[24] "[A] moderate interpretation of the 'well-founded fear' standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." *INS v. Cardoza-Fonseca*, US Supreme Court, 467 US 407 (1987).

[25] *Adjei v. Minister of Employment and Immigration*, [1989] 2 FC 6680, 683 OR (1989) 7 Imm. L.R. (2d) 169 (FCA).

[26] *R. v. Secretary of State for the Home Department, ex parte Sivakumaran et al*, [1988] All ER 193.

[27] Goodwin-Gill, supra n. 9, 40, fn 31, citing Hessischer Vervaltungsgerichtshof, 13 UE 1568/84, 2 May 1990.

[28] Goodwin-Gill, supra n. 9, 39.

[29] Hathaway, supra n. 21, 80-3.

[30] UNHCR Handbook, supra n. 20, para. 42-5.

2.1.2 'Persecution' = Serious harm + lack of state protection

2.1.2.1 What harm is serious enough?

Whereas the criterion of 'well-founded fear' focuses on evidentiary standards in assessing claims for refugee status, the term persecution refers to the substantive nature of the harm that is feared. There is no universally accepted definition of 'persecution'.[31] States have been left with a wide margin of appreciation as regards interpreting the term 'persecution', and practice is neither coherent nor consistent.[32] According to the UNHCR a threat of deprivation of life or freedom must always be considered persecution, in addition to other grave violations of human rights.[33] The term persecution is closely linked with human rights and a human rights-based understanding of the concept persecution is widely advocated.[34] Goodwin-Gill argues that persecution within the Refugee Convention includes measures which threaten deprivation of life or liberty; torture or cruel, inhuman or degrading treatment; subjection to slavery or servitude; non-recognition as a person; as well as oppression, discrimination or harassment of a person in his or her private home, or family life.[35] Hathaway on his part has defined persecution as "the sustained and systematic violation of basic human rights demonstrative of a failure of state protection."[36] On the basis of a categorisation of the human rights norms in the International Covenant on Civil and Political Rights,[37] the International Covenant on Economic, Social and Cultural Rights,[38] and the Universal Declaration on Human Rights[39] Hathaway

---

[31] UNCHR Handbook, supra n. 20, para. 51; Goodwin-Gill, supra n. 9, 66; Kourula, *Broadening the Edges: Refugee definition and international protection revisited*, Martinus Nijhoff Publ., 1997, 91.

[32] Goodwin-Gill, supra n. 9, 67.

[33] UNHCR Handbook, supra n. 20, para. 51. See also Goodwin-Gill, supra n. 9, 67-9.

[34] There are, however, some exceptions. See, e.g., D. J. Steinbock, 'The refugee definition as law: Issues of interpretation', in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, F. Nicholson & P. Twomey (eds.), Cambridge University Press, 13, at 29-33; D. Wilsher, 'Non-state actors and the definition of a refugee in the United Kingdom: Protection, accountability of culpability?', 15 IJRL 68 (2003), at 81-84, 103-106.

[35] Goodwin-Gill, supra n. 9, 69.

[36] Hathaway, supra n. 21, 104-5.

[37] New York 16 Dec. 1966, 999 *UNTS* 171.

[38] New York 16 Dec. 1966, 993 *UNTS* 3.

[39] 10 Dec. 1948, UN GA res. 217 A (III).

identifies human rights norms the infringement of which is classified as persecution.[40] First, violations of the non-derogable rights in the ICCRP are always considered persecution. Second, failure to respect and ensure other civil and political rights which is beyond what is strictly required by the exigencies of an emergency or where a derogation impacts disproportionately on certain subgroups of the population would amount to persecution. Finally, where violations of economic, social and cultural rights are grave enough to amount to deprivation of life or cruel, inhuman or degrading treatment, they should be considered as persecution.

Despite varying categorisations of what kind of human rights violations amount to persecution, it is accepted that the Refugee Convention and its refugee definition should be interpreted in the light of international human rights instruments.[41] For the purposes of this study Hathaway's definition of persecution will be used. It should, however, be noted that Hathaway's categorisation is based on a traditional understanding of non-derogable rights, and Article 4(2) of the ICCPR should not be seen as an exhaustive list of rights. As has been held by the Human Rights Committee, the fact that only certain provisions are listed as non-derogable does not mean that other articles may be subjected to derogations at will.[42] More specifically, the Committee has stated that there are elements in some provisions that are not listed

---

[40] Hathaway, supra n. 21, 108-111. Violations of the fourth group of rights, that is, rights included in the UDHR but in neither Covenant (such as the right to property) do not classify as persecution. Hathaway's linkage with to Covenants has been criticised as too tight and it has been argued that the concept of persecution "simply does not implicate the full range of rights listed in the Covenants." D. A. Martin, *Book reviews and notes. The Law of Refugee Status by James C. Hathaway*, 87 *AJIL* 348 (1993), 350. For critique of the human rights-based understanding of persecution see also D. Steinbock, 'The refugee definition as law: Issues of interpretation', in F. Nicholson & P. Twomey (eds.), *Refugee Rights and Realities – Evolving International Concepts and Regimes*, Cambridge University Press, 1999, 13-36. Despite such critique, Hathaway's definition has been accepted both in case law in state practice, see e.g., *Horvath v. Secretary of State for the Home Department*, UK House of Lords, [2001] 1 AC 489; *MIM v. Khawar*, High Court of Australia 2002, [2002] HCA 14; *Refugee Appeal No. 71427/99*, New Zealand Refugee Status Appeals Authority, [2000] NZAR 545; and UK *IAA Gender-guidelines* 2000, infra n. 136, para. 2A.3. See also R. Haines QC, 'Gender-related persecution', in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, 327.

[41] The EU draft refugee status directive, supra n. 17, also links the analysis of the nature of persecution to human rights law. What is worrying is, however, that the revised proposal (June 2003) refers "in particular" to the non-derogable right in the ECHR (Article 11(1)(a)). Still, the non-exhaustive list of acts of persecution in paragraph 2 of the Article seems to indicate a less strict position as it also includes discriminatory legal, administrative or judicial measures, and discriminatory prosecution or punishment.

[42] CCPR, *General Comment No. 29*, States of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 30 Aug. 2001, para. 6.

as non-derogable that cannot be made subject to lawful derogations. Examples of such provisions are the right of all persons deprived of their liberty to be treated humanely, the fundamental principles of fair trial (including the presumption of innocence and court review of any form of detention), the prohibitions against taking of hostages, abductions and unacknowledged detention, rights of minorities, the prohibition against propaganda of war and advocacy of national, racial or religious hatred and, most importantly in the context of internal displacement, the prohibition of deportation or forcible transfer of population.[43] In addition, it should be noted that some ICCPR rights are derogable only because it cannot become necessary to derogate from them during a state of emergency, not because they would be more fundamental than some other rights, e.g. article 11. Further, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[44] the Convention on the Elimination of All forms of Racial Discrimination (ICERD),[45] and the Convention on the Rights of the Child (CRC)[46] should be included in the relevant core of human rights norms. Also the United Nations Declaration on Violence against Women (1993),[47] and the Beijing Declaration and Platform of Action[48] into account when analysing the content of the term 'basic human rights'.[49]

2.1.2.2 Lack of state protection and agents of persecution

The purpose of refugee law is to provide substitute protection of the international community in situations where it is not reasonable to expect adequate national protection of basic human rights in the (applicant's) country of origin (the principle of surrogacy). Thus, when determining whether there is a risk of persecution, the state's

---

[43] Ibid., para. 13.

[44] New York, 18 Dec. 1979, 1249 *UNTS* 13.

[45] New York, 7 Mar. 1966, 660 *UNTS* 195.

[46] New York, 20 Nov. 1989, 28 *ILM* 1456 (1989)

[47] 20 Dec. 1993, UN GA res. 48/104, UN doc. A/RES/48/104.

[48] Fourth World Conference on Women, Beijing, China 4-15 Sept. 1995, Department of Public Information, United Nations, New York, 1996.

[49] Compare H. Crawley, *Women as Asylum Seekers: A Legal Handbook*, Immigration Law Practitioners' Association (ILPA) & Refugee Action, 1997, 51; A. Macklin, 'Refugee women and the imperative of categories', 17 *HRQ* 213 (1995); and Haines, supra n. 40, at 328.

ability and willingness to effectively respond to such a risk must be assessed.[50] When determining whether a certain treatment can be called persecution, two elements must be satisfied; first, whether the harm feared amounts to 'persecution'; and second, whether the state can be held responsible/accountable for the harm.[51] If it can be established that meaningful national protection is available a 'well-founded fear of persecution' cannot be said to exist.[52]

The "most obvious" form of persecution is confined to situations where human rights are violated by organs of the state (such as police or military), in pursuance of a "formally sanctioned persecutory scheme".[53] This could be called "state persecution."[54] Second, persecution may also consist "non-conforming behaviour" by state officials which is not subject to a timely and effective rectification by the state.[55] Relating to some gender-specific forms of persecution, such as rape, the latter type of situations have proved problematic as decision makers have made a distinction between acts committed by an official in an official capacity, and acts committed by an official in a private capacity—because rape is seen as motivated by private feelings such as lust or revenge, it is seen as a private act.[56] Third, seriously harmful acts committed by private individuals or groups of persons, when the government either supports, condones or tolerates such acts (in other words, when the government is *unwilling* to offer protection) also amounts to persecution.[57] Finally, the state may be

---

[50] Hathaway, supra n. 21, 125. This line of reasoning has been approved in national case law, see e.g., *Islam and Shah*; *Horvath*; *Refugee Appeal no. 71427/99*; and *Khawar*, at supra n. 40.

[51] Macklin, supra n. 49, at 222.

[52] Hathaway, supra n. 21, 125.

[53] Ibid.

[54] C. Yeo, 'Agents of the state: When is an official of the state and agent of the state?', 14 *IJRL* 4 (2002), 509, at 517.

[55] Hathway, supra n. 21, 125.

[56] See, e.g., the US case of *Klawitter v. INS*, [1992] 970 F.2d 149, CA (US) 6th Cir.

[57] Hathaway, supra n. 21,126; A. B. Johnsson, 'The international protection of women refugees: A summary of principal problems and issues', 1 *IJRL* 2 (1989) 221, at 224; UNHCR Handbook, para. 65. Some guidance can also be taken from the doctrine of positive obligations in human rights law as developed in the jurisprudence of the European Court of Human Rights. For example, in the context of *non-refoulement* in the case of *H.L.R. v France*, the European Court of Human Rights did not rule out the possibility that Article 3 of the European Convention on Human Rights might also apply to situations where risk of persecution in the country of origin emanated from persons or groups of persons who were not public officials. What must be shown, however, is that the authorities in the receiving country were not able to provide sufficient protection. *H.L.R. v. France*, ECHR Reports

unable to provide effective protection for human rights. Thus, as long as the state fails to protect a person at risk, the reason for failure to protect is irrelevant; whether it is indifference or genuine incapability. Neither does the fact that the authorities are willing to offer protection change the situation if the authorities still remain incapable of offering such protection. Hence, the need of surrogate protection from the international community arises when the state ignores or is unable to react to legitimate expectations of protection and thus fails its duty to protect its citizens.[58]

2.1.2.3 Non-state persecution and 'Internal Flight Alternative' (IFA)

The concept of internal flight or relocation alternative refers to "a specific area of the country where there is not 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."[59] Even though the Refugee Convention does not include any references to internal flight alternatives, rules relating to 'internal flight alternative' (IFA; or 'internal relocation alternative', or 'international protection alternative') are increasingly relied upon in national refugee status determination. Because the notion of IFA has developed in an *ad hoc* manner through jurisprudence, policy statements, and academic analysis, the application of the concept has been characterised by inconsistency and a lack of a clearly conceptualised understanding (of the concept).[60] Hence, there has been a need for a clear substantial and procedural

---

1997-III. See also *T.I. v. UK*, ECHR Application No. 43844/98. See Wilsher, supra n. 34, for a critical perspective.

[58] Macklin, supra n. 49, at 234; Hathaway, supra n., 21, 126-8; P. Hyndman, 'The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil Applicants', 9 *HRQ* (1987), 49, at 67.

[59] UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 Jul. 2003, (hereafter UNHCR IFA Guidelines), para. 6. In assessing whether there is an IFA possibility the UNHCR proposed a two-pronged analysis (the relevance analysis and the reasonableness analysis), see ibid., para. 7. For an alternative analysis see the *Michigan Guidelines on the International Protection Alternative*, Apr. 1999, 21 *Michigan Journal on International Law* 1 (1999), 131, also available at http://refugeecaselaw.org/Refugee/guidelines.htm, site last visited 21 Nov. 2003.

[60] See, e.g., R. Marx, 'the criteria of applying the "Internal Flight Alternative" test in national refugee status determination procedures', 14 *IJRL* 179 (2002), at 179-180; N. Kelley, 'Internal flight/relocation/protection alternative: Is it reasonable?', 14 *IJRL* 4 (2002), at 5; J. C. Hathaway and M. Foster, 'Internal protection/relocation/flight alternatives as an aspect of refugee status determination', in Feller et. al. (eds.) Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambrdige University Press, 2003, 357, at 358-365.

framework for IFA determination. Recent attempts to articulate such standards include the Michigan guidelines on the internal protection alternative[61] and the UNHCR guidelines on internal flight or relocation alternative.[62] Furthermore, the draft EC refugee status directive includes a provision on internal protection.[63] Particularly relevant the IFA analysis is in cases where the source of persecution is a non-state actor.[64] Thus, in addition to the other obstacles in cases of non-state persecution, the decision makers must be satisfied that there is not IFA available.

According to the prevailing understanding of IFA, there should be a presumption against finding an internal flight or relocation alternative in situations where the persecutor is, or is sponsored by the government.[65] Where the persecutor is a non-state actor, however, the feasibility of an IFA will depend upon the persecutor in likely to pursue the claimant to the area concerned and whether state protection form the harm feared is available there.[66] Here both the ability and willingness of the state to protect the claimant from the feared harm must be taken into account. According to the UNHCR it can be presumed that if the state is unwilling or unable to protect the individual in one part of the country, it may also not be able or willing to do so in other areas. This consideration is particularly relevant in cases of gender-related persecution.[67] Furthermore, it is inappropriate to (equate) administrative authority or control exercised by international organisations on a transitional or temporary basis

---

[61] Michigan Guidelines on the Internal Protection Alternative, available at http://www.refugeecaselaw.org/Refugee/guidelines.htm, site last visited 3 Dec. 2003. For a critique of the Michigan guidelines, see Kelley, supra n. 60, at 32-36.

[62] Supra n. 59.

[63] EU draft refugee status directive (June 2003), supra n. 17, Article 10.

[64] UNHCR IFA guidelines, supra n. 59, para. 38.

[65] Compare the wording on this issue in the UNHCR Guidelines, the Michigan Guidelines, and the EC draft directive: the UNCHR Guidelines state that there is "a presumption in principle" that an IFA is not available, while the Michigan Guidelines state and the EC draft directive that there should be a "strong presumption" against finding an IFA. The UNHCR Guidelines continue to state that "unless exceptionally it is clearly established that the risk of persecution stems from an authority of the State whose power is clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country." UNHCR IFA Guidelines, supra n. 59, para. 7(I)b; 13-14; Michigan Guidelines, supra n. 60, para. 16; COM (2001) 510, Article 10(1), supra n .17.

[66] 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. UNHCR IFA Guidelines, supra n. 59, paras. 7(I)c; 15.

[67] Ibid., para. 15.

with national protection provided by states. Similarly, the UNHCR Guidelines state, it is inappropriate to refer to protection by a local clan or militia in an area where such entities are not the recognised authority, and/or where the control over the concerned area may only be temporary.[68]

2.1.3 'For reasons of…' or the nexus to a persecution ground

Refugee law requires that there is a nexus (link) between who the claimant is or what she believes in and the risk of serious harm in her home country. The peril the claimant for refugee status faces must thus be linked to her socio-political situation.[69] Thus, the harm a person fears must be causally linked to at least one of five grounds enumerated in the Convention. Even though the Convention ground must be a relevant contributing factor, it need not be shown to be the sole or dominant cause.[70] The nexus issue is particularly problematic in cases of non-state persecution, and, as will be further discussed in section 8.5 below, it is in this respect that the national application of the nexus clause of the refugee definition differs most. Thus, the recent clarification of the UNHCR point of view was most welcome. According to UNHCR's interpretation, in cases where there is a risk of being persecuted by non-state actors, for reasons that 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 not related to a Convention ground, but the inability or unwillingness of the state to offer protection is for reasons of a Convention ground, the causal link is established.[71] For example, where a woman is abused by her husband in a state that

---

[68] Ibid., paras. 16-17.

[69] Hathaway, supra n. 21, 136-7.

[70] UNHCR Gender Guidelines, supra n. 4, para. 20.

[71] UNHCR Gender Guidelines, supra n. 4, para. 21; UNCHR *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, (hereafter UNHCR PSG Guidelines), paras. 20-23; T. A. Aleinikoff, 'Protected characteristics and social perceptions: An analysis of the meaning of 'membership of a particular social group', in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, 263, at 301-303; *Summary of Conclusions: Gender-related persecution*, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 6. See also *Refugee Appeal No. 71427/99*, para. 112, New Zealand Refugee Status Appeals Authority, and J. C. Hathaway, *The Michigan Guidelines on Nexus to*

takes no action against such abuse, the woman may not be able to establish that her husband has abused her for reasons of her membership in a particular social group, or any other Convention ground. Nonetheless, if the state is unwilling to extend protection against the abuse based on one of the Convention grounds, the requirement of a causal link is satisfied. Conversely, in a case where a woman is threatened with FGM by her tribe—on account of her being a female member of a tribe practicing FGM—in a state that prohibits but cannot prevent circumcision, the causal link is established irrespective whether the lack of state protection is related to a Convention ground or not.

2.1.4 Grounds for persecution

The so-called Convention grounds to which the feared harm must be linked are race, religion, nationality, particular social group and political opinion. Thus a persecutor may intend to harm a person because of, for reasons of, or on account of that person's race, religion, nationality, membership of a particular social group or political opinion. Usually there is more than one element combined in one person, for example a political activist belonging to a particular religious group.[72] 'Race' must be understood in its widest sense; encompassing all kinds of ethnic groups that are referred to as "races" in common usage. 'Race' may also entail membership of a specific social group of common descent forming a minority. 'Nationality' again should not only be understood as "citizenship" but also refers to an ethnic or linguistic group. The grounds 'race' and 'nationality' may occasionally overlap.[73]

In relation to gender-related claims for refugee status the problematic grounds tend to be political opinion and particular social group. The remaining grounds, race, nationality and religion tend to be rather straightforward. E.g., if a woman of a certain nationality or race is raped, the problem is not determining what 'nationality' or 'race' encompasses in the case but rather whether she was raped 'for reasons of' her nationality. Thus the problems concern finding a nexus between the ground and the

---

a Convention Ground, 2nd Colloquium on Challenges in International Refugee Law, Ann Arbor, Michigan, USA March, 2001, available at http://www.refugee.org.nz/Michigan.html.

[72] UNHCR Handbook, supra n. 20, para. 67.

[73] Ibid., 68-76.

persecution suffered. However, regarding political opinion and particular social group also the interpretation of those concepts tends to be difficult in gender-related claims. These grounds will be elaborated upon below in sections 2.4 and 3.4.

2.2 Gender, sex and gender-related persecution: some terminological remarks

'Gender-related persecution' is the established term for a range of different claims in which gender is a relevant consideration in determining refugee status. It has, however, no legal meaning *per se*.[74] Gender-related persecution can be roughly divided into two categories. First, persecution can be a *type of harm* that is specific to the victim's sex or gender. Second, a person may be persecuted *because of* her gender, or rather, because of deviating from her "attributed gender role".[75] The former category can be called 'gender-specific forms of persecution' or *gender-specific persecution* and the latter 'gender-based reasons for persecution' or *gender-based persecution*.[76] Thus, sexual violence, FGM, and forced abortions are examples of gender-specific forms of persecution. Persecution for reasons related to kinship or because of the status, opinions or activities of relatives; persecution as a consequence of deviating from discriminatory religious or customary laws or mores/customs; abuse by non-state actors against which the state is unwilling or unable to protect them; and grave gender discrimination fall under the category of gender-based grounds of persecution.[77]

---

[74] UNHCR Gender Guidelines, supra n. 4, para. 1.

[75] K. Folkelius & G. Noll, 'Affirmative exclusion? Sex, gender, persecution and the reformed Swedish Aliens Act', 10 *IJRL* 4 (1998), 607, at 611. See also N. Kelly, 'Guidelines for women's asylum claims', 6 *IJRL* 4 (1994) 517, at 518-19; T. Spijkerboer, *Women and refugee status: Beyond the public/private distinction*, Emancipation Council, the Hague, 41.

[76] J. Connors, 'Legal aspects of women as a particular social group', 9 *IJRL Special Issue* (1997) 114, at 120; UNHCR Division of International Protection, 'Gender-related persecution: An analysis of recent trends, 9 *IJRL Special Issue* (1997), 79 at 99. Even though it would be clearer to refer to both categories by the full term, the shorter versions will be used here for reasons of expediency.

[77] For different categorisations in order to identify cases where women can be eligible for refugee status see, e.g., N. Kelly, 'Gender-related persecution: Assessing the asylum claims of women', 26 *Cornell Journal of Int'l Law* 3, (1993) 625, at 642; CIRB Gender Guidelines (1993), supra n. 12, updated in 1996.

It is important to note that the persecution is not *caused by* the victim's sex or gender as the *ultimate factor*.[78] In this context it is important to draw attention to the differences between the terms 'gender' and 'sex' and the implications of such differences for understanding gender-related persecution. 'Gender' refers to "the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another", whereas 'sex' is a biological determination.[79] Thus, a person's *sex* may determine the type of persecution that is chosen by the persecutor (e.g., FGM or rape). It could also be argued that domestic violence is typically a form of persecution determined by the persons *gender*; the type of persecution (beatings or other abuse) may be gender-neutral but the context makes the violence essentially gendered, reinforcing socially attributed (norms) of male dominance of women. In contrast, it is not the sex of a woman persecuted because of her refusal to wear a chador that is the reason for the persecution; she is targeted for persecution because of her actual or attributed resistance to a norm "emanating from the construction of gender in her community."[80]

In sum, "*sex* appears to influence the *choice of a specific persecutory practice*, while the *goals* to be pursued with that practice are affiliated with the *construction of gender* prevailing in the victim's community."[81] In other words, women and men may suffer similar forms of persecution (e.g., torture) for similar reasons (e.g., nationality or race). However, sometimes a woman suffers both a gender-specific type of persecution (e.g., FGM) for gender-based reasons (being a female member of a tribe where FMG is practiced). In other cases a woman may be subject to gender-specific harm (e.g., rape) because of her political opinion or nationality, that is, reasons unrelated to her gender. Finally, a woman may be subject to a gender-neutral form of harm (such as beatings) because of her gender or her attributed gender role, e.g., her failure to comply with social mores concerning the "proper" behaviour of women.

---

[78] Folkelius & Noll, supra n. 75, at 611.

[79] UNHCR Gender Guidelines, supra n. 4, para. 3.

[80] See Folkelius & Noll, supra n. 75, at 611.

[81] Ibid., at 613 (emphasis added).

2.3 Gender-specific forms of persecution

2.3.1 Gender-specific harm as persecution

As mentioned above, gender-specific forms of persecution include various forms of abuse or violence that are specific to the victim's gender. Usually gender-specific forms of persecution pertain to abuse suffered by women, but this does not exclude the possibility of men being subject to similarly gender-specific forms of harm.[82] It should also be recalled that 'persecution' consists of serious harm combined with a lack of state protection, in other words, the "sustained and systematic violation of basic human rights demonstrative of a failure of state protection."[83]

The 1993 Declaration on Elimination of Violence against Women[84] defines 'violence against women' as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Such gender-specific violence includes battering, sexual abuse, dowry-related violence, FGM, rape, and trafficking in women and forced prostitution.[85] Such forms of abuse are regarded as violations of human rights, including the prohibition against torture and inhuman treatment, the right liberty and security of person and the prohibition against discrimination. Therefore, FGM, rape, domestic violence or trafficking for the purposes of forced prostitution or sexual exploitation are regarded as 'violations of basic human rights' for the purposes of defining persecution. In other words, any 'serious harm' or 'violation of basic human rights' that is specific to the (female) gender of the victim can be regarded as a gender-specific form of persecution—provided that it is sustained or systematic and

---

[82] See for example, cases concerning enforced sterilizations of men due to Chinese family planning policies, e.g., *Applicant A v. MIEA*, High Court of Australia 997, 190 CLR 225; *Matter of Chang*, Interim Decision No. 3107, BIA 1987 (USA); and *Chan v. Canada (MEIA)*, [1995] 3 SCR 593.

[83] *Supra* n. 36, and text.

[84] UNGA resolution 48/104, 20 Dec. 1993, UN doc. A/RES/48/104, Article 1.

[85] Supra n. 47, Article 2.

the state is unwilling or unable to provide protection against the abuse (e.g., due to lack of an adequate legal process for sanctioning abusers).[86]

Sometimes also a law can in and of itself be persecutory, particularly where the law emanates from traditional or cultural norms and practices that are not in conformity with international human rights standards. In such cases the claimant must establish that she has a well-founded fear of being persecuted as a result of that law.[87] Further, where the penalty of punishment for non-compliance with, or breach of a certain law or policy is disproportionately severe (and has a gender dimension), it may amount to (gender-related) persecution.[88] If the methods of implementation lead to consequences of a substantially prejudicial nature for the persons concerned (e.g., forced abortions or sterilisations),[89] even such laws or policies that have justifiable objectives (e.g., family planning policies) will amount to persecution.[90] Further, a pattern of discrimination or other less favourable treatment may on cumulative grounds amount to persecution. Discrimination may also consist of the state's failure to extent protection to individuals against certain types of harm. For example, if a state as a matter of practice or policy does not offer protection against serious abuse, such as domestic violence, the discrimination in extending protection which results in serious harm inflicted with impunity, can amount to persecution.[91]

2.3.2 Persecution by non-state actors and lack of state protection

Because of its focus on states' duty to offer protection and/or the failure to offer such protection, international refugee law recognises that the persecutor can be a private

[86] The UNHCR has held that "there is no doubt that rape, and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors." UNHCR Gender Guidelines, supra n. 4, para. 9 and 18. As Goodwin-gill notes, there a little sense in making a list of all known measures of persecution as there are no limits to the perverse side of human imagination. Goodwin-Gill, supra n. 9, 69. See also Aleinikoff, supra n. 71, at 303; *MIMA v. Khawar*, 23 Aug. 2000, para. 160; *Islam & Shah*, [1999] 2 WLR 1015, 1035.

[87] UNHCR Gender Guidelines, supra n. 4, para. 10.

[88] Ibid., para. 12.

[89] Or e.g., serious restrictions to earn one's livelihood, the right to practice one's religion, or access to educational facilities, they may amount to persecution. UNHCR Handbook, supra n. 20, para. 54.

[90] UNHCR Gender Guidelines, supra n. 4, para. 13.

[91] Ibid., para. 15.

person.[92] Thus, it is generally acknowledged that "serious discriminatory or other offensive acts committed by the local populace, or by individuals," can be considered persecution if they are "knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.[93]

The EU draft refugee status directive provides that in evaluating the effectiveness of protection in cases of persecution by non-state actors, it shall be considered whether *reasonable steps* are taken to prevent the persecution or suffering of serious harm, and whether the applicant has *access* to such protection. "Reasonable steps" include operating an effective legal system for the detection, prosecution and punishment of persecutory acts.[94] Somewhat more explicitly, it has been stated that a refugee claimant is not required to risk his/her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.[95] Even though not part of the refugee definition, the doctrine of state responsibility under international law may also provide for some parallel illustrations which may help to identify the proper level of state protection. For example, if abuse by private groups or persons can be attributed to the state, the lack of protection can be inferred, or if the state fails to exercise due diligence in protecting fundamental human rights, the circumstances may provide a basis for a fear persecution within the Convention.[96]

A state cannot, however, be said to have failed its duty to protect if the authorities have not been given an opportunity to respond to a form of harm where it might have been reasonable to expect protective measures.[97] Still, even if a state has prohibited a persecutory practice, e.g., FGM, but continues to condone or tolerate the practice, or is not able to stop the practice effectively, the practice amounts to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices

---

[92] D. E. Anker, 'Women refugees: Forgotten no longer?', in J-Y. Carlier & D. Vanheule (eds.), *Europe and Refugees: A Challenge?*, Kluwer Law International, 1997, 125-156, at 128.

[93] UNHCR Handbook, supra n. 20, para. 65.

[94] EU draft refugee status directive (June 2003), supra n. 17, Article 9A(2). According to Article 9 protection may be granted either by the state or by "parties or organisations controlling the state or a substantial part of the territory of the state." Compare to the original Commission proposal, COM (2001) 510, supra n. 17, Article 9.

[95] As stated, e.g., in *Ward v. Canada (Attorney General)*, 30 Jun. 1993, 2 SCR [1993] 689, at 724.

[96] See, e.g., Goodwin-Gill, supra n. 9, 73.

will thus not in itself be sufficient to determine that an individual's claim to refugee status is not valid.[98]

Thus, when determining whether the state has failed to protect a concerned person, one should consider whether the person has sought and been denied protection by the authorities, whether the authorities have (had) knowledge of the harm the person may face and not done anything to protect him/her, or whether there are reasons to believe that it would be meaningless to seek protection from the authorities, e.g., because persons in similar situations have not been protected or because the authorities systematically fail to apply existing laws.[99] Before it can be said that a claimant of refugee status can access effective state protection, that protection must be "meaningful, accessible, effective, and available to all regardless of sex, race, ethnicity, sexual orientation, disability, religion, class, age, occupation, or any other aspect of identity." Further, it should be noted that in some cases there may be protection in theory, but not in practice.[100]

2.4 Gender and the grounds for persecution

2.4.1 Gender and the category of 'particular social group'

2.4.1.1 Defining a 'particular social group'

The original aim of the particular social group-category was arguably protection of certain known categories of refugees from known forms of harm. What is less clear, however, is whether the concept was intended to be applied to at the time unidentified groups from new forms of persecution.[101] It has been argued that the category 'particular social group' was intended to be an all-encompassing one which would include grounds or and types of persecution that could arise in the future. The intention would thus have been to protect individuals from future injustice. Thus some

---

[97] Hathaway, supra n. 21, 130.

[98] UNHCR Gender Guidelines, supra n. 4, para. 11.

[99] N. Kelly, 'Guidelines for women's asylum claims', 6 *IJRL* 4 (1994) 221, at 222-3.

[100] Haines, supra n. 40, at 333.

[101] Goodwin-Gill, supra n. 9, 46-7; Hathaway, supra n. 21, 159.

have argued that the category 'particular social group' is wider than the other grounds of persecution and many situations that fall under that category are also covered by other grounds, such as race, nationality or religion.[102] Even though this approach has been rejected as an "all-embracing safety-net" and as such going too far,[103] the notion of a particular social group has been said to possess "an element of open-endedness potentially capable of expansion in favour of a variety of different classes susceptible to persecution."[104] Thus, "the term particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[105] A particular social group usually encompasses persons with a similar background, habits and social status.[106] In determining whether a group constitutes 'a particular social group' attention should be given to factors such as common ethic, cultural and linguistic origin, education, family background, economic activity, shared values, outlook, and aspirations.[107]

According to Hathaway the notion of 'a particular social group' includes 1) groups defined by an innate, unalterable characteristic; 2) groups defined by their past temporary or voluntary status (which they are unable to change); and 3) existing groups defined by volition, as long as the purpose of the group is so fundamental to their human identity that they cannot be required to abandon it. Thus, a particular social group should be definable by reference to "a shared characteristic of its members which is fundamental to their identity."[108] Human rights norms may help to identify characteristics deemed so fundamental to human dignity that ought not to be compelled to forego them.[109] This approach has been called the "protected characteristics" approach, and has dominated decision-making in common law

---

[102] A. C. Helton, 'Persecution on account of membership in a social group as a basis for refugee status', 15 Columbia Human Rights Law Review 39 (1983), at 45. See also A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I Refugee Character, Sijthoff, 1966, 219-20.

[103] Hathaway, supra n. 21, 158-9; UNCHR PSG Guidelines, supra n. 71, para. 2.

[104] Goodwin-Gill, supra n. 9, 47-8.

[105] UNCHR PSG Guidelines, supra n. 71, para. 3.

[106] UNHCR Handbook, supra n. 20, para. 77.

[107] Goodwin-Gill, supra n. 9, 47.

[108] Hathaway, supra n. 21, 161.

[109] Aleinikoff, supra n. 71, at 294.

jurisdictions.[110] Alternatively, in some common law jurisdictions the so-called "social perception" approach examines whether or not a group shares a common characteristic which makes them a cognisable group or sets them apart from society at large.[111] In civil law jurisdictions the particular social group ground is generally less well developed.

In its recent guidelines on 'membership of a particular social group' the UNHCR offers its definition of a 'particular social group'. In the UNHCR's definition the two above-mentioned approaches are reconciled. Thus a particular social group is

> "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."[112]

This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.[113] If a claimant alleges a social group that is based on a characteristic determined to be neither unchangeable nor fundamental, it must be determined whether the group is nonetheless perceived as a cognisable group in that society.[114]

It should be noted that a particular social group cannot be defined "exclusively by the persecution that members of the group suffer of by a common fear of being persecuted."[115] Nevertheless, persecutory action toward a group may be a relevant

---

[110] UNCHR PSG Guidelines, supra n. 71, para. 5. For further discussion see, infra section 3.4.

[111] Ibid., para. 7. This approach has been used in Australia, see, e.g., *Applicant A. and Another v. MIEA and Another*, High Court of Australia (1997) 190 CLR 225; 142 ALR 331.

[112] UNCHR PSG Guidelines, supra n. 71, para. 11.

[113] Ibid., para. 12.

[114] Ibid., para. 13.

[115] Ibid., para. 14.

factor in determining the visibility of a group in a particular society.[116] Also, a fundamental human right (the exercise of which is threatened by the persecution) can constitute a unifying characteristic of a social group if the society regards those persons as a group because of their common wish to exercise a certain human right.[117] Further, there is no requirement to prove that every member of a particular social group has a 'well-founded fear of persecution' in order to establish a 'particular social group' in accordance with the Refugee Convention.[118] Thus, as Aleinikoff sums up, the definition of a 'social group' must describe a group that is perceived as a distinct group in a society where the shared characteristics of the group reflect the reason for the persecution.[119] Furthermore, there is no requirement that the group must be "cohesive." In other words, it need not be shown that the members of a particular social group know each other or associate with each other.[120] In addition, the size of a group is not a relevant criterion in determining whether a group is a 'particular social group' under the Refugee Convention.[121]

Finally, it should be noted that "mere membership of a particular social group will not normally be enough to substantiate a claim for refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."[122] Also, one or more Convention grounds may overlap each other, depending on the circumstances of each individual case.[123]

---

[116] *Summary of Conclusions: Membership of a particular social group*, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 6.

[117] Aleinikoff, supra n. 71, at 293-4 (quoting *Applicant A v. MIMA*, para. 246).

[118] Aleinikoff, supra n. 71, at 288; UNCHR PSG Guidelines, supra n. 68, para. 17; *Summary of Conclusions: Membership of a particular social group*, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 7.

[119] Aleinikoff, supra n. 71, at 289.

[120] UNCHR PSG Guidelines, supra n. 71, para. 15: *Summary of Conclusions: Membership of a particular social group*, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 4.

[121] UNCHR PSG Guidelines, supra n. 71, paras. 18-19.

[122] UNHCR Handbook, supra n. 20, para. 79; UNCHR PSG Guidelines, supra n. 71, para. 16.

[123] UNHCR Handbook, supra n. 20, para. 77; *Summary of Conclusions: Membership of a particular social group*, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 3.

2.4.1.2 Women as a particular social group[124]

Gender-based groups are typical examples of "social subsets" defined by an innate and unchangeable characteristic.[125] As women are identified as a group in society, they are often subject to different treatment and standards in some countries.[126] In accordance with the UNHCR's definition of a particular social group, 'women' both share a common characteristic (their gender) which is both innate and unchangeable, and are usually perceived as a group by society. The UNHCR Executive Committee recognised already in 1985 that "States […] are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2)" of the Refugee Convention.[127] The Executive Committee reiterated this position in 1993 in relation to persecution through sexual violence.[128] Accordingly, in its recent guidelines on membership of a particular social group, the UNCHR states that sex falls within the ambit of the social group category, "with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently from men."[129]

As was noted above, there is no requirement of cohesiveness in the UNCHR definition of a social group. Thus 'women' may constitute a particular social group under certain circumstances, whether or not they associate with one another based on

---

[124] These comments aim at identifying the current, gender-sensitive interpretation. As the development of the concept has received considerable attention elsewhere those issues will not be considered here. See, e.g., D. L. Neal, 'Women as a social group: Recognizing sex-based persecution as grounds for asylum', 20 *Columbia Human Rights Law Review* (1988), 203; M. Fullerton, 'A comparative look at refugee status based on persecution due to membership in a particular social group', 26 *Cornell Journal of International Law* 3 (1993), 505; N. Kelly, 'Gender-related persecution: assessing the asylum claims of women', 26 *Cornell Journal of International Law* 3 (1993), 625; A. Macklin, 'Refugee women and the imperative of categories', 17 HRQ (1995), 213; and Connors, supra n. 76.

[125] Hathaway, supra n. 21, 162.

[126] UNCHR Gender Guidelines, supra n. 4, para. 30.

[127] Executive Committee Conclusion *No. 39 (XXXVI) – 1985 Refugee women and international protection*, UN doc. A/AC.96/673, para. 115(4), para. (k).

[128] Executive Committee Conclusion *No. 73 (XLIV) 1993 – Refugee protection and sexual violence*, UN doc. A/AC.96/821, para. 21, para. (d).

[129] UNCHR PSG Guidelines, supra n. 71, para. 12.

that shared characteristic.[130] The size of a social group has occasionally been used as a reason for not recognising 'women' as constituting a social group. The UNCHR guidelines put an end to such restrictions: "the purported size of the social group in not a relevant criterion in determining whether a particular social group exists."[131] The UNHCR also notes that even though 'women' have been recognised as a particular social group, this does not mean that all women would be eligible for refugee status;[132] a claimant must fulfil all the other criteria in the refugee definition.

2.4.2 Political opinion and religion

The traditional understanding of persecution for reasons of political opinion implies that the person concerned holds opinions that are not tolerated by the authorities, for example, opinions that are critical of the government's policies or methods. Further, the person concerned must fear persecution because the authorities have knowledge of such opinions or such opinions are attributed by the authorities to the person concerned. In situations where the person has not expressed his opinions but it can reasonably be expected that the authorities will, sooner or later, become aware of his opinions, and that as a result the person will come into conflict with the authorities, the person can be considered to have a fear of persecution for reasons of political opinion.[133] A political opinion can also be implicit in conduct. In other words, action which is perceived to be a challenge to a governmental authority is considered to be an expression of a political opinion.[134]

The image of the typical refugee as a person fleeing persecution for his or her direct involvement in political activities does, however, not always correspond to the reality of the experiences of women in some societies. Women are less likely than men to be involved in high profile political activities and are instead often involved in political activities that reflect dominant gender roles, such as nursing or cooking for rebel soldiers, or preparing and distributing leaflets. The problem is that such activities are

---

[130] Ibid., para. 15; UNCHR Gender Guidelines, supra n. 4, para. 31.

[131] UNCHR PSG Guidelines, supra n. 71, para. 18; UNCHR Gender Guidelines, supra n. 4, para. 31.

[132] UNCHR PSG Guidelines, supra n. 71, para. 19.

[133] UNHCR Handbook, supra n. 20, paras. 80, 82.

[134] Hathaway, supra n. 21, 152-57; Goodwin-Gill, supra n. 9, 49.

not always recognised as political. Women are also frequently being targeted, not because of their own opinions but because of the political opinions or activities of their relatives. Because women's imputed or real political activities or opinions often differ from those of men, they tend to be misunderstood. Similarly, persecution on the basis of religion may be differently experienced by men and women. For example, gravely discriminatory treatment due to failure to comply with religious dress codes may well be construed in terms of freedom of religion. For some reason such claims have, however, been usually construed in terms of political opinion, not religion.

Canada was the first country to adopt guidelines for determination of gender-related claims for refugee status. In these guidelines the problems relating to women's asylum claims based on political opinion were acknowledged and it was held that women who oppose institutionalised discrimination of women, or express views of independence from male social or cultural dominance in their societies, may be found to fear persecution for reasons of imputed political opinion.[135] Further, the guidelines emphasise that when interpreting 'political opinion' it is important to take into consideration that in a society where women have a subordinate status and the authority exercised by men over women results in a general oppression of women, their political protest activism does not always take the same form as men's. In addition, the political nature of oppression of women in a context of religious laws and rituals must be recognised. In a society where the governing religion requires certain behaviour only of women, the authorities can perceive contrary behaviour as evidence of an unaccepted political opinion.[136] Subsequently also other countries have adopted a more gender-sensitive reading of 'political opinion'[137] and for example, feminism, refusal to wear a *chador* and participate in Islamic functions, resistance to

[135] CIRB *Gender guidelines* 1993, *supra* n. 12, 282.

[136] Ibid.

[137] 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, reprinted in 7 *IJRL* (1995), 700-19), 10-16; *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000, (hereafter *UK Gender guidelines* 2000), 33-38, *Riktlinjer för utredning och bedömning av kvinnors skyddsbehov*, Migrationsverket, Sweden, 25 Apr. 2002, 13-17. See also von Sternberg's discussion of US and Canadian case law, supra n. 10, 176-188.

FGM, as well as resistance to mandated female subservience and objection to husband's physical abuse have been classified as political opinions.[138]

Nine years after the adoption of the Canadian guidelines the UNHCR issued its own guidelines on gender-related persecution. According to these guidelines 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."[139] The UNHCR continues to note that such opinions may include an opinion relating to gender roles as well as "non-conformist behaviour" which leads the persecutor to impute a political opinion to the person concerned. Importantly, the guidelines state that it is the context of the case that determines whether an opinion or activity is of a political or non-political nature. The general rule is that a claim for refugee status on the basis of political opinion presupposes that the claimant "*holds or is assumed to hold* opinions not tolerated by the *authorities or society*, which are critical of their *policies, traditions or methods*."[140]

Women's gender-related claims tend, however, to be subsumed under the particular social group category, sometimes also in situations where 'political opinion' would more accurately reflect the reality of the situation. This is arguably partly due to the abovementioned problems caused by a restricted view of political opinion and a failure to appreciate that women's political activism or opinions may take different forms than that of men. It has been argued that usage of the social group ground may deny the meaningfulness of women's experiences, and the genuine political character of women's actions, as well as marginalize women's asylum claims.[141] It should, however, be noted the grounds political opinion and membership in a particular social group do not exclude each other, and may often overlap, for example, feminism or resistance against dominant gender roles can seen as political opinion and a woman holding such opinions as a member of a particular social group.

---

[138] Connors, supra n. 76, at 121-22. See also *Olympia Lazo-Majano v. INS*, 813 F.2d 1432 (Court of Appeal 9th Cir. 1987).

[139] UNCHR Gender Guidelines, supra n. 4, para. 32. Compare to wording in *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689; and Goodwin-Gill, 49.

[140] UNCHR Gender Guidelines, supra n. 4, para. 32. (Emphasis added).

2.5 Summary

The recently adopted UNHCR gender guidelines provide for an internationally accepted framework for interpreting the refugee definition in gender-related claims for refugee status. The guidelines clarify the position on three main elements of the refugee definition that have been particularly problematic in gender-related asylum claims. First, the guidelines affirm the position of the overwhelming majority of academics that, in the absence of an accepted definition of 'persecution', international human rights standards should guide the determination of what treatment amounts to 'persecution' for the purposes of obtaining refugee status. Further, the UNHCR guidelines clearly state that women may be subject also to forms of harm that are specific to their sex, and state that there is no doubt that gender-related violence such as rape, FGM, or domestic violence may amount to persecution—whether such acts are perpetrated by states or private actors—where such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable to, offer effective protection.[142] Also severe punishments for women who transgress social mores may amount to persecution, as will also implementation of family planning polices through the use of forced abortions and sterilisations—even if they are carried out in the context of a legitimate law.[143]

Second, in addition to affirming the already largely accepted position on gender-related forms of persecution and persecution by non-state actors, the UNHCR guidelines clarify the position on one of the most difficult issues in relation to gender-related claims for refugee status, namely the questions of nexus to a persecution ground. Significantly, the guidelines clarify the position as to the proper test for linking the persecution to a Convention ground, as they clearly state that the Convention ground must be a "*relevant contributing factor*, though it need not be shown to be the sole, or dominant, cause."[144] This clarification is very welcome, as the stance on the nexus issue remains unclear in many jurisdictions. Furthermore, the

---

[141] Spijkerboer, T., *Women and refugee status: Beyond the public/private distinction*, Emancipation Council, The Hague, 1994, 41; Crawley, supra n. 49, 144-145.

[142] UNHCR Gender Guidelines, supra n. 4, paras. 9, 19.

[143] *Ibid.*, paras. 12-13.

[144] *Ibid.*, para. 20 (emphasis added).

guidelines state that in cases where there is a risk of being persecuted by non-state actors, and the reason of persecution is unrelated to a Convention ground, but the unwillingness or inability of the state to provide protection is for reasons of a Convention ground, nexus is established. Conversely, nexus is also established where the lack of protection is not related to a Convention ground, but the persecution at the hands of non-state actors is motivated by such a ground.[145] Thus, the proper understanding of the causal link in non-state actor-cases could be illustrated as follows:

	Failure of state protection for reasons of a Convention ground	**Failure of state protection unrelated to a Convention ground**
Persecution by non-state actor(s) for reasons of a Convention ground	Nexus	Nexus
Persecution by non-state actor(s) unrelated to a Convention ground	Nexus	No nexus

Third, the UNHCR gender guidelines affirm that each Convention ground of persecution must be given a gender-sensitive interpretation.[146] The guidelines note that female claimants often face persecution because a Convention ground is attributed or imputed to them, and that in many gender-related claims persecution may feared for reasons related to several Convention grounds.[147] The guidelines state that where a woman fails to conform to roles assigned to them by religion, or refuses to abide by religious norms of behavioural codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. Alternatively, opinions as to gender roles, or non-conformist behaviour that leads the persecutor to impute a certain political opinion to the person in question, may constitute a political opinion. Thus, political opinion should be understood "in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society or policy may be engaged." Whether an opinion is 'political' or not should always be determines by the context of the case; thus, there are no inherently political or non-political activities.[148] In its definition of a particular

[145] *Ibid.*, para. 21. See also UNHCR PSG guidelines, supra n. 71, paras. 20-23.

[146] *Ibid.*, para. 22. See also Haines, supra n. 40, at 342.

[147] UNHCR Gender Guidelines, paras. 22-23.

[148] *Ibid.*, paras. 25-26, 32.

social group, the UNHCR guidelines on membership of a particular social group reconcile the two main approaches to the social group issue, that is the 'protected characteristics' approach and the 'social perception' approach.[149] The gender guidelines restate the definition of a particular social group found in the UNHCR guidelines on membership of a particular social group, and reaffirm that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."[150] The social perception approach has been criticised as too far going, and some commentators have argued that by reconciling the two above-mentioned approaches the guidelines are not faithful to the discussions at the UNHCR Global Consultations.[151] Still, bearing in mind the inconsistent application of the social group category formulation of a common, analytical standard should be seen as welcome. From the perspective of women's asylum claims the UNCHR definition of a particular social group should be seen as a positive development.

---

[149] UNHCR PSG guidelines, supra n. 71, 10-11.

[150] UNHCR Gender Guidelines, supra n. 4, para. 29-30. See also UNHCR PSG guidelines, supra n. 71, para. 12.

[151] James Hathaway, Law of Refugee Status, *seminar 13-14 Oct. 2003*, Helsinki. On the contrary see K. Musalo, 'Revisiting social group and nexus in gender asylum claims: A unifying rationale for evolving jurisprudence', 54 *DePaul Law Review* (2003) 777, at 804-807; and Aleinikoff, supra n. 71, at 294-301.

3 Interpretation of the refugee definition in gender-related cases by national courts

> "[A]s in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning […] without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. […] In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning."[152]

3.1 Introductory remarks

3.1.1 Gender considerations in national asylum policies and procedures

In the wake of the UNHCR *Guidelines on Protection of Refugee Women* which were issued in 1991, a number of states have adopted guidelines or other policy papers concerning asylum claims of women. Canada was the first state to do so in 1993.[153] The aim of the Canadian Guidelines was promote a consistent approach in decision-making, in turn leading to a coherent body of jurisprudence.[154] The Canadian Guidelines focus mainly on two substantial issues, claims involving women who have transgressed religious laws or social mores and claims involving domestic violence, as well as various problems relating to procedure. In 1996 the Guidelines were updated in order to include recent jurisprudential developments, most notably *Canada (Attorney General) v. Ward*.[155] In the USA a memorandum concerning asylum claims of women was issued in 1995, aimed at providing asylum officers with "guidance and

---

[152] *R. v. SSHD, ex parte Adan; R v. same, ex parte Aitseguer*, House of Lords (UK) 19 Dec. 2000, [2001] 2 WLR 143, per Lord Steyn.

[153] CIRB Gender Guidelines, supra n. 12.

[154] N. Mawani, 'Introduction to the Immigration and Refugee Board Guidelines on Gender-related persecution', 5 *IJRL* 2 (1993), 240-47, at 242-43.

[155] *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 Nov. 1996 (hereafter IRB Gender Guidelines 1996).

background on adjudicating bases of women having asylum claims based whole on in part on their gender."[156] Also the US guidelines deal both with procedural issues and the substantial issues relating to the legal analysis of claims. Subsequent to the much-publicised decision in *Matter of R. A.* the INS drafted proposed amendments to the asylum regulations.[157] The aim of the proposed rules was to clarify issues relating to the refugee definition, particularly regarding membership in a particular social group, as well as questions relating to past persecution. However, due to the change of administration these regulations have not yet entered into force and thus the current US policy concerning gender-based claims for refugee status remains somewhat unclear. The UK Immigration Appellate Authority published their extensive gender guidelines in 2000,[158] and the Swedish Migration Board issued their gender guidelines, which focus on procedural issues, in 2002.[159] Gender guidelines have also been issued in Australia,[160] and other states have issued other policy instruments relating to gender or female asylum seekers.[161] Neither Germany nor Finland has

---

[156] Memorandum: *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, p. 1 (hereafter INS Gender Guidelines). Also reprinted in 7 *IJRL* (1995), 700-19.

[157] INS Proposed rules, Asylum and withholding definitions, 7 Dec. 2000, US Federal Register, Vol. 65, No. 236, *65 FR 76588*. The proposed rules have so far not been finalized by the Bush Administration.

[158] *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000 (hereafter IAA Gender Guidelines).

[159] *Riktlinjer för utredning och bedömning av kvinnors skyddsbehov*, [Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection], Migrationsverket, Praxisenheten, Sweden, 2002 (hereafter Swedish Gender Guidelines). English version available at www.migrationsverket.se. It should also be noted that the Swedish Aliens Act was amended in 1997 to provide a residence permit due to need of protection, but not refugee status, to persons who have a well-founded fear of persecution on account of sex or homosexuality. For a critique of the provision see Folkelius & Noll, supra n. 75.

[160] *Refugee and Humanitarian Visa Applicants—Guidelines on Gender Issues for Decision Makers*, Department of Immigration and Multicultural Affairs, Jul. 1996.

[161] E.g., *Work Instruction no. 148: Women in the Asylum Procedure*, Dutch Immigration and Naturalisation Service (IND), translation reprinted in T. Spijkerboer, *Gender and Refugee Status*, Ashgate, 2000; *St. meld. Nr. 17 (2000-2001) Asyl- og flyktingpolitikken i Norge* [Asylum and refugee policy in Norway], http://odin.dep.no/krd/norsk/publ/stmeld/016001-040005/index-inn001-b-n-a.html, and *Nyhetsbrev om Norsk flykting- og innvandringspolitikk*, Nr. 8, 20 Aug. 2001, available at http://odin.dep.no/krd/norsk/publ/periodika/nb/016081-230003/index-dok000-b-n-a.html, site visited 5 Dec. 2003. Article 17(2) of the 1998 Swiss Asylum Act entrusts the Swiss Federal Council to enacting additional procedural provisions that must take into account the specific nature of women and minors. In addition, the definition of persecution in Article 3(2) of the Asylum Act has been amended by adding a reference to gender ("motives of flight specific to women shall be taken into account.") See W. Kälin, 'Gender-related persecution', in V. Chetail & V. Gowlland-Debbas, *Switzerland and the International Protection of Refugees*, Kluwer Law International, 2002, 111, 112-13.

issued gender guidelines. In Germany, there was a motion (in Parliament) calling for a legal amendment to include gender-specific persecution as a ground for granting asylum in 2000,[162] and the new immigration law that was passed in 2002, included both persecution by non-state actors and gender-related persecution as grounds for granting refugee status. This law was, however, invalidated by the Federal Constitutional Court in December 2002 due to defective Parliamentary procedures. A new—substantially similar—legislative proposal was introduced by the government in the beginning of 2003.[163] In Finland, the Government Bill for a new Aliens Act[164] mentions female asylum seekers and briefly elaborates on the interpretation of the refugee definition in cases of gender-related persecution. Further, the Directorate of Immigration has issued guidelines concerning interviewing minor asylum seekers which include a section concerning domestic violence and sexual abuse.[165] In addition, the Advisory Board on Refugee and Migration Issues has stated that a gender-perspective should be included in all societal decision making. The aim is that in the planning, preparation and actual decision making attention should be given to the eventual effects the decision in question may have particularly on the position of women.[166]

---

[162] *Entschlieszungsantrag 14/1083, Bundesministerium des Innern, A 3 – 125 410/2b, 23 Jun. 2000, Stellungnahme fuer die Beratung des Antrages der Abgeordneten Patra Blaess u.a. und der Fraktion der PDS, Anerkennung geschlechtsspezifischer Fluchtursachen als Asylgrund – BT –DRs. 14/1083- im Rechtsausschuss des Deutschen Bundestages*, as cited in ECRE, *Non-state Agents of Persecution and the Inability of the State to Protect—The German Interpretation*, ECRE, London, Sept. 2000, p.17.

[163] Pressmitteilung der Bundesregierung, *Zuwanderungsgesetz: Gesetzgebungsverfahren beginnt erneut*, Berlin 15 Jan. 2003, available at http://www.bafl.de/template/index_asylrecht.htm, site visited 27 Nov. 2003. For text of the proposed law see http://www.bafl.de/template/migration/zuwanderungsgesetz/zuwanderungsgesetz_entwurf_2003_01_15.pdf. See also See BverfG U. v. 18 Dec. 2002, 2 BvF 1/02—2 BvF 1/02 -, 25 S., M 2862, available at http://www.asyl.net, site visited 27 Nov. 2003. See also *Asylmagazin* issues *1-2/2003*; *3/2003*; *4/2003*; *5/2003*; *6/2003; 7-8/*2003; 10/*2003*; *11/2003*; and *U.S. Committee for Refugees World Refugee Survey 2003 – Germany*, June 2003, available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd, site visited 25 Nov. 2003.

[164] *Hallituksen esitys Eduskunnalle ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi* [Government proposal for Aliens Act and some related acts], HE 28—2003, pp. 78, 177-178.

[165] Ulkomaalaisvirasto, *(Yksintulleen) alaikäisen turvapaikanhakijan haastatteluohjeistus* [Guidelines for interviewing separated minor asylum claimants], November 2001, pp. 32-34.

[166] *Työhallinnon julkaisu 178: Maahanmuuttajanaiset Suomessa* [Publication 178: Migrant women in Finland], Pakolais- ja siirtolaisuusasiain neuvottelukunta [Advisory Board on Refugee and Migration Issues], Työministeriö [Ministry of Labour] 1997, 54.

Most of the national gender guidelines or policy papers include provisions relating to procedural questions or problems and evidentiary considerations that are particular to women's asylum claims. The main focus of some guidelines (e.g., the Swedish Gender Guidelines) is on procedural and evidentiary matters. It has been recognised that women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy, e.g., because women are reluctant to disclose their experiences of sexual violence in order to avoid dishonouring their families or disclosing their own shame, or because women from cultures where may men do not share details of their political activities with their spouses, mothers or daughters, may not be aware of such details. Awareness concerning problems caused by 'Post-traumatic Stress Disorder', 'Rape Trauma Syndrome', or 'Battered Woman Syndrome' has increased.[167] The availability of female asylum officers, interpreters and legal representatives in gender-related cases has been emphasised in some guidelines, and attention has been drawn to the fact that women should be given opportunity to be interviewed on their own, outside the hearing of other family members. It has been stressed that women should be invited to make independent claims for asylum.[168] Some guidelines have also mentioned that body language may be interpreted in many different ways and that this may cause misunderstandings. Also certain terms, such as 'rape' or 'assault' may have different meanings or cultural connotations in different countries. Further, terms such as 'torture' or 'persecution' may be unfamiliar to the asylum seeker, or a female asylum seeker herself may not understand, e.g., that the term 'torture' may include rape or FGM.[169] Finally, some guidelines draw attention to the fact that delay in filing an application for refugee status or revealing full details will not necessarily be due to lack of credibility on part

---

[167] IRB Gender Guidelines 1996, supra n. 155, p. 15. See also INS Gender Guidelines, supra n. 156, pp. 5-7; IAA Gender Guidelines, supra n. 158, paras. 5.11, 5.15, 5.21, 5.27; Swedish Gender Guidelines, supra n. 159, p. 5, 11-12, 14; Sisäasiainministeriö [Ministry for the Interior, Finland], *Turvapaikkaohje* [Asylum guidelines], 17 Jan. 2003, Dnro SM-2003-124/Ka-23, 4.

[168] IAA Gender Guidelines, supra n. 158, paras. 5.3, 5.6, 5.9, 5.26-5.28, 5.30-5.33; Swedish Gender Guidelines, supra n. 159, p. 7-8.

[169] INS Gender Guidelines, supra n. 156, p. 5. See also IAA Gender Guidelines, supra n. 158, paras. 5.23, 5.25, 5.37; Swedish Gender Guidelines, supra n. 159, p. 11, 14; Finnish guidelines on minor asylum seekers, supra n. 165, p. 31-33.

of the claimant. For example, torture or sexual violence may produce such profound feelings of shame that they become a major obstacle to disclosing such abuse.[170]

Whereas the guidelines issued in common law countries tend to be extensive and comprehensive, some of the guidelines issued in civil law countries have been brief, and non-comprehensive.[171] Even though commentators have received the various gender guidelines enthusiastically, some weaknesses have been identified. For example, the non-binding character of the guidelines has been seen as problem. Further, some have argued that there is a risk that gender guidelines further reinforce the distinction between 'normal cases' and 'women's cases'. Some of the guidelines also give expression to notions of western superiority regarding progress and emancipation.[172] While it must be recognised that gender guidelines are not free from problems, they provide illustrations of differences in policies relating to gender in the refugee context, and are thus highly useful for the purposes of this study.

3.1.2 Determination of refugee status by States

While the Refugee Convention defines refugees and provides for standards for their protection, it remains silent about procedures for determining refugee status. Even though the UNHCR is a considerable authority when it comes to interpreting the Refugee Convention, its guidelines are intended to provide "legal interpretative guidance"[173] for governments, and many states accept direct or indirect participation by UNHCR in procedures for the determination of refugee status, the Refugee Convention leaves states the choice of means regarding implementation of the Convention at the national level.[174] In some countries the principle of asylum for refugees is expressly acknowledged in the constitution, while in others ratification of the Refugee Convention and/or Protocol has direct effect in national law. Further, in some countries states follow up their acceptance of international obligations such as those in the Refugee Convention by enacting specific refugee legislation or by

---

[170] IAA Gender Guidelines, supra n. 158, para. 5.43.

[171] Spijkerboer, supra n. 159, 173-76.

[172] Ibid., 176-80.

[173] UNHCR Gender Guidelines, supra n. 4, para. 6.

[174] Goodwin-Gill, supra n. 9, 33-34.

adopting appropriate administrative procedures.[175] In addition to procedures relating to asylum applications made in a country or at the borders, most states also have different procedures for recognising persons residing outside the concerned country as refugees, e.g., the 'Overseas Refugee Program' in the US,[176] or quota refugees in Finland, Sweden and Germany. Such procedures will not be considered here.

The United States Immigration and Nationality Act provides for a definition of a refugee, which adopts the wording offered by the Refugee Convention.[177] The Immigration and Nationality Act also provides for a set of procedures applicable to asylum seekers.[178] The (Bureau of) Citizenship and Immigration Services (BCIS, the former Immigration and Naturalization Service, INS) is the first instance examining asylum claims. Decisions by asylum officers of the BCIS may be appealed to an Immigration Judge. In cases where the applicant has been arrested, the Immigration Judge is the first instance decision-maker. A decision by an Immigration Judge can in turn be appealed to the Board of Immigration Appeals (BIA), and decisions by BIA further to a Court of Appeals. Finally, decisions by Courts of Appeals may be appealed to the Supreme Court of the US.

The new Canadian Immigration and Refugee Protection Act entered into force 2002. That act provides that refugee protection is conferred upon a person who is a "Convention refugee" or a person in need of protection. The definition of a Convention refugee restates the refugee definition of the Refugee Convention.[179] In Canada the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) is the first instance body determining asylum claims. Before that, Canada Immigration (CIC) determines who is eligible to have his/her claim heard by the IRB.

---

[175] Ibid., 21-22.

[176] Immigration and Nationality Act, Section 101(a)(42), 8 USC §1101(a)(42), see e.g., K. Musalo, J. Moore & R. A. Boswell, *Refugee Law and Policy—A Comparative and International Approach*, 2nd ed., Carolina Academic Press, 2002, 67-78.

[177] Immigration and Nationality Act, Section 101(a)(42), 8 USC §1101(a)(42), available at http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-21?f=templates&fn=document-frame.htm#slb-act. See also Musalo, Moore & Boswell, supra n. 176, 66; D. Vanheule, 'United States', in Carlier et.al., supra n. 10, 609, at 610-616.

[178] See Immigration and Nationality Act, Section 208.

[179] Immigration and Refugee Protection Act, Sections 95, 96, available at http://laws.justice.gc.ca/en/I-2.5/index.html.

A negative decision by the RPD can be appealed (both by the applicant and the Minister) to the Refugee Appeals Division of the IRB, and further to the Federal Court. Finally, a decision of the Federal Court can be appealed to the Supreme Court of Canada.[180]

Although the Refugee Convention and Protocol are not formally incorporated into UK law, the rules adopted for the implementation of the 1971 Immigration Act have traditionally referred to the Convention definition and the context of applications for entry, extensions of stay, and against deportation. The Asylum and Immigration Appeals Act 1993 does not define refugees as such but refers to the definition found in the Refugee Convention.[181] In the UK, the first decision on an asylum application is taken by the Immigration and Nationality Directorate (IND) of the Home Office. This decision may be appealed to the Immigration Appellate Authority (IAA) where cases are heard by a special adjudicator. Both the asylum seeker and the Home Office may ask for leave to appeal against the special adjudicator's decision to the Immigration Appeals Tribunal (IAT). If leave of appeal is granted, and the IAT rejects the appeal, a further application for leave to appeal to the Court of Appeal may be made on a question of law. Finally, the decision of the Court of Appeal may be further appealed to the House of Lords.[182]

The Federal Republic of Germany has both constitutional and enacted law provisions benefiting refugees. Thus, in Germany an asylum seeker may be granted 'political asylum' in accordance with Article 16a of the German Constitution,[183] or protection

---

[180] Immigration and Refugee Protection Act, Section 110. The sections relating to the Refugee Appeals Division have not yet been proclaimed in force. See also J. Donald & D. Vanheule, 'Canada', in Carlier et. al., supra n. 10, 165, at 167-176; Rousseau, C., Crepeau, F., Foxen, P. & Houle, F., 'The complexity of determining refugeehood: A multidiciplinary analysis of the decision-making process of the Canadian immigration and refugee board', 15 *Journal of refugee studies*, 1 (2002), 43.

[181] Goodwin-Gill, supra n. 9, 23. See Also Immigration Rules (HC 395) 23 May 1994, para. 334.

[182] See ELENA, *Research Paper of Non-state Agents of Persecution*, 1998—updated 2000, 56-57; the Immigration and Asylum Act of 1999; and the Nationality, Immigration and Asylum act of 2002; Lambert (1997), supra n. 10, 17-19; 38-41; 67-71; D. Vanheule, 'United Kingdom', in Carlier et.al., supra n. 10, 563, at 564-569.

[183] *Grundgezetz für die Bundesrepublik Deutschland*, 23 May 1949, as amended 26 Jul. 2002 (available at http://www.bundestag.de/gesetze/gg/gg_07_02.pdf, site last visited 5 Dec. 2003), Article 16a, according to which persons persecuted on political grounds enjoy the right of asylum.

from *refoulement* in accordance with Section 51(1) of the Aliens Act.[184] In both cases applicants enjoy refugee status under the Refugee Convention, there is, however a difference in types of residence permit.[185] Section 51(1) of the Aliens Act is phrased in the terms of the Refugee Convention (Article 33), whereas Article 16a of the Constitution does not refer to the wording of the Refugee Convention. Still, the Federal Constitutional Court has decided that the concept of political persecution in accordance with Article 16a of the Constitution must be determined in accordance with the Refugee Convention.[186] The competent German authority for refugee status determination is the Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*). An appeal against a negative decision by the Federal Office may be made to an Administrative Court (*Verwaltungsgericht*). A further appeal against a decision by an Administrative Court may be made to a Higher Administrative Court (*Oberverwaltungsgericht* or *Verwaltungsgerichthof*). Finally, a decision by the Higher Administrative Court may be appealed to the Federal Administrative Court (*Bundesverwaltungsgericht*). Where the asylum seeker believes that a violation of a provision of the Constitution may reasonably be alleged, the case may be appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*).[187]

The Swedish Aliens Act covers matters relating to asylum and refugee status.[188] Chapter 3, Section 2 provides for a definition of refugee, which corresponds to the wording of the Refugee Convention. Chapter 3, Section 3 provides for a form of subsidiary protection for persons in need of protection, including persons who on

---

[184] *Ausländergezetz* (AuslG 9 Jul. 1990), available at http://bundesrecht.juris.de/bundesrecht/auslg_1990/index.html, site last visited 5 Dec. 2003; K. Hullmann, 'Germany', in Carlier et. al., supra n. 10, 225, at 232-234. See also Asylum Procedure Act, *Asylverfahrengesetz*, 26 Jun. 1992, available at http://bundesrecht.juris.de/bundesrecht/asylvfg_1992/index.html, site last visited 5 Dec. 2003.

[185] In addition, a person may be granted suspension of deportation in accordance with Article 3 of the ECHR. ELENA, supra n. 182, 37.

[186] Tiedemann, P., 'Protection against persecution because of 'membership of a particular social group' in German law', 2000.

[187] ELENA, supra n. 182, 37; Lambert (1997), supra n. 10, 24-28; 52-56; K. Hullmann, 'Germany', in Carlier et. al., supra n. 10, 225, at 227-237.

[188] Utlänningslag, SFS nr: 1989:529, 8 Jun. 1989, as amended by SFS 2003:153, available at http://rixlex.riksdagen.se. See also G. Wikrén & H. Sandesjö, *Utlänningslagen med kommentarer*, 7nde upplagan, Nordstedts Juridik, 2002, 155-194.

account of their gender or homosexuality have a well-founded fear of persecution.[189] In Sweden the Migration Board (*Migrationsverket*) is the first instance body for determining refugee status. Negative decisions of the Migration Board may appealed to the Aliens Appeals Board (*Utlänningsnämnden*). Aliens Appeals Board is an administrative agency with powers similar to those of a court of law. The decisions of the Aliens Board cannot be appealed. In some cases, however, the Aliens Appeals Board may submit a matter to be decided by the Government.[190]

Finally, in Finland issues relating to asylum and international protection are regulated in Chapter 5 of the Aliens Act.[191] Section 30 of Act incorporates the refugee definition of the Refugee Convention, and provides that a person fulfilling these criteria shall be granted asylum.[192] In addition to asylum, a subsidiary form of international protection can be granted to 'persons in need of protection'.[193] Further, the principle of *non-refoulement* is incorporated in Section 9(4) of the Finnish Constitution,[194] as well as in several provisions of the Aliens Act. First instance decisions concerning asylum applications in Finland are made by the Directorate of Immigration (*Ulkomaalaisvirasto*, *Utlänningsnämnden*). Decisions by the Directorate of Immigration may be appealed to the Helsinki Administrative Court (*Helsingin Hallinto-oikeus*, *Helsingfors Förvaltningsdomstol*).[195] If the Administrative Court's decision is negative, the applicant may ask for leave to appeal to the Supreme

---

[189] In addition a residence permit can be granted on humanitarian grounds. Swedish Aliens Act, Chapter 3, Section 4. The principle of *non-refoulement* is incorporated in Chapter 8 of the Aliens Act.

[190] Swedish Aliens Act, Chapter 7, Section 11(2). See Homepage of the Aliens Appeals Board, http://www.un.se/, site last visited 17 Nov. 2003; and Lambert (1997), supra n. 10, 15; 30-34; 60-65.

[191] *Ulkomaalaislaki N:o 378/1991*, 22 Feb. 1991, as amended by Act 537/1999. Unofficial English translation (updated until 6 Aug. 2001) available at the homepage of the Directorate of Immigration: http://www.uvi.fi/. Parliament is currently considering a Government proposal for a renewed Aliens Act. The renewed Aliens Act is expected to enter into force in May 2004. See HE 28—2003.

[192] Section 30 will be replaced by Section 87 (Chapter 6) of the renewed Aliens Act when it is adopted.

[193] That is, persons who are threatened by capital punishment, torture or other inhuman or degrading treatment or punishment or if he cannot return to his/her country of origin because of an armed conflict or environmental catastrophe. See Section 31 of the current Aliens Act (Section 88 of the renewed Act). See also Section 20 which provides that residence permit may be granted (to a person residing in Finland) if it would be "clearly unreasonable" to refuse a residence permit.

[194] *Suomen Perustuslaki* [Constitution of Finland], *N:o 731/1999*, 11 Jun. 1999, entry into force 1 Mar. 2000. An unofficial English translation is available at http://www.finlex.fi/pdf/saadkaan/E9990731.PDF.

[195] See Sections 33 and 57 of the Aliens Act, respectively.

Administrative Court (*Korkein Hallinto-oikeus*, *Högsta Förvaltningsdomstolen*). The Supreme Administrative Courts grants leave to appeal only where it considers that a ruling on a particular issue is important for the application of the law in other similar cases, for reasons of uniform judicial practice or if there are other weighty grounds.

3.2 Gender-specific harm as persecution--is it 'serious enough'?[196]

3.2.1 Discrimination or persecution?

According to the UK gender guidelines discrimination may amount to 'serious harm', or be a factor which turns 'harm' into 'serious harm' or be a factor in failure of state protection (for example, discriminatory access to police protection).[197] A discriminatory measure may, in itself or cumulatively with others, be 'serious harm' for example if the discrimination has prejudicial consequences for the person concerned (e.g., restrictions on freedom of movement or lack of access to education).[198] The guidelines continue to note that a wide range of (discriminatory) penalties that may be imposed on women for disobeying restrictions placed on women may constitute serious harm.[199] Further, some discriminatory restrictions on women may have, e.g., social or medical consequences for women that constitute serious harm.[200]

The Canadian guidelines similarly provide that discriminatory laws may constitute persecution if the law or policy is inherently persecutory, or is used as a means of persecution for of the enumerated reasons; if the law or policy is, although having legitimate goals, is administered through persecutory means or if the penalty for non-compliance with a policy or law is disproportionately severe.[201] Shortly after the adoption of the guidelines the Federal Court found that 75 lashes for breach of the

---

[196] The discussion in this section is intended to be illustrative, and does not attempt to provide for an exhaustive overview of current state policy and case law. The forms of gender-specific harm presented here are perhaps the most common ones, there are, however, also other kinds of gender-specific harm, e.g., trafficking. Further, gender-specific forms of persecution are seen as including forms of persecution disproportionately affecting women. This study follows James Hathaway's definition of persecution as "the sustained and systematic violation of basic human rights demonstrative of a failure of state protection." Hathaway, supra n. 21, 104-5. As mentioned above, the definition consists of two elements, 'serious harm' and 'lack of state protection'.

[197] IAA gender guidelines, supra n. 158, para. 2A.7.

[198] Ibid., para. 2A.10, 2A.11.

[199] Ibid., para. 2A.12.

[200] Ibid., para. 2A.13. For example, consequences for women in child or arranged marriages, or on divorce or widowhood.

[201] IRB gender guidelines 1996, supra n. 155, p. 8.

Iranian law governing women's dress was disproportionate to the objective of the law and thus constituted persecution.[202] In the US the position is that compelling obedience to law constitutes persecution if it requires a person to renounce or violate deeply held religious or fundamental beliefs.[203] Further, certain penalties for violating discriminatory laws might constitute persecution.[204]

Under German law persecution does not include prosecution for violation of domestic law.[205] Still, there have been cases where Iranian women refusing to comply with Islamic dress codes have been granted asylum, as such refusal has been seen as comparable to opposition to the existing political order. Also capital punishment for adultery in Iran has been seen as persecution. In addition, Afghan women living under the Taliban regime have been seen as politically persecuted.[206] The Swedish Aliens Appeals Board has held that serious restrictions in the right to earn a livelihood are such discriminatory measures that amount to persecution.[207] Still, in Sweden cases where laws or policies are inherently discriminatory or where punishments are disproportionate to the goal of laws or policies have rarely given rise to refugee status; instead some women have been granted residence permit on humanitarian grounds or because of fear of inhuman or degrading treatment or punishment. The decisions tend not to include any discussion on whether and in what circumstances discriminating

---

[202] *Namitabar v. Canada*, [1994] FC 42. The court thus circumvented judging the legitimacy of the law itself. See A. Macklin, 'Cross-border shopping for ideas: A critical review of United States, Canadian, and Australian approaches to gender-related asylum claims', 13 *Georgetown Immigration Law Journal* (1998) 25, 42-3. However, there is also case law to the contrary; in *Mohamed Hussein Moustapha Daghmash v. MCI*, Federal Court Trial Division, No. IMM-4302-97, 19 Jun. 1998, punishment of lashing for breach of improper dress in Saudi Arabia was not persecution, but prosecution. See *Interpretation of the Convention Refugee Definition in the Case Law*, Legal Services—Immigration and Refugee Board, 31 Dec. 2002, 3-11, for reference.

[203] See, e.g., *Fatin v. INS*: "governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." 12 F.3d 1233, US Court of Appeal (3rd Cir.) 1993.

[204] Macklin, supra n. 202, at 43. See also *Fisher v. INS*, 79 F.3d 955, US Court of Appeals (9th Cir.) 1996.

[205] B. Ankenbrand, 'Refugee women under German asylum law', 14 *IJRL* 45 (2002), at 49.

[206] See K. Müller, 'Geschlechtsspezifische Verfolgung', in *Asylmagazin 1-2/2002*, available at http://www.asyl.net, site visited 25 Nov. 2003, quoting Verwaltungsgerichtshof Baden-Württemberg, Inf AuslR 1990, 346; Hessicher Verwaltungsgerichthof, InfAuslR 1989, 17; Verwaltungsgericht Köln, U.v. 29 Sept. 1992—7 K 1032 1/89; BAF.

[207] *Utlänningsnämnden* [Aliens Appeals Board], UN 31-93, 1 Mar. 1993, available at http://www.un.se/praxis2.htm, site visited 18 Nov. 2003.

laws or policies can be considered persecution.[208] In Finland there have been some cases concerning capital punishment for adultery or homosexuality in Iran. Even though asylum has not been granted on this basis, the decisions of the Directorate of Immigration imply that death penalty for adultery or homosexuality is a disproportionately severe, and discriminatorily enforced punishment.[209] The Directorate of Immigration has, however, held that lashing as a punishment for breaking the law is not a basis for granting asylum or international protection.[210] The Directorate of Immigration has also held that problems resulting from breaking Islamic dress codes are not such consequences that it would be motivated to grant international protection.[211]

The draft EU refugee status directive may provide some remedy to the restrictive interpretations on this issue in countries such as Germany, Finland and Sweden. Article 11(1)b of the draft directive states that discriminatory legal, administrative or judicial/police measures may amount to persecution if they pose a “significant risk” to the life, freedom or security of a person. Further, Article 11(1)c of the draft directive provides that even though criminal prosecution or punishment for breach of a law of general application usually will not amount to persecution, prosecution may amount to persecution if the State of origin engages in discriminatory prosecution or adjudication, or if it the imposed punishments are discriminatory or inhuman. Also, if the purpose of legislation is to criminalise the exercise of a fundamental international

---

[208] See M. Bexelius, *Kvinnor på flykt: En analys av svensk asylpolitik ur ett genusperspektiv 1997-2001*, Rådgivningsbyrån for asylsökande och flyktingar, 2001, 137-42, refers to UN Fall nr: 0005; UN Fall nr: 0007; UN Fall nr: 0006; UN Fall nr: 0004 Most of these cases concerned Iranian women, who had had extramarital relationships and feared punishment for adultery (stoning) if returned to Iran.

[209] UVI Case no. 2. The Directorate of Immigration held that as the laws on adultery in Iran have been undoubtedly stricter in relation to women (the applicant was a man), and as Iran’s authorities have announced a moratorium on stoning penalties, the applicant did not have a well-founded fear of persecution. The applicants were granted residence permit as it would have been unreasonable to return them. See also HHAO Case no. 8. *NB.* The cases of the Finnish Directorate of Immigration and Helsinki Administrative Court as well as unpublished cases of the Supreme Administrative Court are cited by reference to fictive numbers due to confidentiality of the asylum process.

[210] UVI Case no. 12. The case concerned a homosexual man who had been given 30 lashes, it remained unclear whether the lashing was a punishment for being homosexual or for drinking alcohol at a party. The applicant was granted a residence permit as it would have been unreasonable to return him.

[211] UVI Case no. 7.

human right, or to require an individual to commit acts which are in violation of basic norms of international law, the law may be regarded as persecutory.[212]

3.2.2 Rape and other sexual violence

Rape and other forms of sexual violence are increasingly recognised as serious harm for the purposes of constituting persecution. The UK gender guidelines include rape and various other forms of abuse under the rubric of sexual violence.[213] The guidelines state that rape, sexual violence and other gender-specific harm does not differ analytically from other forms of ill-treatment and violence that are commonly held to amount to persecution and may constitute torture or inhuman or degrading punishment or treatment.[214] In the UK sexual violence has generally been recognised as 'serious harm' and as violation of fundamental human rights.[215] In Canada rape has been characterised by the IRB as a "prime example of persecution."[216] The US gender guidelines state that rape and other forms of severe sexual violence can clearly be held to constitute persecution (as forms of serious physical harm).[217] The guidelines continue to note that severe sexual abuse "does not differ analytically from beatings, torture or other forms of physical violence that are commonly held to amount to persecution.[218] In a recent Federal Court case it was affirmed that rape can constitute

---

[212] COM(2001)510, supra n. 17, Art. 11 and motivations, p. 20.

[213] Including enforced nakedness; mechanical or manual stimulation of the erogenous zones; the insertion of objects into the body openings; the forced witnessing or commission of sexual acts; forced masturbation; fellatio and oral coitus; a general atmosphere of sexual aggression, loss the ability to reproduce and well as threats of all of the above. IAA gender guidelines, supra n. 158, para. 2A.18.

[214] Ibid., para. 2A.16; 2A.19.

[215] Still, rape has often been insufficient to find a claim for refugee status. However, where Convention grounds for persecution are lacking, there appears to be growing recognition of the implications of rape, and thus exceptional leave to remain tends to be granted. H. Crawley, *Refugees and Gender: Law and Process*, Jordans, 2001, 93-94. See also, e.g., *R v. SSHD, ex parte Subramaniam*, CA (UK), 22 Oct. 1999, No. 99-0447-C; *The Queen on the application of N. v. SSHD*, CA (UK) 15 Jul. 2002, [2002] EWCA Civ 1082.

[216] *Interpretation of the Convention Refugee Definition in the Case Law*, Legal Services—Immigration and Refugee Board, 31 Dec. 2002, (hereafter IRB Interpretation) 3-9 (chapter 3.1.3.1), referring amongst others to *Chan v. Canada (MEI),* [1993] 3 F.C. 675; *Elizabeth Aurora Hauayek Mendoza v.* MCI, FCTD No. IMM-2997-94, 24 Jan. 1996; Arguello-Garcia, Jacobo Ignacio v. *M.E.I. (F.C.T.D., no. 92-A-7335), McKeown, June 23, 1993. Reported:* Arguello-Garcia v. Canada (Minister of Employment and Immigration) *(1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.).*

[217] INS gender guidelines, supra n. 156, p. 9, referring, *i.a.*, to *Lazo-Majano v. INS*, CA (US) 813 F.2d 1432 (9th cir. 1987). See, however, also the *Campos-Guardado* case CA (US), 809 F.2d 285 (5th Cir. 1987).

torture and an egregious violation of humanity, and that rape and sexual violence can constitute sufficient persecution to support an asylum claim.[219]

In Germany most courts recognise that rape and other sexual violence amount to serious harm for the purposes of constituting persecution.[220] This position has been upheld by the Federal Administrative Court.[221] There has, however, been a tendency to marginalize rape cases, and see them as privately motivated.[222] Concerning Sweden it has been argued that there is no uniform view among officials as to whether rape is 'serious harm' for the purposes of constituting persecution. Still, in most cases of rape the starting point tends to be that rape may amount to persecution.[223] Despite this, some Swedish cases involving rape and other abuse asylum claims have been dismissed on the grounds that the abuse suffered was not extensive enough.[224] In Finland rape is—usually implicitly—seen as a serious enough human rights violation to constitute persecution.[225] Still, due to the restrictive interpretation of other elements of the refugee definition (such as agents of persecution, persecution grounds) asylum

---

[218] INS gender guidelines, supra n. 156, p. 9.

[219] *Zubeda v. Attorney General*, US Court of Appeal (3rd Cir.), 23 Jun. 2003, 333 F.3d 463. See also *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000); *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996).

[220] E.g., Administrative Court Hessen 2 Dec. 1991, Streit 10(1992); Higher Administrative Court Rheinland-Pfalz 11 Mar. 1992—13 B 10028/87; Administrative Court Regensburg 30 Oct. 1997, Streit 16(1998); Administrative Court Ansbach 19 Feb. 1992, Streit 11(1993).

[221] Several cases concerning Bosnian women raped by Serbian soldiers, e.g., Federal Administrative Court 6 Aug. 1996, Informationsbfief für Ausländerrecht [InfAuslR] 1997. See also B. Ankenbrand, 'Refugee women under German asylum law', 14 *IJRL* 1 (2002), 45, 49. However, widespread rape by militia (in situations of generalised violence) has not been recognised as persecution as it is seen as generalised violence against women in a war zone. Administrative Court Stuttgart, 22 Jan. 1998—A 18 K 14880/96; Higher Administrative Court Berlin 9 Feb. 1987—9 B 103/86. The underlying principle is that ill-treatment which is endures by the entire population does not amount to persecution. See B. Ankenbrand, 'Refugee women under German asylum law', 14 *IJRL* 1 (2002), 45, at 48-9.

[222] See Müller, supra n. 206.

[223] Bexelius, supra n. 208, 71.

[224] Ibid., 71-2, referring to one case where the applicant had been blindfolded and repeatedly raped. In addition the perpetrators had threatened to kill her if she went to the police. The applicant's credibility was not questioned. It is, however, unclear whether the court referred to.

[225] UVI Case no. 3 (residence permit granted on the basis of need of protection); UVI Case no. 11 (residence permit because it would be unreasonable to return the person); UVI Case no. 9 (need of protection); UVI Case no. 1 (application denied. On appeal the Helsinki Administrative Court held that the applicant was in need of protection, as her political activities were not considered significant, HHAO Case no. 7); HHAO Case no. 2 (need of protection, applicant had not shown that she had a well-founded fear of persecution on Convention grounds); Supreme Administrative Court (KHO), KHO Case no. 1 (need of protection).

is very rarely granted. As the reasoning tends to be scarce it is difficult to determine on what grounds the decision has been made. For example, in a case where a woman had been raped and abused by a general because she refused to marry him, the Directorate of Immigration held that the threat the applicant invoked was not persecution in accordance with the Aliens Act.[226] It is thus unclear whether the rape itself was not considered a serious enough human rights violation to constitute persecution, or whether there was no Convention ground for persecution.

Despite these (mainly) positive developments rape is still occasionally seen as occurring in situations of generalised violence such as war, and thus the applicant is not singled out for persecution. In other cases, rape is often seen as a common crime, or as motivated by personal factors. Thus, even though it is rare that cases are dismissed because sexual violence is not seen as serious enough harm,[227] the context in which the sexual violence occurs, is often determinative to the question of persecution. So some extent, the EU draft refugee status directive may remedy this situation, as it clearly states that sexual violence is a form of persecution.[228] Further, the Commission's commentary notes that persons from situations of large scale oppression are entitled to be recognised as refugees if their race, religion, nationality, membership of a particular social group, or political opinion accounts for their well-founded fear of being persecuted.[229]

3.2.3 Violence within the family

Violence within the family is a broader term than domestic violence, or intimate violence, as it also refers to abuse inflicted by parents on their children. In some contexts the abuse may take specific forms, such as honour killings, dowry-deaths or *sati* (widow-burning). I have also included cases dealing with forced marriages under

---

[226] UVI Case no.16. The applicant was granted a residence permit on the basis of Section 20 of the Aliens Act, that is, it would have been clearly unreasonable to return her to her country of origin.

[227] Spijkerboer, supra n. 75, 109.

[228] Version of June 2003, supra n. 17, Article 11(2)(a); 11(2)(f). Compare to Commission's original proposal COM (2001) 510, supra n. 17, Article 7(d), the earlier version states also that "it is immaterial whether the applicant comes form a country in which many or all persons face the risk of generalised oppression." Article 11(2)(c). This provision has regrettably been deleted from the later versions of the draft. See also the Commission's comments at p. 16.

[229] COM (2001)510, Art. 11(2)c, and the Commission's comments, p. 21, supra n. 17.

this topic, as these cases also often involve domestic violence. It should be noted, however, that in some countries (e.g., Canada) forced marriages *per se* are seen as a form of persecution.[230] Violence within the family includes various different forms of physical, sexual and psychological abuse, and often gender-specific forms of harm. Even though all forms of violence within the family are not gender-specific, also those forms of violence that are not gender-specific tend to disproportionately affect women and girls.[231]

As noted in the US gender guidelines the forms of harm that women suffer around the world are varied, and that therefore also the forms of harm giving rise to asylum claims are varied.[232] This statement is particularly true in relation to domestic violence cases as the forms of violence vary considerably. The US guidelines continue to note that "serious physical harm" has consistently been held to constitute persecution, and rape and other forms of sexual violence clearly fall within the meaning of persecution.[233] The proposed rules on asylum and withholding deportation of December 2000[234] reaffirm that that persecution should be understood as "the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm."[235] While the Canadian gender guidelines are very brief on the issue of types of gender-specific serious harm, the main principle is that what constitutes persecution should be determined by reference to various international human rights instruments, including CEDAW.[236] Similarly, the UK gender guidelines state that whether particular treatment amounts to 'serious harm' should be decided on

---

[230] See case citations in *Compendium of Decisions—Guideline 4 Women refugee claimants fearing gender-related persecution, Update*, Immigration and Refugee Board, Feb. 2003 (hereafter IRB Compendium) , at 35-40.

[231] See e.g., Crawley, supra n. 215, 129-32.

[232] INS gender guidelines, supra n. 156, p. 9.

[233] Ibid.

[234] In the proposed rules on asylum and withholding deportation of December 2000, the INS has in certain respects clarified the US position particularly in relation to cases relating to violence within the family. Even though the main part of the regulations is concerned with the definition of a particular social group, it party deals with the definition of persecution as well.

[235] The proposed rules have not entered into force (yet). See infra n. 437-38 and text for further discussion.

[236] IRB gender guidelines, supra n. 155, p. 10-11.

the basis of international human rights standards.[237] More specifically, the UK guidelines note that harm within the family includes various cultural practices relating to marriage, such as forced marriages, honour killings, dowry deaths and *sati*.[238] There is, however, no further discussion on domestic violence as persecution, other than a note to the effect that treatment which would constitute serious harm if it occurred outside the home will also constitute serious harm if it occurs within a family context.[239]

The earliest Canadian cases dealing with domestic violence are from the early 1990s.[240] Most cases deal with physical or sexual violence, such as beatings or rape.[241] Indeed, the IRB has described torture, beatings and rape as "prime examples of persecution."[242] In a number of recent cases refugee status has been granted to women who have been subject to abuse as a result of forced marriages, or who are threatened with honour killings.[243] Also dowry-related abuse has been considered persecution for the purposes of refugee status.[244] In addition, recent Canadian cases concerning spousal abuse include cases where female claimants feared violence at the

---

[237] IAA gender guidelines, supra n. 158, para. 2A.15.

[238] Ibid., para. 2A.24.

[239] Ibid., para. 2A.23.

[240] See, e.g., IRB, CRDD T93-07375, 18 Jan. 1994 (application granted); *Donna Hazel Fouchong v. Canada (Secretary of State)*, FCTD, No. IMM-7603-93, 18 Nov. 1994 (application denied); *Narvaez v. Canada (MCI)*, [1995] 2 FC 55 (TD) (application allowed); *Loferne Pauline Cuffy v. Canada (MCI)*, FCTD, No. IMM-3135-95, 16 Oct. 1996 (application allowed).

[241] See e.g., IRB, CRDD M98-09327, 25 Aug. 1999; IRB, CRDD A99-00937 et al., 16 Aug. 2000; IRB, CRDD TA0-00844, 42 Mar. 2001.

[242] IRB Interpretation, supra n. 216, 3-9, referring amongst others to *Chan v. Canada (MEI),* [1993] 3 F.C. 675; *Elizabeth Aurora Hauayek Mendoza v.* MCI, FCTD No. IMM-2997-94, 24 Jan. 1996; Arguello-Garcia, Jacobo Ignacio v. *M.E.I. (FCTD, no. 92-A-7335),* 23 Jun. 1993. *Reported:* Arguello-Garcia v. Canada (Minister of Employment and Immigration) *(1993), 21 Imm. L.R. (2d) 285 (FCTD)*.

[243] IRB, CRDD T99-14088, 2 Jun. 2000, concerned a minor girl (from Pakistan) who had been forcibly married to her cousin and then suffered violence at the hands of her husband; and IRB, CRDD TA0-13595 et al., 21 Aug. 2001, concerned a woman (from Turkey) who had been targeted for honour killing as she had refused to go through with an arranged marriage and married another man; IRB, CRDD MA0-00006, 26 Nov. 2001, concerned a girl who had been physically punished as she had refused to marry an older man who already had two wives and twelve children. See also IRB RPD MA1-08227, August 19, 2002; IRB RPD TA1-21612 et al., September 9, 2002 and *Canada (MCI) v. Lin, Dan* FCTD**,** no. IMM-2996-00, 21Mar. 2001; and *Diallo v. Canada (MCI)* FCTD, no. IMM-5850-01,26 Nov. 2002; 2002 FCT 2004.

[244] IRB, CRDD U96-03318, 9 Jun. 1997.

hands of their former common law husbands[245] as well as children abused by their fathers. In a recent Canadian case 16-year old girl had been abused by her father in Romania. The abuse she had suffered was seen as amounting to past persecution and she was also held to have a well-founded fear of being persecuted if returned to Romania. Accordingly, she was granted refugee status.[246] However, in many domestic violence cases the main issue is not whether the abuse suffered amounts to persecution, but other questions such as availability of an internal flight alternative or membership of a particular social group.[247]

The main UK domestic violence case turned on the issue of particular social group rather than on the issue of what treatment (assault and violence leading to hospital treatment in the *Islam* case and violence and accusations of adultery in the *Shah* case) constituted persecution.[248] Also in relation to asylum applications based on a fear of honour killings it is usually readily accepted that honour killings as such are serious enough harm; the critical issue tends to be whether the state is willing and/or able to provide sufficient protection, or whether there is an internal flight alternative.[249] Similarly, in the recent Australian landmark domestic violence case *MIMA v. Khawar*, already the Refugee Review Tribunal accepted that the treatment Ms. Khawar had

---

[245] IRB, RPD TA2-02714, 9 May 2003; IRB, RPD MA2-04891 et al., 12 May 2003. The IRB granted refugee status in both cases.

[246] IRB, RPD TA2-00795, 2 Dec. 2002. In another Canadian case a woman who had suffered intra-family violence on part of her in-laws and whose daughter had almost been raped by her father-in-law was granted asylum. IRB, RPD MA1-07954 et al., 26 Aug. 2002. See also M. Randall, 'Refugee law and state accountability for violence against women: A comparative analysis of legal approaches to recognising asylum claims based on gender persecution', 25 *Harvard Women's Law Journal* (2002), 281.

[247] In one Canadian Federal Court case the applicant had repeatedly been severely beaten and sexually assaulted by her husband. The IRB had not taken issue with the question whether the harm suffered by the applicant amounted to persecution, and the Federal Court's analysis is limited to the issue of an internal flight alternative (IFA). Thus, the severity of the harm suffered was not as such an issue in the case. *Patricia Gonzales-Cambana v. MCI*, Federal Court of Canada, FCTD No. IMM-933-96, 24 Jan. 1997. Also the early Canadian spousal abuse case of *Canada (MEI) v. Mayers* focuses on the question of 'particular social group' rather than on the issue of domestic violence as serious harm and persecution. *MEI v. Marcel Mayers*, Federal Court of Canada, [1993] 1 FC 154, 5 Nov. 1992.

[248] *Islam v. SSHD; R. v. IAT and Another, ex parte Shah (Conjoined Appeals)*, 25 Mar. 1999, House of Lords, as published in 11 *IJRL* 3 (1999), 496. See also *McPherson v. SSHD*, 19 Dec. 2001, UK CA [2001] EWCA Civ 1955 (Article 3 ECHR).

[249] See, e.g., *Chaudhary + 2 v. SSHD*, IAT 21 Mar. 2003, UK IAT [2002] 07369; *SSHD v. Kircicek*, IAT 28 Nov. 2002, [2002] UK IAT 05491; and *SSHD v. Naseem*, IAT 11 Nov. 2002, [2002] UK IAT 05177.

been subject to amounted to persecution, and the case focused instead on the issues of failure of state protection and the particular social group category.[250]

Similarly, in the much-publicised US domestic violence case of *In re R. A.* the main issue did not relate to the issue of whether the harm suffered amounted to persecution or not, but to whether the group the applicant referred to was 'a particular social group' and whether her husband had abused her 'on account of' her membership to that group or on account of an imputed political opinion. The applicant, a Guatemalan woman, had been subject to very severe physical and sexual abuse by her husband since she was 16 years old. The board members BIA stated that they "struggle[d] to describe how deplorable they [found] the husband's conduct to have been."[251] The immigration judge found that the suffered harm rose to the level of past persecution. However, despite noting that the respondent had been "terribly abused and ha[d] a genuine and reasonable fear of returning to Guatemala" the BIA on appeal vacated the immigration judge's decision to grant the applicant asylum.[252] Still, also in the US asylum has been granted in some honour killing-cases and cases relating to forced marriages.[253] Also violence within the family-cases concerning women and girls who have fled abuse by their fathers have been considered in the asylum context. The US case of *In re S. A.*[254] concerned a young Moroccan woman with liberal Muslim beliefs had been severely abused, both emotionally and physically, by her father who had orthodox Muslim views concerning the proper role of women in Moroccan society. She (but not her brothers) had been subject to beatings, kicking, burnings, and had been forbidden to leave the house and attend school. She had attempted to commit suicide twice. The BIA found that the treatment she had been subject to amounted to persecution (past persecution) and that she also had a well-

---

[250] *MIMA v. Khawar*, High Court of Australia, 11 Apr. 2002, [2002] HCA 14. See also S. M. Knight, 'Reflections on Khawar: Recognizing the Refugee from Family Violence', 14 *Hastings Women's Law Journal* (2003), 27.

[251] *In re R. A.*, BIA Interim Decision no. 3403, 11 Jun. 1999.

[252] For further discussion of this case, see chapter 9, n. xx, below. For references to recent US domestic violence cases where asylum has been granted by immigration judges see Musalo, Moore &. Boswell, supra n. 176, 673.

[253] See Centre for Gender and Refugee Studies case summaries: http://www.uchastings.edu/cgrs/summaries, site last visited 2003.

[254] BIA, Interim Decision No. 3433, 27 Jun. 2000.

founded fear of future persecution if she would be returned to Morocco. Accordingly she was granted asylum.[255] In another US case a 19-year old Mexican girl had been subject to extreme abuse by her father. The girl's father had abused the whole family (six children and his wife) and the petitioner had been beaten frequently and severely and had several scars as a result of this abuse. Her father had refused to allow her to seek medical treatment for any of the injuries he inflicted and her mother did not allow her to go to the police. A US Immigration Judge granted her asylum but this decision was subsequently vacated by the BIA. The BIA did not, however, dispute that abuse the petitioner had been subject to amounted to persecution.[256]

In Germany the position has been quite different, as spousal violence is often regarded as common for the circumstances in the concerned country and thus not amounting to persecution. Thus so far refugee status has been granted only in exceptional domestic violence cases in Germany.[257] There have, however, been cases where women fearing honour killings have been granted asylum. In one case a Jordanian woman who had been disowned by her husband, and subsequently had had an intimate relationship with another man (and had got pregnant) feared being killed by her male relatives. The court found that state protection was not available to her, and thus the feared persecution—honour killings—was attributable to the state, and was seen as 'political persecution'. The court stated that there was no need for further consideration of the

---

[255] Despite its positive outcome the decision has been criticised because of the failure to link the persecution to the construction of gender and gender subordination. Instead the BIA held that the girl had been persecuted on account of her religion. "The religious element of the case appears to be merelt a stand-in for patriarchal norms and social arrangements concerning the status of women." A. Sinha, 'Domestic violence and U.S. asylum law: Eliminating the "cultural hook" for claims involving gender-related persecution', 76 *New York University Law Review* (2001), 1562, at 1590-1591.

[256] *Aguirre-Cervantes v. INS*, US Court of Appeals (9th Cir.), 21 Mar. 2001, published in 13 *IJRL* 4 (2002), 586. On appeal the 9th circuit Court of Appeal granted withholding of removal and held that she was eligible for asylum. The case was, however, subsequently vacated by an order of the Court, and remanded to the BIA. The main issue in the case was whether a family can constitute a particular social group. See below, sub-section 3.4.3, n. 451. Note also *Matter of Juan* (BIA 1999) where a Honduran boy who had been abused by his father, and who feared violence from the police as a homeless child was granted asylum. As referred to in Musalo, Moore & Boswell, supra n. 176, 673, 574.

[257] Higher Administrative Court Schleswig-Holstein 7 Aug. 1998—2 L 212/97 (denied); Administrative Court Düsseldorf 10 Oct. 2000—25 K 6796/98.A (denied); Administrative Court Bayeruth 28 Apr. 1997, Streit 15/1997) (granted). See also Ankenbrand, supra n. 205, at 50.

question whether honour killings were a serious enough violation to constitute persecution. [258]

Also in Sweden claims relating to domestic violence or violence within the family very rarely give rise to refugee status.[259] It has been said that it still remains unclear whether domestic violence (physical or sexual) is regarded as serious harm for the purposes of constituting persecution, and that it is doubtful that the Swedish authorities would regard domestic violence as torture or other inhuman or degrading treatment or punishment.[260] It is similarly unclear whether honour killings are regarded as a form of punishment that is serious enough to constitute persecution. There is also often a lack of discussion in decisions as to whether honour killings can be held to constitute inhuman or degrading treatment or punishment.[261] There have also been occasional cases where asylum has been claimed on the basis of forced marriages. Most of the cases also included threat of honour killings.[262] In Finland there have so far been no domestic violence cases where a women has been granted refugee status. There have been some cases where domestic violence and/ or forced marriages have been invoked, but the position of the Directorate of Immigration and Helsinki Administrative Court concerning domestic violence as persecution is quite unclear. Most of the reviewed cases resulted in a negative decision; however, in some cases a residence permit was granted because it would have been unreasonable to

---

[258] The court took into consideration that 25% of all murders on Jordan are honour killings, and that the Jordanian Penal code (articles 340 explicitly and article 98 implicitly) provides for more lenient punishments (between 6 months to one year imprisonment) in cases of honour killings which disproportionately favour men—women cannot benefit from these provisions. The court also held that the fact that one part of the state (the Jordanian head of state and the government) have actively spoken against honour killings, does not change the fact that the state as a whole denies protection to women fearing honour killings. Verwaltungsgericht Berlin, U.v. 23 Aug. 2001—VG 34 X 66.01; 15 S., M1303, *Asylmagazin 12/01*, p. 37, available at http://www.asyl.net, site visited 25 Nov. 2003. See also Müller, supra n. 206.

[259] In some domestic (spousal) violence cases residence status has, however, been granted on *humanitarian grounds*. See, e.g., UN Fall nr: 007 (1997); SIV Fall nr: 00018; UN, Fall nr: 00020; UN Fall nr: 00027; as reported in Bexelius, supra n. 208, fn 186-92.

[260] Bexelius, supra n. 208, 96, 103-6. As the study was conducted before the Swedish gender guidelines were adopted (in 2002) it is unclear how much these guidelines have changed the situation.

[261] Still most honour killing-cases seem to fall on the issue of well-foundedness of fear. In some cases also IFA/IPA is referred to. Bexelius, supra n. 208, 144-48.

[262] Maria Bexelius discusses four cases in her study on Swedish asylum policy 1997-2001. The issue of forced marriages as ‘serious harm’ or persecution was not discussed in any of the cases. Bexelius, supra n. 208, 159-62.

return the claimant (the former humanitarian considerations ground) or the applicant was seen as being in need of protection on other grounds than domestic violence.[263] The Helsinki Administrative Court has, for example, held that the problems the applicant had with her former husband and his possible threats were not a ground for granting the applicant asylum or residence permit on grounds of need of protection.[264] Also the Directorate of Immigration has held that conflicts in the family are not a ground for giving international protection.[265] There have also been some cases where the claimants have feared honour killings. Most of these cases have been rejected, and refugee status has not been granted in any. Still, it seems that the Directorate of Immigration views honour killings as a serious enough threat to constitute persecution—if the other elements of the refugee definition are satisfied.[266] Some decisions seem to imply that forced marriages could amount to persecution. In one case the Directorate of Immigration held that as the applicant's relatives had not in any stage undertaken concrete measures to marry her, or threatened her with marriage, the applicant did not have a well-founded fear of persecution.[267]

3.2.4 Female genital mutilation (FGM)

Female genital mutilation (FGM) is a collective term for practices which involve the total or partial excision of the female genitalia. FGM is a cultural practice, not a religious one. The types of FGM vary from so called *sunna* circumcision or clitoridectomy where (parts of) the clitoris are/is removed, to excision, where the clitoris and labia minora are removed, and to so called pharaonic circumcision or infibulation, where the clitoris and the labia minora and most of the labia majora are removed and the labia majora are sewn together so that only a small opening remains.

---

[263] HHAO Case no. 5 (residence permit); UVI Case no. 13 (denied); UVI Case no. 8 (need of protection); UVI Case no. 4 (residence permit); UVI Case no. 10 (denied).

[264] HHAO Case no. 3. Also HHAO Case no. 5, where the Court held that threats posed by individual relatives could not be seen as persecution.

[265] UVI Case no. 7. The Directorate noted that conflicts within the family are not considered as a ground for giving international protection in accordance with the Aliens Act. ("[P]erhe-elämän ristiriidat eivät ole ulkomaalaislaissa tarkoitettu peruste antaa kansainvälistä suojelua.")

[266] UVI Case no. 10 (denied); UVI Case no. 14 (denied). The applicant was a man, and the Directorate of Immigration noted that women are usually victims of honour killings.

[267] UVI Case no. 4.

The age in which girls undergo FGM varies from a few months to the late teens. Most girls undergo FGM between 4-8 years of age.[268]

The US gender guidelines mention FGM as form of harm which give rise to fear that is unique to women.[269] Decided briefly after the adoption of the gender guidelines, the US Board of Immigration Appeals (BIA) held in the landmark US case of *In re Kasinga* that the level of harm caused by FGM constitutes persecution. The BIA affirmed that persecution consists of "the infliction of harm of suffering by a government, or persons a government is unwilling or unable to control." The BIA also emphasised that a punitive or malignant intent is not required for harm to constitute persecution. Thus, FGM was considered a severe bodily invasion which meets the asylum standard, even if done with a subjectively benign intent. [270] It should be noted that the BIA took into account that FGM is practiced in Togo in the most severe form of the practice, that is, infibulation. Accordingly some commentators worried that this would leave open for the possibility that other less severe forms of FGM would not reach the level of persecution.[271] Still, if FGM is viewed in its entirety, as rape has

---

[268] FGM is practiced in a number of African countries, as well as in immigrant African communities. See, e.g., N. Toubia; I. R. Gunning, 'Arrogant perception, world-travelling and multicultural feminism: The case of female genital surgeries', 23 *Columbia Human Rights Law Review* 2 (1992), 189; A. T. Slack, 'Female circumcision: A critical appraisal', 10 *Human Rights Quarterly* 4 (1988), 437; K. Lee, 'Female Genital Mutilation: Medical aspect and the rights of children', 2 *international Journal of Children's Rights 1* (1994), 35; E. Dorkenoo & S. Elworthy, *Female Genital Mutilation: Proposals for change*, 3rd ed., Minority Rights Group, 1992; O. Koso-Thomas, *The circumcision of women: A strategy for eradication*, Zed Books Ltd, 1987. On the terminological debate in relation to FGM, see e.g. Toubia supra, 226, H. Lewis, 'Between Irua and "Female Genital Mutilation": Feminist human rights discourse and the cultural divide', 8 *Harvard Human Rights Journal* (1995), 1, 6-7; Gunning, supra, 193; E. Dorkenoo, *Cutting the rose—Female Genital Mutilation: The practice and its prevention*, 2nd ed., Minority Rights Group, 1995. For overviews of FGM as a basis for an asylum claim see H. Crawley, *Refugees and Gender—Law and Process*, Jordans, 2001, 175-98; B. Passade Cisse, 'International law sources applicable to Female Genital Mutilation: A guide to adjudicators of refugee claims based on a fear of Female Genital Mutilation', 35 *Columbia Journal of Transnational Law* (1997), 429; P. A. Armstrong, 'Female Genital Mutilation: The move towards the recognition of violence against women as a basis for asylum in the United States', 21 *Maryland Journal of International Law and Trade* (1997), 95; 'Symposium: Shifting grounds for asylum—Female Genital Surgery and sexual orientation', 29 *Columbia Human Rights Law Review* 2 (1998), 467.

[269] INS Gender Guidelines, supra n. 156, p. 9.

[270] *In re Fauziya Kasinga*, Interim Decision no. 3278, BIA, 13 Jun. 1996, p. 9-10. The case concerned a 19 year-old woman from Togo who sought asylum because of her fear of FGM. After her father's death she had, at the age of 17, been forced into a polygamous marriage with an older man who required her to be circumcised.

[271] A. C. Helton & A. Nicoll, 'Female Genital Mutilation as ground for asylum in the united States: The recent case of In re Fauziya Kasinga and prospects for more gender sensitive approaches', 28 *Columbia Human Rights Law Review* (1997), 375, at 382-83.

been in some cases, not merely as a physical harm but also as a reflection of women's perceived "inherent inferiority or weakness" and as a denial of women's personal freedom and autonomy, the severity of the actual practice becomes only an additional consideration.[272] In other US cases FGM has been regarded as torture.[273] American courts have also noted that FGM is a violation of women's and female children's rights, and emphasised that FGM is criminalized under US law.[274] In *Abankwah v. INS* the US Court of appeal for the Second Circuit stated that it cannot be disputed that FGM involves the infliction of "grave harm constituting persecution."[275] In addition to claims files by adolescent or adult women, parents have applied for refugee status due to fears that their minor daughters would be subject to FGM if the family were forced to return to the country of origin. In some cases applicants have been granted 'suspension of deportation' on humanitarian grounds (leading to permanent residence status),[276] in others denied claims for asylum or suspension of deportation. In a recent US case the applicants (mother and two minor daughters) were granted 'stay of deportation' by the Court of Appeal (7th Cir.).[277] It has been said that women who have already undergone FMG are not *per se* outside the scope of the refugee definition.[278] This stance has gained acceptance in US jurisprudence. For example, in a case where a 24 year-old Nigerian woman had been forced to undergo FGM as a child, the Immigration Court referring to *Kasinga* held that the protection must be extended to women who have already suffered FGM as there cannot be a legitimate distinction between women who have already been subject to FGM and

---

[272] Helton & Nicoll, supra n. 271, at 383.

[273] *Philomena Iweka Nwaokolo v. INS*, US Court of Appeals (7th Cir.), No. 02-2964, 27 Dec. 2002, p. 10.

[274] E.g., *Adelaide Abankwah v. INS*, US Court of Appeal (2nd Cir.), No. 98-4394, 9 Jul. 1999, p. 14.

[275] Ibid. p. 15. See also P. Goldberg, 'Analytical approaches in search of consistent application: A comparative analysis of the Second Circuit decisions addressing gender in the asylum law context', 66 *Brooklyn Law Review* (2000), 309.

[276] *Matter of Oluloro*, No. A72-147-491, Immigration Court, Seattle, Washington, 1994, as reported in P. F. Warren, 'Women are human: Gender-based persecution is a human rights violation against women', 5 *National Journal of Constitutional Law* 2 (1995), 279, 318. In this case the Immigration Court held that being US citizens the children needed protection on humanitarian grounds.

[277] *Nwaokolo v. INS*, supra n. 273.

[278] Crawley supra n. 49, 71.

women who risk being subject to the practice. The Court considered, amongst others, the gynaecological problems the woman suffered as a result of FGM.[279]

Also in Canada FGM has been held as constituting persecution.[280] The Canadian gender guidelines mention FGM as form of harm which give rise to fear that is unique to women,[281] and the Immigration and Refugee Board (IRB) has considered FGM to be a "torturous custom",[282] a "cruel and barbaric practice"[283] and a "discriminatory, dangerous and unacceptable practice that constitutes persecution."[284] The IRB has affirmed that FGM constitutes serious harm and a basis for refugee status in a number of recent cases.[285] Also in Canadian practice FGM has been seen as a violation of children's rights, for example, in the Canadian *Farah* case the IRB noted the severe physical and mental consequences of the feared harm and referring to a number of human rights instruments, including Article 19, 24 and 37 of the Convention on the Rights of the Child, granted a Somali woman and her 10 year-old daughter asylum because of fear that the daughter would be subject to FGM if returned to Somalia.[286] Subsequently a number of similar cases have been considered in Canada.[287] It can thus be said that it is well established in Canadian case law that FGM constitutes a form of persecution.

---

[279] *Matter of U.S.*, No. A***, Immigration Court, Anchorage, Alaska, 19 Dec. 1996.

[280] See e.g., *Faustina Annan v. Minister of Citizenship and Immigration of Canada*, [1995] 3 FC 25 (TD), 6 Jul. 1995 (http://reports.fja.gc.ca).

[281] IRB Gender Guidelines, supra n. 155, 10.

[282] *Farah v. Canada (MEI)*, IRB, T-93-12197 et al., 3 Jul. 1994. See also CRDD A96-00453 et al., 8 Dec. 1997; CRDD T97-03141, 27 May 1998; CRDD T98-04876 et al., 14 Sept. 1999; CRDD MA1-00356 et al., 18 Dec. 2001; CRDD MA1-02054 et al., 21 Dec. 2001.

[283] *Annan v. MCI*, supra n. 280.

[284] IRB, CRDD MA1-00356, 18 Dec. 2001, RefLex Issue 192, 11 Jul. 2002, p. 3. See also CRDD T95-00479, 5 Jul. 1996; CRDD M95-13161, 13 Mar. 1997.

[285] See, e.g., RPD MA2-04725, 3 Jan. 2003, RefLex Issue 206, 20 Feb. 2003; RPD MA2-10373, 30 May 2003, RefLex Issue 220, 4 Sept. 2003; *Salamata Sawadogo v. Canada (MCI)*, Federal Court of Canda, FCTD No. IMM-4162-00, 17 May 2001; *Lydia Oritseweyinmi Adodo v. Canada (MCI)*, 25 Oct. 2001, [2001] FCT 1159 (FCTD No. IMM-6503-00).

[286] *Farah*, IRB, Canada, Toronto (T-93-12198, T93-12199, T93-12197), 3 Jul. 1994.

[287] See, e.g., *CRDD MA1-00356*, supra n. 284; U93-08214, RefLex Issue 76, 14 Oct. 1997; *CRDD A96-00453*, 8 Dec. 1997, RefLex Issue 85, 2 Mar. 1998; *CRDD T98-04876*, 14 Sept. 1999, RefLex Issue 128, 8 Dec. 1999.

The UK guidelines include FGM as a gender-specific form of harm, and regard FGM as an infringement of the prohibition of torture and inhuman and degrading treatment, as well as the right to private and family life.[288] The Immigration Appeal Tribunal (IAT) has accepted that FGM causes 'serious harm' and has stated that FGM "is related to an abuse of the respondent's rights under Article 3 of the ECHR".[289] In that particular case the IAT held, however, that there was no evidence to show that there was a failure on part of the Kenyan state to offer protection. Other FGM cases before the IAT have usually failed as the applicant has not been regarded as a member of a particular social group.[290] In some cases the IAT has, however, accepted the kind formulation of membership in a particular social group put forward By the US BIA in *Kasinga*, and has held that a woman fearing FGM was entitled to refugee status.[291]

Also in Germany there have been positive decisions in FGM cases. In German practice FGM constitutes persecution when the state is unwilling to protect victims of FGM and prosecute perpetrators—in other words, when FGM can be attributed to the state.[292] In some cases FGM has been attributed to the state despite existence of legislation criminalizing FGM, as no prosecutions in FGM cases had been undertaken.[293] German courts have characterised FGM as a fundamental violation of human rights and a violation of the personal integrity and physical inviolability of girls and women, causing severe damages and traumas, and lifelong pain. Thus, FGM

---

[288] IAA Gender Guidelines, supra n. 158, paras. 2A.17, 2A.22.

[289] *Secretary of State for the Home Department (SSHD) v Julia Wanguru Muchomba*, Appeal No. CC-25710-2001, 2 May 2002, [2002] UK IAT 01348. See also *Manyi Tataw v. Immigration Appeals Tribunal*, [2003] EWCA Civ 925, 18 Jun. 2003.

[290] See, e.g., *SSHD v. Njeri*, IAT 7 Apr. 2003, [2002] UK IAT 08114; *SSHD v. Adhiambo*, IAT 7 Aug. 2002, [2002] UK IAT 03536; and *Hashim v. SSHD*, IAT 16 Jul. 2002, [2002] UK IAT 02691. However, as FGM is considered torture, or inhuman or degrading treatment, the applicants in most of these cases have been allowed to stay on human rights grounds (Article 3 ECHR).

[291] *Yake v. SSHD*, IAT 19 Jan. 2000, UK IAT 00TH00493. The particular social group was held to be "Yopougon women who may be subject to FMG".

[292] E.g., Verwaltungsgericht Berlin, U. v. 3 Sept. 2003, VG 1 X 23.03—(12 S., M4222); and Verwaltungsgericht Aachen, U. v. 12 Aug. 2003, 2K 1140/02.A—(18 S., M4086), available at http://www.asyl.net, site visited 25 Nov. 2003. See also Ankenbrand, supra n. 205, at 52, citing Higher Administrative Court Hamburg 6 Jan. 1999—3 Bs 211/98; Administrative Court Wiesbaden 27 Jan. 2000—5 E 32472/98A (2), Streit 18(2000); Administrative Court München 2 Dec. 1998—M 21 K 97.53552, InfAuslR 6 (1999), 306; Müller, supra n. 206; and ECRE, *Non-state Agents of Persecution and the Inability of the State to Protect—The German Interpretation*, ECRE, London, Sept. 2000, p. 8-9, citing: Administrative Court München, judgment of 2 December 1998 – M 21 K 97.53552; Administrative Court Trier, judgment of 20 May 1999 – 4 K 1157/98.TR.

is not merely a private practice, but an objectification of women caused by dominant societal perceptions.[294] The discussion in FGM cases tend to focus on the issue of state accountability, not on whether FGM is serious enough treatment to constitute persecution. Indeed, granting asylum to a Nigerian woman fearing FGM, the administrative court in Aachen stated that there was no need for a discussion of the question whether FGM is severe enough violation to constitute persecution.[295]

The Swedish gender guidelines explicitly mention FGM as a gender-specific form of persecution,[296] and in Swedish practice forced FGM is considered cruel, inhuman or degrading treatment in accordance with the UDHR[297] as well as 'persecution on account of sex'.[298] However, as the Swedish Aliens Act includes a provision stating that persons having a well-founded fear of persecution on account of their sex (or homosexuality) may be granted residence permit as persons otherwise in need of protection,[299] applicants fearing FGM cannot be granted refugee status.[300] This provision must be regarded against the background that in Sweden gender-based claims are not regarded as entitling to refugee status because women are not recognised as a particular social group.[301] The aim of the provision was thus to grant stronger protection to persons who had previously been granted residence permit on

---

[293] Administrative Court Berlin, U. v. 3 Sept. 2003, VG 1 X 23.03—(12 S., M4222).

[294] Administrative Court Berlin, U. v. 3 Sept. 2003, VG 1 X 23.03—(12 S., M4222); Administrative Court München, U. v. 6 mar. 2001, M 21 K 98.51167—(64 S., M0443), available at http://www.asyl.net, site visited 25 Nov. 2003.

[295] Administrative Court Aachen, U. v. 12 Aug. 2003, 2K 1140/02.A—(18 S., M4086)

[296] Swedish Gender Guidelines, supra n. 159, p. 2. See also Migrationsverket, *Migrationsverket och kvinnofrid*, August 2002, p. 1.

[297] And thus grounds for residence permit in accordance with Chapter 3, Section 3, sub-paragraph 1 of the Aliens Act, SFS 1989:529, as amended by SFS 1996:1379.

[298] in accordance with Chapter 3, Section 3, sub-paragraph 3 of the Swedish Aliens Act, SFS 1989:529, as amended by SFS 1996:1379. *UN 328-97* (reference to UN 94/12198, 12 Feb. 1996; Bexelius, supra n. 208, 122-4. In a decision of 12 Dec. 2002 the Aliens Appeals board held that a young woman from Tanzania was in need of protection in accordance with Chapter 3, Section 3, sub-paragraph 1 of the Aliens Act (FGM being cruel, inhuman or degrading treatment), see http://www.un.se/pressmeddelanden/021212.asp.

[299] Swedish Aliens Act, Section 3, Chapter 3(3).

[300] For a critique of the renewed Swedish Aliens Act see, Folkelius & Noll, supra n. 75, in particular at 616-631.

[301] Regeringens proposition *Prop. 1996/97:25*, p. 100. This procedure is currently being reviewed by the Swedish government. See U.S. Committee for Refugees World Refugee Survey 2003—Sweden, available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd, site visited 25 Nov. 2003. See also infra sub-section 3.4.5.

‘humanitarian grounds’ by means of a special provision. Even though not specifically referring to FGM, the provision has been used almost exclusively in FMG cases. Thus, in Sweden FGM is recognised as “a serious enough” form of harm for the purposes of constituting persecution, but not for the purposes of obtaining refugee status.

In Finland claims based (exclusively) on FGM have been very rare, if not even non-existent.[302] There have, however, been some cases where FGM has been one of the issues invoked. In one case the issue has been that the applicants feared that their daughters would be subject the FGM if forced to return to their country of origin.[303] In another case the applicant feared persecution as he had helped his sister escape FGM and forced marriage, and therefore he was being threatened. The Directorate of Immigration noted that traditional religious customs that are harmful to a person’s health, such as FGM, are forbidden in the claimant’s country of origin, even if the enforcement of the law has not been completely effective. Further, the Directorate of Immigration held that the applicant should have in the first place turned to the national authorities in order to protect his sister from FGM.[304] The Directorate of Immigration has, however, stated that in principle there would be no obstacles to giving a person fearing FGM refugee status if the prerequisites for persecution are fulfilled.[305]

3.2.5 Forced family planning

The discourse on reproductive rights within the asylum context has mainly focused on the issue of forced family planning in China (the so called one-child policy). In China forced family planning includes forced sterilisations of women and men as well as forced abortions. It should also be noted that in addition to the direct violations of

---

[302] Finnish Directorate of Immigration, 9 Apr. 2003, Answer to EURASIL questionnaire on FGM (available at the writer).

[303] HHAO Case no. 1 (denied).

[304] UVI Case no. 6 (residence permit). It can be noted that the applicant had stated that when he had turned to the police, the police had replied that they would investigate the matter but could not afford him protection due to lack of resources. The police had suggested that the applicant move abroad for some time, until the situation in the country settles.

[305] Finnish Directorate of Immigration, 9 Apr. 2003, Answer to EURASIL questionnaire on FGM (on file with the writer).

physical integrity associated with forced family planning policies, children born outside of such policies may be subject to a range of discriminatory measures, e.g., exclusion from health care or education, which may (cumulatively) amount to persecution.[306]

Refugee claims based on a fear of persecution in the form of sterilisation and abortions have become relatively frequent in North America. In Europe such claims are, however, more rare.[307] The landmark Canadian case of *Cheung v. Canada (MEI)* was decided already in 1993. Here the Canadian Federal Court accepted forced sterilisation as a form of persecution as well as a form of inhuman and degrading treatment. The Court characterised the practice as intrusive and brutal and held that it constituted persecution regardless of whether it is sanctioned by law.[308] The Supreme Court of Canada has reaffirmed that forced sterilisations amount to persecution. In *Chan v. Canada (MEI)* it stated that "forced sterilisation constitutes a gross infringement of the security of person and readily qualifies as the type of fundamental violation of basic human rights that constitutes persecution. Notwithstanding the technique, forced sterilisation is in essence an inhuman, degrading and irreversible treatment."[309] Thus forced abortion, as well as forced or strongly coerced sterilisation, constitutes persecution whether the victim is a man or a woman.[310] Similarly, in the US coerced sterilisation is regarded as a "permanent and continuing act of persecution."[311] Since 1996, a specific provision in the Immigration and Nationality Act states that a person fearing forced abortion or sterilisation has a well-founded fear

---

[306] See, e.g., *Chen Shi Hai v. MIMA*, [2000] HCA 19, 13 Apr. 2000; Afdeling bestuursrechtspraak van de Raad van State (Netherlands), 22 Sept. 1997, RV 1997, 3 NAV 997, 1019-1025 (quoted in Spijkerboer, supra n. 75, 110, fn 18).

[307] See Spijkerboer, supra n. 75, 109-10, for a discussion of forced family planning cases in Dutch case law. In 1996 the Dutch Council of State reversed the earlier District Court position that forced sterilisation (or abortion) was not an act of persecution but rather a humanitarian issue. It held that although the one-child policy in China in itself does not amount to persecution, the method in which the policy is imposed (forced sterilisation) can constitute persecution. (Afdeling bestuursrechtspraak van de Raad van State, 7 Nov. 1996, RV 1996, 6, GV 18d-21).

[308] *Cheung v. Canada (MEI)*, [1993] 2 FC 314 (FCA).

[309] *Chan v. Canada (MEI)*, [1995] 3 SCR. Also the High Court of Australia has accepted the forced sterilisations amount to persecution. *Applicant A v. Australia (MIEA)*, HC, [1998], INLR 1.

[310] IRB Interpretation, supra n. 216, 3-10. See also *Quang Lai v. MEI* (FCTD, no. IMM-307-93), 20 May 1994, at 2.

[311] *Matter of Y.T.L.*, BIA, Interim Dec. No. 3492, 22 May 2003, p. 607. See also *Matter of Chang*, 20 I&N Dec. 38, BIA 1989.

of being persecution on account of political opinion.[312] In the US there have also been cases where men whose spouses have been subject to forced sterilisations have been granted asylum, as they were seen to a well-founded fear of future persecution in the form of forced sterilisation.[313] In the UK, the IAA gender guidelines include forced sterilisations and forced abortions as forms of gender-specific harm. Referring to a statement by the Minister of State for the Home Office, the guidelines note that enforced abortions and sterilisations are to be regarded as torture.[314]

3.2.6 Summary

Rape and other forms of sexual violence are usually recognised as serious enough harm to constitute persecution. Some jurisdictions tend to more explicit that others—in Canada, for example, rape has been characterised as a "prime example of persecution"—but it seems accepted that rape is a form of persecution. FGM is another form of gender-specific harm which is seen as amounting to 'persecution' by most states. Still, women and girls fearing FGM are not granted refugee status in Sweden due to application of the provision on persecution on account of gender in the Swedish Aliens Act, and in Finland there so far been no cases where refugee status has been granted due to a well-founded fear of FGM. As regards the question whether discrimination is considered persecution, the position in the UK, Canada and the US is quite similar, and in gender-related cases it has been held that, for example, discriminatory or disproportionately severe penalties imposed on women for disobeying social mores, policies or laws may amount to persecution. Also in Germany, there have been cases where, e.g., Iranian women refusing to comply with Islamic dress codes or women living under the Taliban regime have been granted asylum. In Sweden and Finland the situation is different, and discriminatory (or disproportionately severe) punishment have rarely given rise to refugee status. Violence within the family is another point where the practice of the common law and

---

[312] von Sternberg, supra n. 10, 166-174. In Canadian jurisprudence forced family planning claims are usually based on membership of a particular social group.

[313] *Matter of C.Y.Z.*, 21 I&N 915 BIA 1997; *Matter of Y.T.L.*, BIA, Interim Dec. No. 3492, 22 May 2003.

[314] Ann Widdecombe MP, HC Considerations of Lords Amendments to the Asylum and Immigration Bill 1995/6, 15 Jul. 1996, Hansard Cols. 822-25. See also Asylum Policy Unit Internal Memo ATP 13/96, as quoted in Crawley, supra n. 215, 152.

the civil law countries tends to differ. As the forms of violence suffered within the home may vary considerably, there are no standards as to when 'domestic violence' is serious enough harm. Still, in common law countries various forms of violence within the family have been recognised as persecution, including beatings, rape and other sexual violence, honour killings, dowry deaths, sati as well as violence related to forced marriages. While the approach has been more restrictive in the studied civil law countries, there have been occasional cases where, for example, women fearing honour killings have been granted refugee status. Finally, of the forms of gender-specific persecution discussed in this study, while recognised as form of gender-specific harm in the UK, claims relating to forced abortions and sterilisations have mainly been successful in North America.

3.3 Persecution by 'non-state actors' and failure of state protection

3.3.1 Non-state actors and forms of failure of state protection

It is generally accepted that refugee law exists to provide surrogate or substitute protection when the state of origin has failed its fundamental duties to its citizens and this failure has a discriminatory impact based on civil or political status.[315] Where the persecutory acts are committed by the state, it is clear that state protection is not available. One can, however, distinguish between four different types of situations of failure of state protection where harmful acts are committed by non-state actors. First, there are situations where harmful acts are committed by private persons, but are instigated, condoned or tolerated by the state. Second, acts of persecution may be committed by *de facto* authorities or quasi-state organs (e.g., during a civil war where non-state entities have gained such control over whole/parts of a country). Third, in some situations the state does not condone the harm caused by private persons, but is unable to provide protection. Finally, persecutory acts may be committed by non-state actors in a situation where the state has collapsed (e.g., due to internal armed conflict)

[315] D. Anker, 'Refugee status and violence against women in the "domestic sphere": The non-state actor question', 15 *Georgetown Immigration Law Journal* (2001), 391, at 399-400.

and where no state authorities are left that could offer protection.[316] Examples of such cases could include women fearing FGM in Somalia, or domestic violence in Afghanistan. In the first and second types the state's failure to offer protection is due to *unwillingness*, whereas in the third and fourth types the state is *unable* to offer protection.

3.3.1.1 Unwillingness of the state to provide protection

In situations where serious harm is inflicted by private persons on the instigation of the state, or where such acts are condoned or tolerated by the state, the state is considered to be unwilling to offer protection. There is a general consensus that such acts amount to persecution for the purposes of a claim for refugee status. Thus, all the states considered in this study accept that where the state is unwilling to provide protection against seriously harmful acts committed by private persons amounts to persecution. For example, the EU Joint Position of 1996 on application of the term refugee provides that "[p]ersecution by third parties will be considered to fall within the scope of the Geneva Convention where it […] is encouraged or permitted by the authorities."[317] The same principle was established by the Canadian Supreme Court in *Ward*,[318] and has been repeatedly affirmed by the House of Lords in the UK.[319] Similarly, in the USA courts have recognised that persecution may be inflicted by persons or organisations which the government is unable or unwilling to control.[320] There is also fairly uniform state practice concerning situations where persecutory acts are committed by de facto authorities or quasi-state organs. There are, however,

---

[316] W. Kälin, 'Non-state agents of persecution and the inability of the state to protect', 15 *Georgetown Immigration Law Journal* (2001), 415, at 416.

[317] *Joint Position of the European Union of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty of the European union on the harmonized application of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees*, ECOJ L63, 13 Mar. 1996, p. 2, section 5.2. The joint position emphasises that recognition of refugee status depends on whether the authorities' failure to act was deliberate or not. See also the EU draft refugee status directive (June 2003), supra n. 17.

[318] *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689.

[319] E.g., *R. v. SSHD, ex parte Adan, Subaskaran & Aitseguer*, CA (UK) Civ., 23 Jul. 1999, [1999] 4 All ER 774, also reported in 11 *IJRL* 4 (1999), 702; *Horvath v. SSHD*, HL (UK) 6 Jul. 2000, [2001] 1 AC 489, also reported in 13 *IJRL* 1/2 (2001), 174.

[320] E.g., *Sangha v. INS*, CA (US) (9th Cir. 1997), 103 F.3d 1482, 1487 (citing *McMullen v. INS*, CA (US) (9th Cir. 1981), 658 F.2d 1312, 1315; *Aguirre-Cervates v. INS*, CA (US) (9th Cir. 2001), reprinted in 13 *IJRL* 4 (2002), 586, 595.

differences in determining the necessary conditions for a group to become a de facto authority.[321] The main area of disagreement concerns situations where the state is *unable* to offer protection. Even though these disagreements may be bridged by the proposed EC refugee status directive once it is adopted,[322] it is motivated to provide for a brief overview of the debate so far.

3.3.1.2 State inability to provide protection: the 'protection approach' vs. the 'accountability approach'

The disagreement as to state inability to provide protection against serious harm by non-state actors has mainly been a debate between Germany and France against 'the rest.'[323] The practice in France has, however, changed during recent years and French authorities appear to be more willing to impute private acts to the state as a consequence of the inability of state protection. Indeed, the recently adopted revised asylum law now recognises persecution by non-state actors.[324] The following

---

[321] Kälin, surpra n. 314, at 416. On the German approach see Marx, infra n. 327, at 456-559. This problem will not be further considered here.

[322] EU draft refugee definition directive, supra n. 17, Article 9 (version June 2003).

[323] Also Switzerland and Italy have adopted a similar position. Recently, there have been, however, some indications of a change in the practice also in both countries. See, e.g., V. Türk, 'Non-state agents of persecution', in V. Gowlland-Debbas (ed.) *Switzerland and the International Protection of Refugees*, Kluwer Law International, 2002, 75, at 100-101; ELENA ns agents, supra n. 182, pp. 46-47; ECRE, supra n. 292, 14; *Opinion of UNHCR regarding the question of 'non-State persecution,' as discussed with the Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House) on 29 Nov. 1999*, UNHCR Berlin, Nov. 1999, p. 9; B. Vermeulen, T. Spijkerboer, K. Zwaan & R. Fernhout, *Persecution by third parties*, University of Nijmegen, Centre for Migration Law, May 1998, Commissioned by the Research and Documentation Centre of the Ministry of Justice of The Netherlands, 19.

[324] Adopted 19 Nov. 2003, see *Women's Asylum News*, Issue 38, November/December 2003, p. 13. Thus, in current practice some cases of non-state persecution have been approved on the grounds that the authorities in the country of origin tolerated the persecution (*tolerance voluntaire*) or because the victim's request for protection would have been in vain (*vanité de protection*). A request for protection is regarded to have been in vain if the authorities are aware of a situation which they ought to remedy and nevertheless fail to employ means at their disposal to afford protection. Particularly the latter course of argument represents a considerable change of position as compared with the traditional French view as represented by the *Dankha* case (*Essakh Dankha*, Conseil d'Etat, 27 May 1983, case no. 42.074: refugee status will not be recognised where the authorities are simply unable to offer protection, or where there is not government at all that could offer protection.) Still, it has been said that the change of direction in France has not represent an official change of policy, but has remains informal and discretionary. However, with the new revised law it also the official position has now changed. See, e.g., CRR 29 Jan. 1999, no. 332531; CRR 7 May 1999, no. 336988, and CRR 11 Jul. 2000, no. 350323, all concerning female applicants from Algeria who were granted refugee status. In the last mentioned case the CRR noted that it was in vain to seek protection from the authorities against the backdrop of absence of legal and administrative mechanisms of protection of women and against

discussion will deal exclusively with the German position as contrasted with that of other states. The European Court of Human Rights has described this disparity in interpreting the refugee definition as an "apparent gap in protection."[325] As this gap had its perhaps most public manifestation in the disparities between UK and German practice on this issue, the questions will be discussed with reference to that.

At the heart of the German understanding of persecution is the concept of accountability, hence terms such as 'the accountability approach' or 'the doctrine of accountability'.[326] In Germany a distinction is made between two different types of questions relating to failure of state protection; first, relating to the circumstances in which a government can be held accountable for acts of private parties and government officials against members of minority groups—essentially issues relating to the 'failure of protection', and second, issues relating to quasi-state organs and collapse of state during internal armed conflict.[327] The latter problematic aspect of German praxis on failure of state protection has, however, at least to some extent been remedied as the German Constitutional Court has recently overturned the jurisprudence of lower courts on this issue. In a landmark case from 2000 the Court held that an ongoing civil war does not *per se* preclude state persecution.[328]

---

the backdrop of prevailing impunity; as quoted in *ELENA*, supra n. 182, 33-35. See also *Kechemir*, Conseil d'Etat, 1 Dec. 1997, case no. 184053, stating that returning a person would violate Article 3 ECHR regardless of whether the risk emanated from non-state actors as long as the authorities were unable to provide protection; and S. Edminster, *Recklessly risking lives: Restrictive interpretations of "Agents of persecution" in Germany and France*, World Refugee Survey 1999, www.refugees.org/world/articles/wrs99_agentspersecution.htm.

[325] *T.I. v. UK*, 7 Mar. 2000, Application No. 43844/98, para. . See also A. Pretzell & Dr. C. Hruschka, 'Non-state agents of persecution: A protection gap in German Asylum Law?' 15 *Tolley's Immigration , Asylum and Nationality Law* No. 4 (2001), 221.

[326] Vermeulen, et.al., supra n. 324, 10-17.

[327] R. Marx, 'The notion of persecution by non-state agents in German jurisprudence' 15 *Georgetown Immigration Law Journal* (2001), 447, at 448-49.

[328] Federal Constitutional Court, 10 Aug. 2000, Collection of decisions, 2 BvR 260/98. See also subsequent decision by the Federal Administrative Court, BverwG, 20 Feb. 2001, 9C20.00; 9C21.00; 1C30.00, 31.00, 32.00, available at http://www.bundesverwaltungsgericht.de, site visited 20 Nov. 2003. Still, German courts have continued to follow the principle 'no state—no persecution' in relation to asylum seekers from Afghanistan and Iraq. See *UNHCR Berlin Press release, 30 Sept. 2003, Decision practice shows: A legal reform is of utmost importance*, available at http://www.ecre.org/en_developments/status/unhcreng.pdf, site visited 28 Nov. 2003. In Sweden the renewed Aliens Act 1997 brought with it also a change in the policy towards persecution by non-state actors. Before that also the Swedish position was that a situation where there was no state, for example, during a civil war, could not give rise to refugee status. *Regeringens Proposition 1996/97: 25—Svensk Migrationspolitik i ett globalt perspektiv*, pp. 97-98. These aspects of the non-state persecution

In accordance with the German 'accountability doctrine', in order for persecution to be attributable to the state, the failure of state protection must be deliberate; in other words, the state must be *unwilling* to provide protection.[329] The state is only accountable for acts committed by non-state actors if it supports or tacitly tolerates them. There have, for example, been cases where rape or sexual violence committed by agents of the state (such as soldiers) has been recognised as persecution.[330] Also, it has been held that even tough FGM had been criminalized in Guinea, and there existed a program on eradication of FGM, the violations could be attributed to the state as no prosecutions in FGM cases had been undertaken. Thus, a state is held accountable for private persecution when it has not used such measures that were available in order to provide needed protection.[331]

By contrast, a state cannot be held accountable for private violence if it has no means or resources to protect victims. Further, inability to protect is not held to be imputable to the state if it takes by and large necessary safeguards to combat violence.[332] Thus, the state is not accountable for private acts if national legislation imposes duties on state organs to offer protection and the government ensures that it is implemented. Also, if the authorities deny protection in individual cases but these incidents do not reflect a systematic governmental policy of inaction, the state cannot be held accountable. Thus, the German jurisprudence emphasises the more general aspects of the national protection system. If the government's intention is not is not to promote official misuse of power or misconduct by the authorities, the private act will not be attributable to the state.[333] It has, e.g., been held that the state cannot be held to be

---

question will not be further considered here, as they are not particularly relevant to gender-related persecution.

[329] ELENA, supra n. 182, p. 1, fn. 1. See also ECRE supra n. 292, p. 4-5, 12-13; and K. Hellmann, 'Germany', in Carlier et.al., supra n. 10, 225, at 269-274.

[330] Ankenbrand, supra n. 205, at 51; ECRE 2000, supra n. 292, p. 7, fn 24.

[331] Administrative Court Berlin, U. v. 3 Sept. 2003, VG 1 X 23.03—(12 S., M4222). See also Administrative Court Aachen U. v. 12 Aug. 2003, 2 K 1140/02.A—(18 S., M4086). Both cases are available at http://www.asyl.net, site visited 25 Nov. 2003. See also Vermeulen et.al., supra n. 324, 20-21.

[332] Marx, supra n. 327, at 449-50, citing at fn. 10 80 BverfGE 315 (1989), 334. See also Müller, supra n. 206, citing BverwG, InfAuslR 1990, 211.

[333] Federal Administrative Court (FAC) 5 Jul. 1994, cited in Marx, supra n. 327, at 450-52. For a more lenient view of the same court see, 74 BverwGE 160 (1986), 163, cited in Marx, supra n. 327, at 450, fn. 11, providing that if the state is willing to take necessary safeguards to protect victims against

accountable for singular instances of abductions because no state is able to prevent crime entirely, especially not crimes committed in the private sphere.[334] In cases concerning abductions, forced marriage and forced conversion to Islam the German Federal Administrative Court held that Turkey could not be held accountable for these practices as it disapproved of them and employed sufficient means generally used for combating crime.[335] One could thus say that the German view applies a very narrow view of the concept of due diligence in relation to the refugee definition. Accordingly, it has been argued that the German 'accountability approach' does not meet the requirements of the due diligence standard from a human rights point of view.[336] Finally, it should be noted that the new immigration law that was passed in 2002, included both persecution by non-state actors and gender-related persecution as grounds for granting refugee status. This law was, however, invalidated by the Federal Constitutional Court due to defective Parliamentary procedures. The Government has reintroduced the bill in January 2003. Therefore, it seems that also the German position on this issue is about to change.[337]

The majority of states, including the US,[338] UK and Canada[339] as well as Finland[340] and Sweden,[341] subscribe to the so-called 'protection approach', which does not limit

---

persecutory private acts but such measures prove to be insufficient with regard to individuals cases, the state is not held accountable: no state is able to accord its citizens absolute protection. See also Müller, supra n. 206, citing BverwG NVwZ 1996, 85).

[334] FAC (BverwGE) 6 Mar. 1990—9 C 14/89, as cited in Ankenbrand, supra n. 205.

[335] FAC 1 Mar. 1992—9 C 135/90; 16 Aug. 1993—9 C 7/93; 17 Aug. 1993—9 C 8/93; 3 Dec. 1993—9 C 450/93, as cited in Ankenbrand, supra n. 205, at 51. Still, in contrast to the case law of the Federal Administrative Court, the Federal Constitutional Court of Germany has held that the preventive measures must be linked to the importance endangered rights. Thus, the jurisprudence of the two highest courts remains inconsistent on this issue. Marx, supra n. 327, at 452.

[336] Marx, supra n. 327, at 451.

[337] See *U.S. Committee for Refugees World Refugee Survey 2003 – Germany*, June 2003, available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd, site visited 25 Nov. 2003. See also Türk, V., 'Non-state agents of persecution', in V. Gowlland-Debbas (ed.) *Switzerland and the International Protection of Refugees*, Kluwer Law International, 2002, 75, at 100; and summary of Parliamentary discussion on non-state actors of persecution 29 Nov. 1999 in ECRE Germany 2000, annex, pp. 1-6; as well as Opinion of the UNHCR Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House), 29 Nov. 1999, supra n. 323.

[338] See, e.g., *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th cir. 1987); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000); and *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000)

[339] *R. v. SSHD, ex parte Adan; R. v. SSHD, ex parte Subaskaran; R. v. SSHD, ex parte Aitseguer*, CA (UK) Civ., 23 Jul. 1999, 11 *IJRL* 4 (1999), 702, 714, also reported in [1999] All ER 774 (hereafter *ex parte Adan*); *Horvath*; *Ward*.

persecution to conduct attributable to the state. Also the UNCHR adheres to this view.[342] This approach examines whether the claimant has a well-founded fear of persecution on account of one on more of the Convention reasons. If that is the case, it does not matter whether the state is willing but unable to protect, or whether the state has collapsed in a time of civil war.[343] The UK approach has been that persecution by non-state actors is recognised in any case where the state is unwilling or unable to provide protection against is, and whether or not there exists competent or effective governmental or state authorities in the country in question.[344]

The disparities between British and German practice were highlighted in the British Court of Appeal case of *ex parte Adan*.[345] Here the issue was whether the British authorities were entitled to treat Germany and France as 'safe third countries' (for the purposes of the Dublin Convention) in relation to asylum seekers who assert fear of persecution by non-state agents, where the state is not complicit in the alleged persecution. The Court of Appeal held that English courts must accept different interpretations of the Convention as long as they are consistent with the 'international meaning' of the treaty. The court found that there is "on the Convention's proper 'international' interpretation, no space for differing views as to the entitlement to

---

[340] HE 28—2003, p. 175; *Sisäasiainministeriö: Turvapaikkaohje*, Dnro SM-2003-124/Ka-23, 17 Jan. 2003 [Ministry of Interior: Asylum Guidelines], p. 25; Helsinki Administrative Court (HHAO) 3 May 2000, decision no. 544; HHAO 3 May 2000, dec. no. 543 as quoted in ELENA, supra n. 182, 28-29.

[341] Sweden made an explicit reservation to the 1996 EU joint position on the term refugee, and stated that persecution by third parties falls within the scope of the Refugee Convention also where the state authorities prove unable to provide protection. Sweden has also implemented this position in its national legislation. See ELENA, supra n. 182, 52-53; Swedish Aliens Act. For a discussion on the situation in Norway see H. Fastrup Ervik, 'Flyktingbeskyttelse av kvinner på flukt fra vold og diskriminering. FNs Flyktingkonvesjon og forpliktelsene etter FNs Kvinnokonvensjon i lys av Norsk praksis', 21 *Mennesker & Rettigheter* 3 (2003), 307, at 319-21.

[342] UNHCR Handbook, supra n. 20, para. 65. See also Wilsher, supra n. 34, at 97-106, who argues that the Horvath case moved the UK away from a protection approach towards a *culpability* test.

[343] Marx, supra n. 327, at 454.

[344] Ex parte Adan, supra n. 339, 716. See also *Adan v. SSHD*, HL 1999, [1999] 1 AC 293, 306: "if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete" (per Lord Lloyd).

[345] Ex parte Adan, supra n. 339. See also *T.I. v. UK*, 7 Mar. 2000, Application No. 43844/98. Even though it referred to the differences between UK and German practice as a gap in protection, the ECtHR found that the case was inadmissible/no violation as Germany had given the UK safeguards that the applicant would avoid the risk of inhuman or degrading treatment (leave to remain on humanitarian grounds). It should be noted the ECtHR only considered whether the British decision of removal was contrary to Article 3 ECHR.

protection of persons who can demonstrate a well-founded fear of persecution by non-State agents and who have no access to state protection."[346] The Refugee Convention is thus "apt unequivocally to offer protection against non-State actors of persecution, where for whatever cause the State is unwilling or unable to offer protection itself."[347] Ruling in favour of the applicants, the court implicitly held that the French and German interpretations where inconsistent with the international meaning of the refugee definition, and could not be regarded as safe third countries. The decision was subsequently affirmed by the House of Lords.[348]

The EC Commission proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection[349] forms a part of the attempts to create a common European asylum policy. The proposed directive clearly states that non-state actors can be actors of persecution where the state (or other parties or organisations controlling (a substantial part of) the state) is unable or unwilling to provide effective protection.[350] Thus the Commission proposal endorses the 'protection approach'. Therefore, the proposal must be seen as a positive development in this respect as it does not mention the deliberateness of the authorities' failure to act (as opposed to the 1996 Joint Position).[351] It remains to be seen whether the provision will survive in its present form also in the final directive, and whether Germany will accept this stance.

---

[346] *Ex parte Adan*, supra n. 339, 727.

[347] Ibid., 722-24. See also G. S. Goodwin-Gill, 'The margin of interpretation: Different of disparate?', 11 *IJRL* 4 (1999), 730; and C. Phuong, 'Persecution by third parties and European harmonization of asylum policies', 16 *Georgetown Immigration Law Journal* (2001), 81 for comments on the case.

[348] *R. v. SSHD, ex parte Adan; R v. same, ex parte Aitseguer*, HL 19 Dec. 2000, [2001] 2 WLR 143.

[349] COM/2001/510, latest amended version June 2003, see supra n. 17.

[350] Ibid., Article 9(c). Compare to Comission's original proposal COM/2001/510, supra n. 17, Article 9(1) and Article 11(2)a.

[351] Joint position of the EU on the harmonised use of the term refugee (1996): 96/196/RIF, ECOJ L 063 13 Mar. 1996, p. 4, para. 5.2. provides for a strict understanding of recognising persecution by non-state actors. It recognises that an act suffered or feared may be persecution if it is "individual in nature and is encouraged or permitted by the state parties." What is remarkable is that the joint position emphasises that recognition of refugee status depends on whether the authorities' failure to act was deliberate or not.

3.3.2 What is the standard of state protection in the country of origin?

One of the central questions regarding persecution by non-state agents and failure of state protection is what is seen as failure of protection, or in other words, what standard of protection must the state be able (or willing— as the case may be in Germany) to afford the persons concerned?

According to the UK IAA gender guidelines failure of state protection may occur through, e.g., legal provisions or absence of legal provisions (e.g., marital rape exemptions in the law); lack of access to justice and police protection; lack of police response to requests for assistance, or a reluctance, refusal or failure to investigate, prosecute or punish individuals; and encouragement or toleration of particular social, religious, or customary laws, practices, and behavioural norm, or an unwillingness or inability to take action against them.[352] In the UK the leading decision is *Horvath v. SSHD*, decided by the House of Lords in July 2000.[353] That decision endorses a formalist position, arguing that the standard of required protection is not one that which would eliminate all risk but "a practical standard, which takes proper account of the duty which the state owes to all its own nationals." Lord Hope continues to note that "we live in an imperfect world [and that] certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection."[354] Referring the *Osman* case (European Court of Human Rights)[355] Lord Clyde again formulated the test for sufficient protection as follows: "there must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case."[356] Referring to

---

[352] IAA gender guidelines, supra n. 158, 25-26, paras. 2B.8, 2B.9.

[353] *Horvath v. SSHD*, HL 6 Jul. 2000, [2001] 1 AC 489; [2000] WLR 379, as reprinted in 13 *IJRL* 1/2 (2001), 174.

[354] Ibid., 182, per Lord Hope.

[355] *Osman v. United Kingdom*, 28 Oct. 1998, ECHR Reports 1998-VIII.

[356] *Horvath*, supra n. 353, per Lord Clyde, IJRL p. 194. Lord Clyde (but not the majority of the House of Lords) approved of the following description of the appropriate standard of state protection by the

Horvath, the Court of Appeals noted in *Skenderaj* that the sufficiency of protection has to be measured against the practical limitations on a state to protect its citizens from violence or threats of violence to which it is not alerted and its protection is deliberately not sought. To do so would impose on the state a duty of guarantee which would be disproportionate.[357] The 'sufficiency of protection' test has proved prejudicial in cases of non-state persecution. For example, even if a person has been persecuted in the past, and protection has proven inadequate, this may not be enough for a victim of non-state persecution to achieve recognition as a refugee. Also, a single incident of persecution by non-state actors is unlikely to be sufficient to amount to past persecution. To satisfy the sufficiency of protection test the applicant will have to show that the system of protection will fail him, and is ineffective. It has been said that unless the applicant has approached the authorities on a number of occasions in relation to a number of separate incidents, and has consistently been denied protection, the sufficiency of protection test will not be met.[358]

One of the few aspects of the refugee definition not discussed by the Canadian Supreme Court in *Ward* was the standard of protection a country needs to offer its citizens. In Canada the traditional standard has been that of "adequate though not necessarily perfect" protection.[359] Thus, the Canadian Federal Court has held that "where a state is *in effective control of its territory*, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough

---

Court of Appeal (per Stuart-Smith LJ): "there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate to the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and the courts, the detect, prosecute and punish offenders." ([2000] INLR 15, 26, para. 22) See however, *Noune v. SSHD*, CA (UK) Civ., 6 Dec. 2000.

[357] *Skenderaj v. SSHD*, CA Civ. 26 Apr. 2002, [2002] EWCA Civ 567, per Auld L.J., para. 43, referring to *Osman v. UK*, supra n. 354, para. 116.

[358] C. Yeo, 'Agents of the state: When is an official of the state an agent of the state?', 14 *IJRL* 4 (2002), 509, at 516, citing *SSHD v. Havlicek*, IAT, 7 Jun. 2000, 00/TH/01488, approved by the Court of Appeal in *Harakel v. SSHD*, [2001] EWCA Civ 884. See also Yeo's discussion of the *Svazas* case (*Svazas v. SSHD*, [2002] INLR 197) in relation to persecution by state official out of the control of the state ("rogue policemen") and its implications in the 'sufficiency of protection' test. Yeo, ibid., at 525-28; and Wilsher, supra n. 34, at 87-91.

[359] *Zalzali v. Canada (MEI),* FC, 30 Apr. 1991, [1991] ACWSJ LEXIS 17678; 1991 ACWSJ 20778; 27 A.C.W.S. 3d 90.

to justify a claim that the victims of terrorism are unable to avail themselves of such protection."[360] In the recent *Nduwimana* case[361] the Federal Court held that protection must not be 100% effective, but if must be such that a claimant *will not be exposed to a serious risk of persecution if returned to the country of origin*. Still, the Court noted that it introduced no new test for state protection.[362] There have, however, also been incidents of a broad view of protection in Canadian case law. For example, in *Bobrik*[363] it was held that even when the state is willing to protect its citizens, a claimant will meet the criteria for refugee status if the protection being offered is ineffective. A state must actually provide protection, and not merely indicate a willingness to help. Where the evidence reveals that a claimant has experienced many incidents of harassment and/or discrimination without being effectively defended by the state, the presumption operates and it can be concluded that the state may be willing but unable to protect the claimant.[364] This standard has, however, been held to be too high.[365] Thus, the Canadian practice on this issue does not seem completely settled. Still, as summarized in *Antoniy Zhuravlev v. MCI*:[366] "[W]hen the agent of persecution is not the state, the lack of state protection has to be assessed as a matter

---

[360] *Canada (MEI) v. Villafranca,* FC *18 Dec. 1992,* 18 Imm. L.R. (2d) 130 (FCA). (emphasis added), as cited in IRB Interpretation, supra n. 216.

[361] *Nduwimana,* FCTD 23 Jul. 2002, no. IMM-1077-01, 2002 FCT 812, as cited in IRB Interpretation, supra n. 216.

[362] IRB Interpretation, supra n. 216, pp. 6-7, fn 30. This approach can be compared to the approach in New Zealand and Australian case law, e.g., *ex parte Miah*, High Court 2001; Refugee Appeal No. 71427/99, 16 Aug. 2000: "The proper approach to the question of state protection is to inquire whether the protection available from the State will reduce the risk of serious harm below the level of well-foundedness, or, as it is understood in New Zealand, to below the level of a real chance of serious harm. The duty of the State is not, however, to eliminate *all* risk of harm." (emphasis in the original) As quoted in H. Lambert, 'The conceptualisation of 'persecution' by the House of Lords: *Horvath v. Secretary of State for the Home Department*', 13 *IJRL* 1/2 (2001), 16. This has been called the 'efficiency of protection' approach. This approach was explicitly turned down by the House of Lords in Horvath: "The *sufficiency of protection* is not measured by the existence of a real risk of an abuse of rights but by the availability of a system of protection of the citizen and a reasonable willingness by the State to operate it." (Horvath, supra n. 353, per Lord Clyde, emphasis added.)

[363] *Bobrik v. MCI* (FCTD, no. IMM-5519-93), 16 Sept. 1994 (per Tremblay-Lamer), as cited in IRB Interpretation, supra n. 216.

[364] As cited in IRB Interpretation, supra n. 216, p. 6-9. See also *Howard-Dejo v. MCI*, FCTD 2 Feb. 1995, no. A-1179-92; *Lukman Alli v. MCI*, FCTD 26 Apr. 2002, no. IMM-1984-01, 2002 FCT 479; *Balogh v. MCI*, FCTD 22 Jul. 2002, no. IMM-6193-00, 2002 FCT 809, as cited in IRB Interpretation, supra n. 216, p. 6-9.

[365] *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780 (T.D.), at 786, as cited in IRB Interpretation, supra n. 216, p. 6-9.

[366] FCTD no. IMM-3603-99, 14 Apr. 2000, as cited in IRB Interpretation, supra n. 216, p. 6-9.

of state capacity to provide protection rather than from the perspective of whether the local apparatus provided protection in a given circumstance. Local failures to provide effective policing do not amount to lack of state protection. However, where the evidence, including the documentary evidence situates the individual claimant's experience as part of a broader pattern of state inability or refusal to extend protection, then the absence of state protection is made out."

In the US this questions has not been as clearly addressed in case law. There are, however, some indications as to the US position. The terminology seems to differ (the US courts use the terminology of 'unable or unwilling to control'), but the substantial reasoning is similar to that concerning the adequate standard of protection by UK and Canadian courts. US Courts have concluded that a government is "unable or unwilling to control" if a pattern of government unresponsiveness to serious harm can be shown.[367] In *Aguirre-Cervantes v. INS* the 9th circuit Court of Appeals referring to reluctance of the police to intervene in domestic violence cases, as well as the legality to use 'correction' discipline to handle wives and children, held that the Mexican government was unable or unwilling to control the abusive behaviour of the applicant's father.[368] Further, the same court has held that government failure to investigate murders as well as government unresponsiveness towards violence against minorities proved that the government in question was unable or unwilling to control the persecutors.[369] Also, in *Abankwah v. INS* the 2nd circuit Court of Appeals held that as the number of prosecutions has been insignificant (only seven arrests between 1994 and 1999) there was not sufficient state protection even if FGM has been criminalized in Ghana.[370] On the other hand, the 9th circuit has held that where there exist full judicial and administrative remedies, and the government goes to considerable effort to ensure that violence or threat of it against religious minorities does not occur, the government is not unable or unwilling to control persecutors.[371] Furthermore, the INS proposed rules on asylum state that "[i]n evaluating whether a government is

---

[367] See INS Proposed rules Fed.Reg. vol. 65, no. 236, supra n. 157, p. 76591.

[368] *Aguirre-Cervantes v. INS*, No. 99-70861 (9th Cir. 2001), at 595-96.

[369] *Mgoian v. INS*, 13 Jul. 1999, CA (US) (9th Cir. 1999), 184 F.3d, 1036.

[370] *Abankwah v. INS*, CA (US) 2nd Cir., 9 Jul 1999, 185 F.3d 18, p. 21.

[371] *Elnager v. INS*, (9th Cir. 1991), 930 F.2d 784, 789, as cited in *Aguirre-Cervantes v. INS*, supra n. 368, 596.

unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes *reasonable steps* to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists."[372] Thus, the US does not seem very unlike the British in *Horvath*, emphasising the existence of legislation, machinery for prosecution and punishment of private harm, as well as willingness to operate such systems.

In Germany, the Federal Administrative Court has held that private acts cannot be attributed to the state if the state's ability to react effectively and in a timely way is hindered by objective circumstances. According to this line of reasoning, it suffices that the state, by and large, affords protection, irrespective of whether the state in the concrete individual case has failed to provide for protection.[373] Furthermore, the state's responsibility with respect to asylum law ends where the affording of protection exceeds the state's capacity, for instance in the case that the state's structures have broken down, or where a state has factually lost control of parts of its territory. Where the state has exhausted all available means, and these have not lead to any results, the need for protection exceeds the capacity of the state.[374] If the state is generally unable to provide protection refugee status will be denied.[375] For example, in FGM cases, the Federal Administrative Court has held that there is adequate protection where the state, by and large, affords protection, irrespective of a failure of protection in a certain individual case.[376]

While there is some case law on these questions in Germany, the Finnish and Swedish practice is scarce. In some Swedish domestic violence cases there have been references to existence of legislation against spouse abuse, and a presumption of the impartiality and gender-neutrality of the justice system In FGM cases the Swedish

---

[372] INS Proposed rules, supra n. 157, p. 76597, Section 208.15(a)(1) (emphasis added). See also explanation on p. 76591.

[373] ECRE, supra n. 292, p. 7, citing following cases of the Federal Administrative Court: BVerwGE 79, 79; BVerwGE 72, 269; BVerwGE 70, 232.

[374] Administrative Court Berlin, U. v. 3 Sept. 2003, VG 1 X23.03—(12 S., M4222).

[375] ECRE Germany 2000, supra n. 321, p. 7, citing BVerwGE 95, 42 (49).

[376] ECRE Germany 2000, supra n. 321, p. 8.

authorities have considered whether legislation exists that prohibits FGM, as well as the enforcement of any such legislation.[377]

The proposed EC refugee status directive states that in evaluating the effectiveness and availability of state protection where the threat of persecution emanates from non-state actors, it shall be considered whether the state takes "reasonable steps" to prevent the persecution or infliction of harm, and whether the applicant has access to such protection. The Commission's commentary to the proposed directive notes that for a system of protection of effective the state must be both able and willing to operate it.[378] In order to determine whether or not "reasonable steps" have been taken in order control or combat persecution or harm, it should be considered, amongst others, whether there is in force a criminal law which makes violent attacks by persecutors punishable by sentences commensurate with the gravity of their crimes, whether any official action taken is meaningful or merely perfunctory (this should include an evaluation of the willingness of law enforcement agencies to detect, prosecute and punish offenders), whether there is a pattern of state unresponsiveness or denial of state services.[379] In order to evaluate whether there is a reasonable access to state protection, it should be considered, *inter alia*, what the qualitative nature of the access to protection is. Here it should be born in mind that applicants as a class must not be exempt from protection by the law.[380]

3.3.3 The duty to seek protection

In cases of persecution by non-state agents, one of the threshold questions in determining failure of state protection is often whether the applicant has sought protection against the harm from state authorities.

In Canada, the position is that a claimant is required to approach the state in the country of origin in situations where protection might reasonably be forthcoming.

---

[377] Bexelius, supra n. 208, 112-114,128-29.

[378] Proposal for a Council Directive, COM/2001/501, Commentary, p. 17-19, supra n. 17.

[379] Proposal for a Council Directive, COM/2001/501, supra n. 17, Commentary, p. 18.

[380] Ibid., p. 18-19.

Otherwise, "the claimant need not literally approach the state."[381] The claimant must show that it was reasonable for him or her not to seek state protection. In any case, a claimant is not required to risk his or her life seeking ineffective protection of a state, merely to demonstrate the ineffectiveness of state protection.[382] Thus, in a domestic violence case the Federal Court held that "the [claimant's] fear did not rest on the lack of legislative and procedural framework in India to protect women abused by their husbands or agents of the their husbands, but rather on the lack of police support to such women and the difficulty, given the lack of such support, in effectively taking advantage and having recourse to the existing legislative and procedural framework of state protection in India."[383]

Similarly, the US BIA held in the precedent case of *In re S.A.* that although the applicant did not request protection from the government, the evidence showed that even if she would have turned to the government for help, the Moroccan authorities would have been unable or unwilling to control her father's conduct.[384] In *Aguirre-Cervantes v. INS* the applicant, whose father had abused her severely, had not been allowed go to the hospital to receive treatment for her injuries, or to go to the police, and she was not aware of any shelters or children's agencies that could help her. She believed that the police would not have helped her even is she had been able to contact the police for help. The 9th circuit Court of Appeals held that the Mexican government was unable or unwilling to provide protection.[385] The INS Proposed rules note that any attempts by an applicant to seek protection within the country are relevant, but not determinative of the state's inability or unwillingness to control the infliction of harm. Thus, "[a]n applicant's failure to attempt to gain access to protection is not in itself determinative of the state's inability of unwillingness to

---

[381] *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, at 724. See also *Kogan v. MCI*, FCTD 5 Jun. 1995, no. IMM-7282-93; *Medina v. MCI*, FCTD30 Oct. 1995, no. IMM-2322-94; *Farias v. MCI*, FCTD 3 Oct. 1997, no. IMM-3305-96; *Quintero v. MCI*, FCTD 6 Jun. 1997, no. IMM-3447-96, as cited in IRB Interpretation, supra n. 216, 6—4, fn. 15.

[382] *Ward*, *supra* n. 381, 724.

[383] *D'Mello v. MCI*, FCTD 22 Jan. 1998, no. IMM-1236-97, para. 13, as cited in IRB Interpretation, supra n. 216, 6—5.

[384] *In re S.A.*, BIA, Int. Dec. no. 3433, 27 Jun. 2000.

[385] *Aguirre-Cervantes v. INS*, No. 99-70861 (9th Cir. 2001), at 587.

control nor does this failure bar an applicant from establishing by other evidence the state's inability or unwillingness to control the infliction of suffering or harm."[386]

In the UK, the Lords only (briefly) implicitly discussed upon the issue of seeking state protection in *Horvath*. Lord Hope of Craighead stated merely that in order for the 'second part' of the refugee definition to be satisfied (that is, 'is unable or unwilling to avail himself of protection') the applicant's fear must be a well-founded fear of being persecuted for availing himself of the state's protection.[387] The Court of Appeals in *Skenderaj*, referring to *Horvath*, made a distinction between two situations lack of protection. First, a claimant may be *unable* to avail himself of state protection due to non-existence of insufficiency of such protection, or because he or she is in some way personally disabled from seeking it. Second, a claimant may be *unwilling* to avail himself of state protection because of a well-founded fear of persecution for a convention reason. Thus, the court held "if the state cannot or will not provide a sufficiency of protection, if sought, the failure to seek it is irrelevant. And that is so whether the failure results from a fear of persecution or simply an acceptance that to do so would be futile."[388] However, where the state can provide sufficient protection but the applicant is unwilling to seek protection for a Convention reason, such unwillingness to seek protection for reasons other than a well-founded fear of persecution (e.g., collusion of the authorities with the persecutor) is not accepted. Still, if the reason for not seeking protection is a well-founded belief that the state would not provide protection, such a state of mind would amount to well-founded fear that would satisfy the criteria of inability to avail himself of state protection. The test is thus whether the potential victim's unwillingness to seek state protection flows from a well-founded fear of persecution.[389]

In contrast with the relatively detailed elaborations of the common law countries, the Commission's commentary EU proposed directive on refugee status provides only that any attempts by an applicant to obtain state protection should be taken into

---

[386] INS Proposed rules, supra n. 157, p. 76591.

[387] *Horvath v. SSHD*, 6 Jul. 2000, [2001] 1 AC 489, at 182, per Lord Hope.

[388] *Skenderaj v. SSHD*, CA Civ. 26 Apr. 2002, [2002] EWCA Civ 567, per Auld L.J., para. 42.

[389] Ibid., para. 43-46. See also Lord Lloyd in *Horvath*, supra n. 387.

account as well as the state responses to these attempts.[390] Also the national practice in the studied civil law countries remains scarce. In some FGM cases the Swedish authorities have implicitly held that it would have been unreasonable to require the concerned women/girls to turn to the local authorities for help.[391] German case law does not consider individual facts with regard to whether protection was sought, or whether it could not be claimed due to prevailing circumstances.[392] In Finland both the Directorate of Immigration and the Helsinki Administrative Court have repeatedly held that where persecution emanates from non-state actors, the applicant must first seek protection from the state authorities in his/her country of origin. If the authorities fail to give protection, the person should turn to higher authorities for protection.[393] In some cases failure to seek police protection against domestic violence has been regarded as a factor weakening the applicant's credibility.[394]

3.3.4 'For reasons of': The link to a persecution ground in cases of non-state persecution in cases of non-state persecution

Before turning to the questions relating to the five Convention grounds for persecution, the link between the well-founded fear of persecution and the grounds for persecution must be discussed briefly. Thus, the words 'for reasons of' in the Refugee definition refer to the fact that a link (alternatively nexus or causation) must be established between the feared persecution and the "socio-political situation and resultant marginalization" of the claimant. In other words, there must be a link, or nexus, between who the claimant is or what she believes in, and the risk of persecution in her country of origin.[395] In national practice, there have been various approaches to interpreting the nexus clause. The most restrictive method requires that the Convention ground in question is the sole reason for the well-founded fear of being persecuted. This approach, the 'sole cause test', has been rejected in most

---

[390] COM 501(2001), supra n. 17, Commentary, p. 18.

[391] Bexelius, supra n. 208,129.

[392] Marx, supra n. 327, at 452.

[393] E.g., UVI Case no. 6 (residence permit on other grounds); UVI Case no. 15; KHO Case no. 3 (denied, HHAO decision upheld).

[394] UVI Case no. 13 (denied).

[395] Hathaway, supra n. 21, 136-37.

jurisdictions.[396] A variant of this test (the 'effective cause test') has, however, been applied particularly by US courts. In accordance with this interpretation Convention grounds for persecution may be rejected as the persecution is regarded to be on account other, non-Convention reasons. Thus, the central idea is that in effect, a predominant, single cause for persecution is isolated and where that cause is not a Convention reason, the claim is rejected.[397] In some other common law countries a so-called 'but for test' is applied. This test asks the question "whether the claimant would be similarly at risk of serious harm *but for* her civil or political status?"[398] This test has, however, been criticised amongst others by the UK House of Lords.[399] A third test is the 'contributing cause test', applied mainly in the US and Canada. This test is the most inclusive standard, providing that an act be motivated by at least in part by a Convention ground or that a Convention ground constitute a factor in the well-founded fear of being persecuted.[400]

As to the issue of nexus in cases of non-state persecution, in Canada the Federal Court has held that the law does not require that the inability to protection be connected to a Convention reason.[401] Also, conversely, it can be argued that even though the source of persecution is not grounded in a Convention reason, a State's failure to protect, if motivated by a Convention ground, can establish a nexus to the refugee definition. In other words, the failure to protect for a Convention reason can in itself amount to persecutory treatment.[402] A similar line of reasoning was adopted by the House of Lords in the landmark case of *Islam and Shah*. The Lords did not, however, elaborate further on the issue of nexus or "causation", it was merely pointed out that answers to questions about causation will often differ according to the context in which the

[396] M. Foster, 'Causation in context: Interpreting the nexus clause in the Refugee Convention', 23 *Michigan Journal of International Law* (2002) 265, at 269.

[397] Ibid., at 270-274.

[398] Ibid., at 274. See also Hathaway, supra n. 21, 37.

[399] *Islam v. SSHD; R. v. IAT and Another, ex parte Shah (Conjoined Appeals)*, 25 Mar. 1999, [1999] 2 All ER 545.

[400] Foster, supra n. 396, at 283-286.

[401] *Badran v. MCI*, FCTD, 29 Mar. 1996, no. IMM-2472-95.

[402] IRB Interpretation, supra n. 216, p. 6—3-6—4.

question is asked.[403] In *Montoya v. SSHD* the Court of Appeals accepted that "there can be circumstances in which a person can be persecuted for Convention reasons notwithstanding that the persecutor's personal motivation was independent of those reasons."[404]

The US Supreme Court held in *INS v. Elias-Zacharias* that in order for persecution to be 'on account of'[405] one or more of the Convention grounds, there must be evidence that the persecutor seeks to harm the victim on account of the victim's possession of the characteristic at issue.[406] Thus, the BIA held in its much-criticised decision in the *Matter of R. A.* that the claimant (a woman fleeing severe spouse abuse) should have established that her husband targeted and harmed her because he perceived her to be a member of particular social group. Thus, as the 'on account of' test was understood to "direct an inquiry into the motives of the entity actually inflicting the harm," the BIA held that the abuse was not 'on account of' a Convention ground, and it had not been established that other members of the particular social group were at risk of harm from the applicant's husband.[407] A year later BIA decided another domestic violence

---

[403] See *Islam & Shah*, supra n. 399, at 514, per Lord Hoffmann, particularly the oft-quoted passage about the Jewish shopkeeper. See also the Court of Appeals in *Skenderaj*, holding that the decision on causation in cases of non-state persecution will "be one of fact and degree," *Skenderaj v. SSHD*, 26 Apr. 2002, [2002] EWCA Civ 567, para. 36.

[404] *Montoya v. SSHD*, CA (UK) Civ. 9 May 2002, [2002] EWCA Civ 620, para. 31. In that particular case Mr. Montoya's claim for refugee status was denied.

[405] The US version of 'for reasons of'.

[406] *INS v. Elias-Zacharias*, 502 US 478, 482 (1992).

[407] *In re R.A.*, BIA, 11Jun. 1999, Interim Dec. no. 3403, (1999 BIA Lexis 31), 33, 40-41. The decision was subsequently (2001) overturned by the Attorney General (Janet Reno) and remanded to the BIA for reconsideration until after the adoption of the INS proposed rules (65 Fed. Reg. 76588, 7 Dec. 2000). See http://www.uchastings.edu/cgrs/documents/legal/ag_ra_order.pdf, site visited 5 Nov. 2003. The proposed rules have so far not been finalized by the Bush Administration. However, Attorney General John Ashcroft has taken the *Matter of R.A.* decision away from the BIA and intends to issue his own decision. See http://www.uchastings.edu/cgrs/campaigns/alvarado.htm, site visited 5 Nov. 2003. The INS proposed rules do not otherwise change the stance of *Matter of R.A.* in relation to the nexus issue, but do state that it is not necessary to show that the persecutor would threaten all or other members of a particular social group. Thus the commentary to the proposed rules notes that "it may be possible in some cases for a victim of domestic violence to satisfy the 'on account of' requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of these women is in a domestic relationship with the abuser." Further, the rules state that "evidence about patterns of violence in the society […] may also be relevant to the 'on account of' determination. For example, in the domestic violence context, and adjudicator would consider any evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship." INS proposed rules, 2000, supra n. 157, 76593. See also K. Musalo, 'Revisiting social group and nexus in gender asylum claims: A unifying

case, *In re S.A.*, concerning a daughter who had suffered severe abuse at the hand of her father. In this case of the BIA held that the persecution the claimant had suffered was 'on account of' her religious beliefs, as her (liberal Muslim) beliefs differed from those of her father (orthodox Muslim beliefs regarding the proper role of women). The BIA explicitly pointed out that because of the religious element in *In re S.A.* the domestic violence suffered by the applicant in that case was different from that in *Matter of R.A.*.[408] In *Aguirre-Cervantes v. INS*, the 9th circuit Court of Appeals held that the applicant had been persecuted (subject to severe domestic violence) 'on account of' her membership of a particular social group, namely her family. The Court held that the evidence demonstrated that the goal of the applicant's father was to dominate and persecute members of his immediate family, and that it was the applicant's status as a member of that family that prompted her beatings.[409] Still, despite certain positive judgments, the US stance remains unlike the British and Canadian, as it requires that it is the serious harm/acts of the persecutor that must be linked to a Convention ground.[410]

Within the civil law countries in the EU the issue of nexus remains unclear, and is rarely taken up as a separate issue in cases. Indeed, not even the relatively detailed EU refugee status directive takes directly issue with the question of nexus. The amended proposal merely states that "there must be a connection between the [Convention] reasons […] and the acts of persecution."[411] However, in the context of attributed Convention grounds, the revised proposal states that "[…] provided that such a

---

rationale for evolving jurisprudence', 54 *DePaul Law Review* (2003) 777, at 799-804, who argues that after the R. A. decision was vacated the earlier BIA decision in the *Matter of Kasinga* is the controlling authority regarding nexus.

[408] *In re S.A.*, BIA 27 Jun. 2000, Interim Dec. no. 3433 (precedent decision). The BIA noted that because of his orthodox Muslim beliefs regarding women and his daughter's refusal to submit to his "religion-inspired restrictions and demands", the claimant's father treated her differently from her brothers, in other words, abused her.

[409] *Aguirre-Cervantes v. INS*, supra n. 384, 594.

[410] For a discussion of nexus question in the jurisprudence of the UK, New Zealand, Australia and the USA see Musalo, supra n. 407.

[411] EU draft refugee status directive (version June 2003), supra n. 17, Article 11(3). Hathaway has criticised the revised draft for its failure to treat failure of protection as a component of the risk of being persecuted, and thus as undermining claims where there is a nexus only to such failure of protection. J. Hathaway, 'What's in a label?', 5 *European Journal of Migration and Law* 1 (2003), 1, at 15.

characteristic is attributed to him or her *by the actor of persecution*."[412] Thus, without addressing the question clearly, the revised proposal more or less implicitly states that nexus must be established to the persecutor. This is clearly out of line with British practice on the issue, and a worrying aspect of the draft directive.

3.3.5 Summary

One of the main problems concerning gender-related asylum claims—as well as violations of women human rights generally—has been that the harm in such claims is often caused by non-state actors. As has been discussed in this section there are considerable differences in the approaches towards persecution by non-state actors between different countries. However, there is a general consensus that where the state is *unwilling* to provide protection against serious harm inflicted by private persons, such acts fall within the scope of the Convention refugee definition. Still, also in such cases there are considerable differences in application concerning the required standard of protection (e.g., 'sufficient protection' in the UK, and 'reasonable steps' in the US and in the EU draft directive), as well as whether and to what extent the applicant is required to seek state protection against private harm. In addition, there is the main dividing line concerning state *inability* to provide protection; all studied countries *except Germany* accept that persecution is not limited only to private conduct attributable to the state, and recognise persecution by non-state actors in any case where the state is unwilling or unable to provide protection against such harm. Whereas the non-state actor question has received a considerable amount of attention in the case law of the studied common law countries, and to a certain extent in Germany, in Finland and Sweden the issue has not been subject to detailed analysis.

---

[412] EU draft refugee status directive (version June 2003), supra n. 17, Article 12(2), emphasis added. See also Hathaway, supra n. 411, at 15.

3.4 Comparison of constructions of a 'particular social group'

3.4.1 The *Ward* legacy in Canadian jurisprudence

In the leading Canadian judgment on the refugee definition, the Supreme Court in *Ward v. Attorney General of Canada*[413] formulated its understanding of membership of a particular social group. Before Ward, the particular social group category had been considered in a few Federal Court cases, including *MEI v. Mayers*[414] and *Cheung*.[415] After a thorough examination of a number of approaches to the question of particular social group and an extensive analysis of the Federal Court decisions in *Mayers* and *Cheung* as well as the US BIA decision in *Acosta*,[416] the Supreme Court proposed the following categories for membership of a particular social group:

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.

The Court went on to note that the first category "would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to

---

[413] *Ward v. Canada (Attorney General)*, SC (CA) 30 Jun. 1993, 2 S.C.R. [1993] 689.

[414] *Canada (MEI) v. Marcel Mayers*, FC (CA), 5 Nov. 1992, [1993] 1 FC 154 (C.A.). *Mayers* concerned a woman from Trinidad and Tobago who had been abused and raped by her husband. The Federal Court held that 'Trinidadian women subject to wife abuse' was a particular social group. A 'particular social group' was defined as "(1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness and solidarity, or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it."

[415] *Cheung v. MEI*, FC (CA) [1993] 2 FC 314 (C.A.). Applying the test proposed in *Mayers* (supra n. 414) the Federal Court held that women in China who have more than one child and are faced with forced sterilization constituted a particular social group.

[416] See discussion on *Matter of Acosta*, (1985) 19 I & N 211.

the anti-discrimination influences, in that one's past is an immutable part of the person."[417] In 1995 the Supreme Court had again the opportunity to elaborate on their understanding of membership of a particular social group. In a split decision in *Chan v. MEI*[418] the majority of the Court held that the claimant did not meet the burden of proof regarding well-founded fear of persecution, and refrained from addressing the social group question. In his dissent Justice La Forest did, however, elaborate on the question of membership of a particular social group and clarified the reasoning in *Ward*.[419] In particular, the dissent discussed the second category of social groups, that is, voluntary associated groups, and held that the right of a person or a couple to freely decide the number, spacing and timing of their children was a fundamental human right, that and parents asserting their right to have more than one child formed an association. Justice La Forest wrote: "a refugee alleging membership in a particular social group does not have to be in a voluntary association with other persons similar to him- or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with kindred persons. The association exists by virtue of a common attempt made by its members to exercise a fundamental right."[420] Thus, the association in question would so fundamental that the applicant could not be required to forsake it, and the applicant was found to be a member of a particular social group. As gender is an innate characteristic 'women' as well as sub-groups of women may constitute a particular social groups. Such subgroups may be identified by reference to characteristics, in addition to gender, which may also be innate or unchangeable, such as age, race or marital or economic status.[421] Examples of social groups identified by Canadian jurisprudence relevant to gender-related claims include the family; homosexuals (sexual orientation); women subject to domestic abuse; women forced into marriage without their consent; women subject to circumcision; persons subject

---

[417] *Ward*, supra n. 413, 739.

[418] *Chan v. Canada (MEI)*, SC (CA) 19 Oct. 1995, 3 S.C.R. [1995] 593.

[419] Although made in dissent, Justice La Forest's comments on the social group issue were joined by two other Court members and were not contradicted by the majority. It should also be recalled that Ward was an unanimous judgment. See K. Daley & N. Kelley, 'Particular social group: A human rights based approach in Canadian Jurisprudence', 12 *IJRL* 2 (2000), 148, at 151.

[420] Chan, supra n. 418, dissent per La Forest, 643-46.

[421] IRB Gender Guidelines (1996), supra n. 155, p. 8-9.

to forced sterilization; and educated women.[422] It should be noted that even though a social group cannot be defined solely by the fact that a group of persons is subject to persecution,[423] social groups have been defined through gender and the feared persecution, for example, as 'women subject to circumcision'. The updated Canadian gender guidelines issued in 1996 clarify this issue by stating that a group is not considered to be "defined *solely* by common victimisation if the claimant's fear of persecution is also based on her gender, or on another innate or unchangeable characteristic."[424]

3.4.2 *Islam and Shah* and 'particular social group' in the UK

The famous *Islam and Shah* case[425] was the first case concerning the construction the particular social group Convention ground to reach the House of Lords. Before 1999 the Court of Appeals had considered the question of how a particular social group should be construed for the first time in *Savchenkov v. SSHD*.[426] In this case the Court of Appeal accepted that 'membership of a particular social group' should be interpreted *esjudem generis*, and that the concept of 'particular social group' must have been intended to apply to social groups which exist independently of persecution.[427] In the *Islam and Shah* case the House of Lords held that a particular social group is comprised of a group of persons who share a common, immutable characteristic that is either beyond the power of a person to change, or is so integral to the individual's identity that it ought not to be required to be altered. Furthermore, it was not required that a particular social group should possess a component of cohesiveness—even though cohesiveness might prove the existence of a particular

---

[422] See IRB Interpretation, supra n. 216, pp. 4—6-4—9.

[423] Ward, supra n. 413, 729-33.

[424] IRB Gender Guidelines (1996), supra n. 155, p. 6.

[425] *Islam v. SSHD, R. v. IAT and another ex parte Shah (conjoined appeals)*, HL (UK), 25 Mar. 1999, [1999] 2 WLR 1015, (hereafter *Islam & Shah*), as reprinted in 11 *IJRL* 3 (1999), 496. See also *Islam & Shah* in the Court of Appeals, [1998] 1 WLR 74; [1997].

[426] *Savchenkov v. SSHD*, [1996] Imm. AR 28. See M. Vidal, '"Membership of a particular social group" and the effect of *Islam and Shah*', 11 *IJRL* 3 (1999), 528, at 530-32.

[427] *Savchenkov v. SSHD*, supra n. 426, 34. See also *Lazarevic v. SSHD*, CA (UK), [1997] Imm AR 251, where the Court of Appeals held that 'particular social group' must be construed *esjudem generis* with the other Convention grounds but there is not requirement that the social group must possess a civil or political status in order to be recognised as a social group. See Vidal, supra n. 426, at 532.

social group.[428] The phrase applies to whatever groups might be regarded as falling within the Convention's anti-discriminatory objectives. Thus, women can constitute a particular social group if the live in a country which discriminates against them on the grounds of sex.[429] Consequently, the applicants, two Pakistani women who had been subject to domestic violence and accusations of adultery, had a well-founded fear of persecution for reasons of their membership in the particular social group 'Pakistani women'.[430] Further, the Lords held (unanimously) that a particular social group must exist independently from the persecution claimed. However, it was also held that the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.[431] Issued in 2000 the IAA gender guidelines, reiterating the principles of *Islam and Shah*, state that a particular social group will exist where "a group of individuals with a particular characteristic are recognised as being different form others in the society." Whether that is the situation will, according to the guidelines, depend on evidence and the factual situation in the particular country of origin. Thus, the society of a country of origin, the acts of persecutors as well as other external factors have a role in defining, identifying and even causing the creation of a particular social group. As examples of relevant particular characteristics (innate, unchangeable or such that a person should not be required to change them) include gender, age, race, marital status, family and kinship

---

[428] *Islam & Shah*, per Lord Steyn, and Lord Hoffmann, supra n. 425, IJRL 501-503; 511-12 respectively. See also comments by G. Goodwin-Gill, 'Judicial reasoning and 'social group' after Islam and Shah', 11 *IJRL* 3 (1999), 537, at 538.

[429] *Islam & Shah*, per lord Steyn, and Lord Hoffmann, supra n. 425, IRJL 503; 511-12 respectively. See also Vidal, supra n. 426, at 533. The emphasis on the principles of non-discriminatory has been criticised. For example, Goodwin-Gill has expressed fears that the non-discrimination argument may be unnecessarily limiting. Goodwin-Gill, supra n. 428, at 538-39. See also judgment per Auld LJ in *Skenderaj v. SSHD*, 26 Apr. 2002, [2002] EWCA Civ 567, paras. 19, 23-27, where he questions the relevance of non-discrimination considerations in cases of persecution by non-state actors. He state that "it is not necessary to insist upon discrimination as a defining element of a particular social group to satisfy […] that the latter must exist independently of, and not be defined by, persecution." (para. 27) In addition, see judgment by the High Court of Australia in *Chen Shi Hai v. MIMA*, (2000) 201 CLR 293.

[430] Lords Steyn, Hope of Craighead and Hoffman favoured the broader formulation of 'Pakistani women'. Lord Steyn also held in the alternative that the group consisted of 'Pakistani women accused of transgressing social mores and who are unprotected by their husbands or other male relatives'. Lord Hutton concurred with Lord Steyn's alternative, narrower group, and Lord Millet dissented and would have dismissed the appeals.

[431] Islam & Shah, per Lord Steyn, supra n. 425, IJRL 504-505. Lord Steyn citied with approval the Australian case of *A v. MIEA*, 142 ALR 331, 359 (McHugh J.). See also *Yake v. SSHD*, IAT 19 Jan. 2000, UK IAT 00TH00493. The particular social group was held to be "Yopougon women who may be subject to FMG".

ties, sexual orientation, economic status and tribal or clan affiliation. Furthermore, the guidelines note that whether such factors are unchangeable depends on the social and cultural context in which the woman lives, as well as of the perception of the agents of persecution and those responsible for state protection.[432]

3.4.3 Evolving constructions of 'membership of a particular social group' in the USA

In 1985 the US Board of Immigration Appeals described a particular social group in *Matter of Acosta*[433] as follows: "Applying the doctrine of *ejusdem generis*, we interpret the phrase 'persecution on account of membership in a particular social group' to mean 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, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, 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 consciences."[434] About a year later the US Court of Appeals for the 9th circuit took a quite different approach to the social group issue and held that a particular social group implied "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 a voluntary associational relationship among purported members, which imparts some common characteristic that is

---

[432] IAA gender guidelines, supra n. 158, 39-40, paras, 3.35-3.39. See also *Montoya v. SSHD*, CA (UK), 9 May 2002, [2002] EWCA Civ. 620.

[433] *Matter of Acosta*, (1985) 19 I & N 211.

[434] The formulation in *Acosta* has had a considerable influence of the understanding of phrase 'particular social group' in many other jurisdictions. See e.g., *Ward*, supra n. 413, and *Islam & Shah*, supra n. 426. See also *Matter of Kasinga*, where the BIA applying the criteria for defining a particular social group set down in *Acosta*, held that a "particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." Thus, the BIA found that the applicant was a member of a social group consisting of young women members of a certain tribe who had not undergone FGM, and who opposed the practice. *In re Kasinga*, BIA 13 Jun. 1996, Interim decision no. 3278, (21 I & N dec. 357), p. 10.

fundamental to their identity."[435] Since then the US practice on the social group issue has been divided into two streams, one, representing the BIA and most Circuit Courts of Appeals, following the BIAs decision in *Acosta*, the other—the minority of Circuit Courts (in fact only the 9th circuit)—the approach in *Sanchez-Trujillo*.[436] However, in 1999, the BIA held in the *Matter of R.A.* that the immutable or fundamental characteristic-criterion was only a threshold, and that also an additional criteria must be demonstrated in order to fall under the social group category—namely that group members "understand their own affiliation with the grouping, as do other persons within the particular society" and the suffered harm is "itself and important societal attribute."[437] The Attorney General subsequently vacated the BIAs decision, and the INS issued proposed rules on interpreting the refugee definition.[438] The rules restate the definition of particular social group as laid out in *Acosta*.[439] The commentary to the rules affirms that gender is "clearly such an immutable trait." Further, the commentary notes that membership of a social group cannot be defined by the persecution suffered.[440] However, the in addition, the rules include a list of factors the may be considered in determining whether a social group exists, but which are not necessarily determinative. These factors are largely inspired by *Sanchez-Trujillo* and *Matter of R.A.*.[441] The proposed rules have, however, not yet entered into force, and it

---

[435] *Sanchez-Trujillo v. INS*, CA (US) 2nd Cir., 801 F.2d 1571 (1986).

[436] See Aleinikoff, supra n. 72, at 275-280. See also *Geovanni Hernandez-Montiel v. INS*, CA (US) 9th Cir., 24 Aug. 2000, 225 F.3d 1084, as reprinted in 12 *IJRL* 4 (2001), 608, 615.

[437] *In re R.A.*, BIA 11 Jun. 1999, Interim dec. no. 3402, (1999 BIA LEXIS 31), 29-31, available at www.refugeecaselaw.org, site visited 7 Nov. 2003. The decision was subsequently (2001) overturned by the Attorney General (Janet Reno) and remanded to the BIA for reconsideration until after the adoption of the INS proposed rules (65 Fed. Reg. 76588, 7 Dec. 2000). No decision has yet been taken in the case. See supra n. 209. See also H. Schaffer, 'Domestic violence and asylum in the United States: In re R- A-', 95 *Northwestern University Law Review* (2001), 779; A. Binder, 'Gender and the "membership in a particular social group' category of the 1951 Refugee Convention', 10 *Columbia Journal of Gender and Law* (2001), 167.

[438] The proposed rules aim at removing certain barriers that the *In re R.A.* decision posed to claims involving domestic violence. INS proposed rules, supra n. 157, 76588. For comments on the proposed rules, see K. Musalo & S. Knight, 'Steps forward and steps back: Uneven progress in the law of social group and gender-based claims in the United States', 13 *IJRL* 1/2 (2001), 51, at 58-61; 65-67. See also von Sternberg, supra n. xx, 254-298, for an extensive overview of US and Canadian case law.

[439] INS proposed rules, supra n. 157, Section 208.15(c)1.

[440] Ibid., 76593-76594.

[441] INS proposed rules, supra n. 157, Section 208.15(c)3. See also Musalo & Knight, supra n. 438, at 66-67, who note that the 9th circuit Court of Appeals had by 2001 been the only court to apply these proposed additional factors.

is unclear whether they will be affirmed by the Bush administration.[442] Irrespective on what the fate of the proposed rules is, it should be noted that the 9th circuit Court Appeals seems recently to have revised its position on the social group issue. In its decision in *Hernandez-Montiel v. INS* (concerning a young Mexican gay man with a female sexual identity) the 9th circuit Court of Appeals noted that the case law on the issue "is not wholly consistent"[443] and held that its decision in *Sanchez-Trujillo* should be interpreted as consistent with the *Acosta* test and that the so called voluntary association test is an alternative basis for establishing membership in a particular social group.[444] Referring to the INS proposed rules, the 9th circuit reaffirmed this approach in *Aguirre-Cervantes v. INS*, and found that the applicant had been persecuted by her father for reasons of her membership in a particular social group, namely her family.[445]

3.4.4 'Political persecution' and sparse use of the 'particular social group' ground in Germany

Generally it can be said that the German jurisprudence on this issue continues to be scarce.[446] The majority of the lower administrative courts follow a ruling by the

---

[442] See infra n. 406.

[443] *Geovanni Hernandez-Montiel v. INS*, CA (US) 9th Cir., 24 Aug. 2000, 225 F.3d 1084, as reprinted in 12 *IJRL* 4 (2001), 608, at 614.

[444] Ibid., at 615. See also the INS proposed rules, supra n. 157, 76594.

[445] *Aguirre-Cervantes v. INS*, No. 99-70861 (9th Cir. 2001), 593. The *Aguirre-Cervantes* case was, however, subsequently vacated per stipulation and remanded to the BIA (*Aguirre-Cervantes v. INS*, 270 F.3d 794, 9th Cir. 2001; 273 F.3d 1220, 9th Cir. 2001), as Aguirre-Cervante's father was found dead in Mexico in December 2001. The BIA will hear the case again, but as the source of persecution does not exist anymore, the claim may be moot. See M. G. Daugherty, 'The Ninth Circuit, the BIA, and the INS: The shifting state of the particular social group definition in the Ninth Circuit and its impact of pending and future cases', 41 *Brandeis Law Journal* (2003), 631, 653.

[446] P. Tiedemann, 'Protection against persecution because of 'membership of a particular social group' in German law', 2000. See also Kälin who notes that also the Swiss practice on the social group issue is sparse, and it seems that the Swiss authorities have not yet decided how to approach the question of gender-related claims for refugee status. W. Kälin, 'Gender-related persecution', in V. Gowlland-Debbas (ed.), *Switzerland and the International Protection of Refugees*, Kluwer Law International, 2002, 111, at 121. Although French jurisprudence does not include detailed analyses of membership of a particular social group, French authorities have (occasionally) approved social group claims, and the results have been similar to those of decisions in common law countries. See, e.g., *Commission des recours des réfugiés* (CRR), *Aminata Diop*, CRR Decision no. 164078, 18 Sept. 1991; Mlle Kinda, CRR decision no. 366892, 19 Mar. 2001; CRR decision no, 369776, 7 Dec. 2001; M. et Mme Sissoko, CRR decision no. 361050 and 373077, 7 Dec. 2001; Berang, CRR decision no. 334606, 6 May 1999; *Ourbih*, Conseil d'Etat, SSR, Decision no. 171858, 23 Jun. 1997. See further, Aleinikoff, supra n. 72, at 280-82.

Federal Administrative Court that in order for a person to qualify as a refugee (either under Article 16a of the Constitution or section 51 of the Aliens Act) the persecution must be 'political.' There thus is a tendency to subsume potential social group claims under other Convention grounds.[447] Thus, persecution of women on account of their gender can be seen as 'political persecution'. For example, failure to comply with religious dress codes is seen as equal to resistance against the dominant political order.[448] Usually gender is combined with some other characteristic, such as ethnicity, religion, or resistance against social mores, in order for the requirements of political persecution to be met.[449] Also, in FGM cases, which tend to be typical social group claims in common law countries, courts have found that the applicants suffered 'political persecution', and held that women fleeing FGM have a conviction that they have the right to have an intact body and refuse to undergo FGM. Such a conviction is political seen in context of relations between men and women, and the position of women in society.[450] In a case concerning honour killings a court held that honour killings relate to the societal position and role of women, and the killing of women who have failed to conform to the social mores regulating female sexuality, aim at eliminating perceived or imputed political beliefs.[451]

Still, German courts have at times determined asylum claims based on membership of a particular social group. Particular social groups recognised by German courts include women from Iran unwilling to comply with the Islamic dress code, and single women in Afghanistan.[452] It has also been indicated that homosexuals would constitute a particular social group.[453] In a recent FGM case, it was held that the

---

[447] Aleinikoff, supra n. 72, at 283.

[448] Müller, supra n. 206.

[449] Ibid..

[450] Administrative Court Aachen, U. v. 12 Aug. 2003, 2 K 1140/02.A—(18 S., M4068).

[451] Administrative Court Berlin, 23 Aug. 2001, citing Federal Administrative Court, BverfG 10 Jul. 1989—2 BvR 502/86 ua.-BverfG 80, 315.

[452] Hessen Higher Administrative Court, decision 14 Nov. 1988, 13 TH 1094/87, InfAuslR 1998(?), 17; Frankfurt Administrative Court, decision 23 Oct. 1996, 5E 33532/94.A(3), NVwZ-Beilage 6/1997, 46, respectively, cited in Tiedemann, supra n. 446.

[453] Administrative Court Hessen, HessVGH, Urt. v. 21 Aug. 1986—10 OE 69/83, InfAuslR 1987, 24. this decision was reaffirmed by the Federal Administriative Court, without any elaboration on the grounds. BVerwG, Urt. v. 15 Mar. 1988—9 C 278.86, BVerwGE 79, 143. The general principle is that asylum will be granted in accordance with article 16a of the German Constitution if a person is persecuted because of a personal characteristic which in unchangeable (in the way race, or nationality

applicant feared persecution—FGM—because she belonged to the group of women. As women in Guinea have another social status and other social functions than men, the court held that they could be defined as particular social group.[454] The courts have usually not attempted to define a social group. Rather, the courts tend to reach their decisions based on an intuitive sense. Most cases merely include a single sentence referring to membership of a particular social group, without further reasoning.[455] There have, however, been some decisions where courts have attempted to articulate standards for evaluating social group claims. In these cases the approach towards the social group category has been twofold; some courts have looked at homogeneity among group members and some sort of internal group structure, whereas other courts have asked whether the alleged group is perceived by the general population as a group and, if so, whether it is perceived in strongly negative terms.[456] The meaning of membership of a particular social group remains unclear both in German jurisprudence and legal literature. The social group ground is used, but without close analysis. Thus, it has been said that there is no established interpretation of the term particular social group in Germany.[457]

3.4.5 Finland, Sweden and differing views on women as a 'particular social group'

The Swedish position on the question of women and 'particular social group' for the purposes of refugee status has been straightforward—"identity as a woman is not within the purview of the convention's ground 'membership in a particular social group'."[458] The preparatory work to the amendments to the Aliens Act in 1997, the

---

are unchangeable) Hence there is no need to formulate homosexuals as a social group. See Tiedemann, supra n. 446.

[454] Administrative Court Berlin, U. v. 3 Sept. 2003, CG 1 X 23.03—(12 S., M4222), available at http://www.asyl.net, site visited 25 Nov. 2003.

[455] Tiedemann, supra n. 446.

[456] M. Fullerton, 'A comparative look at refugee status based on persecution due to membership of a particular social group', 26 *Cornell International Law Journal*, 1993, 505, at 531-35. See also Tiedemann's 'participant theory', emphasising community and 'observer theory', emphasising a common characteristic, Tiedemann, supra n. 446.

[457] Tiedemann, supra n. 446.

[458] Migrationsverket [Swedish Migration Board], Legal Practice Division, *Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection*, 28 Mar. 2001, 13. See also *Regeringens Proposition 1996/97:25—Svensk Migrationspolitik i ett Globalt Perspektiv*, pp.

Government notes that to generally refer women and homosexuals as members of a particular social group goes too far and that they must be given protection outside the framework of the Refugee Convention.[459] In accordance with this position the Swedish Aliens Appeals Board has held that even if the group of women were limited to those who in a certain country belong to a certain cultural group, it would be unreasonable to recognise such a group of women as members of a particular social group apart from the rest of the individuals who belong to the same cultural group.[460] As mentioned above, the Swedish Aliens Act includes a provision which states that a person who has a well-founded fear of persecution on account of his sex or homosexuality can be granted residence status as a person "otherwise in need of protection." The first cases dealt with after the entry into force of this provision in 1997 concerned claims from girl from Togo fearing FGM. In these cases the Aliens Appeals Board quoted the interpretation of particular social group given above, and applying Chapter 3, Section 3(3) decided that the claimants should be considered to be in need of protection based on the risk of subjection to FGM against their will.[461] In 2002, the Swedish government began an internal review of this policy in response to the Commission's draft refugee status directive (which proposes that persecution on the grounds of gender and sexual preference should be considered under

---

98. Still, during the preparatory work of the Aliens Act the Swedish government did not reject the idea that women in general might be considered as belonging to a particular social group. Regeringens Proposition [Government proposal] 1996/97:25, *Svensk migrationspolitik i ett globalt perspektiv* [Swedish migration policy in a global perspective], p. 101. See also Folkelius & Noll, supra n. 75, at 623; and Wikrén & Sandesjö, supra n. 187, 167.

[459] Regeringens Proposition [Government proposal] 1996/97:25, *Svensk migrationspolitik i ett globalt perspektiv* [Swedish migration policy in a global perspective], p. 152.

[460] Aliens Appeals Board, *UN 328-97*, 20 Mar. 1997, citing an earlier decision (*UN 94/12198*, 12 Feb. 1996), available at http://www.un.se/praxis2.htm, site visited 18 Nov. 2003. The same position applies to homosexuals. See, however, the case *reg. 85-98* (http://www.un.se/praxis2.htm, site visited 18 Nov. 2003), submitted by the Aliens Appeals Board to be decided by the Government, where the Government held that even though homosexuality cannot be seen as a basis for a particular social group, and homosexuality as such was not in Iran a sufficient ground to fear persecution, the applicant's case had received a lot of attention in Sweden and abroad, and there were therefore reasons to believe that the applicant could be targeted by the authorities upon return to Iran. Therefore the applicant was in need of protection.

[461] Aliens Appeals Board, *UN 95/03144*; *UN 94/04057*, 23 Mar. 1997, as cited in Folkelius & Noll, supra n. 75, at 624. See also *UN 328-97*.

'membership of a particular social group').[462] Proposals based on this review were expected in 2003.[463]

In Finland membership in a particular social group is very rarely used as a ground of persecution. Even though there are no doctrinal obstacles to utilising the social group ground, in practice, cases that would on the surface look like typical social group cases in Canada or the UK, for example, are not recognised as such in Finland. For example, family members of politically active persons are usually not recognised as members of a particular social group. For example, in one case the daughter (and other members of the family) of a member of political party had been subject to severe beatings by the Angolan police, who had come to search for her father. Even though it seemed clear on the facts that the applicant had been subject to abuse because of her father's political activities, the issue of membership of a particular social group was not raised.[464] In other types of cases it has been held that as the applicant's political activities have not been significant, the applicant did not have a well-founded fear of persecution on Convention grounds. For example, in a case where a young woman who had refused to participate in collecting money for the war between Eritrea and Ethiopia, had been subject to various threats and sexual violence because of this, was not regarded as a Convention refugee as her political activities were not regarded as significant.[465] A social group analysis was not applied. Another problematic issue is, of course, that the Finnish interpretation of 'political opinion' is very restrictive. The Government proposal for a renewed aliens act provides in this respect for a considerable improvement. The proposal explicitly states that women

---

[462] See the above discussion on the differences between the Commission's original proposal and the now revised draft with respect to the particular social group, infra sub-section 3.4.6.

[463] U.S. Committee for Refugees World Refugee Survey 2003—Sweden, available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd, site visited 25 Nov. 2003. See Fastrup Ervik, supra n. 343, at 321-23, for a discussion of Norwegian practice.

[464] UVI Case no. 5. The applicant was instead granted a residence permit on the basis of need of protection. See also KHO 29 Feb. 2000/401, Dnro 1039/3/99; HHAO Case no. 6; and UVI Case no. 17. In the last case where a young woman feared persecution because of the political activities of her father. She was granted a residence permit on the basis of need of protection; the issue of membership of a particular social group was not raised.

[465] HHAO Case no. 7 (residence permit on the basis of need of protection). Similarly HHAO Case no. 9, overturned to earlier decision of UVI, on remand UVI granted residence permit on the basis of need of protection. UVI Case no. 18). The Court held that the applicant's political and societal activities had not been particularly significant.

can in some cases be persecuted for reasons not related to race, religion, nationality or political opinion. In such cases membership of a particular social group can be regarded as the ground of persecution. Also sexual orientation is mentioned as another example of membership of a particular social group.[466] It remains to be seen whether this statement will result in any changes in the practice once the renewed Aliens Act enters into force.

3.4.6 The EU refugee status directive and membership of a social group

The original Commission proposal for the EU refugee status directive states that "the concept of social group shall include a group which may be defined in terms of certain fundamental characteristics, such as sexual orientation, age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership. The concept shall also include groups of individuals who are treated as 'inferior' in the eyes of the law."[467] The commentary to the directive further notes that states that term 'membership of a particular social group' was deliberately drafted in an open way and needs to be interpreted in a broad and inclusive manner. Thus, a social group may be defined by a fundamental characteristic (e.g., gender, sexual orientation, age, family relationship), or history, or by an attribute fundamental to identity or conscience (e.g., trade union membership or the advocacy of human rights).[468] Further, Commission notes that the concept is not confined to narrowly defined, small groups of persons, and no voluntary associational relationship or *de facto* cohesion of members is required. In addition, the interpretation should also allow for the inclusion of groups of individuals who are treated as 'inferior' or as 'second class' in the eyes of the law, which thereby condones persecution at the hands of private individuals or other non-state actors, or

---

[466] HE 28/2003, p. 175: "Naisiin sukupuolen perusteella kohdistuva vaino voidaan myös […] yhteiskunnallisen ryhmään kuulumisen tulkinnassa ottaa yhtenä tekijänä erikseen huomioon mahdollisena turvapaikan perusteena. Naista voidaan joissakin tapauksissa vainota myös syystä, jonka ei voida katsoa perustuvan rotuun, uskontoon, kansallisuuteen tai poliittiseen mielipiteeseen. Tällöin vainon syynä voidaan pitää kuulumista tiettyyn yhteiskunnalliseen ryhmään."

[467] COM (2001) 510, supra n. 17, Article 12(d).

[468] COM (2001) 501, Commentary, supra n. 17, p. 22.

where the State uses the law in a discriminatory manner and refuses to invoke the law to protect that group. As examples of such situations the commentary mentions situations where women are the victims of domestic violence, including sexual violence and mutilations, and are unable to obtain effective protection against such abuse in their country of origin because of their gender or social status as married women, daughters, widows or sisters.[469] It is immaterial whether the applicant actually possesses the, e.g., social characteristics which attract the persecutory action, provided that such a characteristic is attributed to him or her by the actor of persecution.[470] However, during the two years after the finalisation of the Commission proposal the draft directive has been subject to considerable revisions. Thus, the current version of the directive defines a particular social group as consisting of persons who "share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; *and* that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."[471] Furthermore, the revised proposal considerably waters down the position on gender-based social groups by stating that "gender related aspects might be considered, without by themselves creating the presumption for the applicability" of the Article.[472] The revised draft has consequently been criticised as it now requires satisfaction 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 UNCHR social group guidelines.[473] Further, social groups defined by sexual orientation or gender are no longer recognised as clear examples of social groups, but may qualify only depending

---

[469] Ibid., p. 22-23.

[470] EU draft refugee status directive, version June 2003, Article 12(2). See also the Commission proposal, which states that it is immaterial whether the grounds, on which a fear of being persecuted is based, are "genuine or simply attributed to the applicant by the State or non-governmental agent of persecution." For example, it may be sufficient that a persecutor believes that an individual holds a certain political view, regardless of the truth of the matter, for a persecutory act to be taken against that individual for the single reason of imputed political opinion. COM (2001) 501, supra n. 17, Article 11(2)b.

[471] EU draft refugee status directive, version June 2003, supra n. 17, Article 12 (d), emphasis added.

[472] Ibid.

[473] Hathaway,, supra n. 411, at 17.

on the circumstances of the country of origin.[474] Thus, it can be said that while the original Commission proposal could be seen as a considerable development of the law, the current text, particularly in relation to gender-based social groups, represents a standard lower than the existing standard in the national laws of some EU member states.

3.4.7 Summary

It could be said that the study reveals two kinds of approaches to membership of a particular social group as a Convention ground for persecution. On one hand, the common law countries, Canada, the UK, and the US (more or less), all adhere to the so-called protected characteristics test. On the other hand, the European civil law countries, Finland, Germany, and Sweden, lack an accepted test for defining a particular social group. Still, the few German cases where a definition of a particular social group has been attempted seem to indicate that a protected characteristics test would be applicable. In addition, in some German cases, the notion of 'political persecution' has focused on unalterable, individual characteristics (such as gender or homosexuality) that have lead to a conflict with the country of origin.[475] Further, there are also some differences between the common law countries' application of the protected characteristics test, for example, as to whether the feared persecution may contribute to the definition of the social group (as in Canada). Also, Canada has been more receptive to social group claims than for example, the US.[476]

Further, as to the question of women as a particular social group, with the exception of Sweden, all other countries in this study recognise that gender may be a defining characteristic of a social group. However, also Sweden is considering revising its position on this question. Generally, it can be said that cases where it has been stated that sex or gender alone, or with other characteristics can define a social group are rare. The UK case of *Islam and Shah* is noteworthy also for its broad definition of the particular social group, namely "Pakistani women". Usually several variables in addition to gender are included to demarcate the social group. Thus, gender-based

---

[474] Ibid..

[475] See also Hellmann, supra n. 328, at 283-284.

[476] See also von Sternberg, supra n. 10, 189.

social groups are usually constructed by reference to gender in addition to other characteristics such as age, nationality, marital status, kinship ties, or tribe membership. In some cases also the feared persecution has been included in the definition of the social group.

4 Gender-related persecution: Conclusions, trends and recommendations

4.1 Conclusions

As late as 1999, Daniel Steinbock wrote that "it is hard to justify the application of the refugee definition to [FGM] or other gender-based harms on the basis of the historical background of the Convention […]. There is no evidence that the drafters or practitioners of refugee law in the post-war period intended to encompass known, traditional gender-based inequalities, however severe."[477] Notions of rape as an act of lust, FGM as a cultural practice and domestic violence as a private matter—but not as forms of persecution—have, however, changed in a "remarkably short period of time."[478] Today, ten years after the adoption of the first national gender guidelines for determining women's asylum claims, it is generally accepted that the Convention "refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status."[479] It has also been recognised that gender (or rather *sex*) may affect the choice of a specific form of persecution, while the reasons for persecution may be related to the construction of *gender* in certain society. There are thus many different dimensions of gender-related persecution.

This study has aimed at articulating a gender-sensitive interpretation of the refugee definition, and at analysing how far state practice in the studied countries is consistent with such an interpretation. The study has focused on those elements of the refugee definition that are perceived as most problematic in gender-related cases, namely, non-state persecution and the link to a Convention ground for persecution. As regards recognition of gender-specific forms of harm as persecution, the practice in the

---

[477] Steinbock, *supra* n. 34, at 28-9.

[478] N. Kelley, 'The Convention refugee definition and gender-based persecution: A decade's progress', 13 *IJRL* 559 (2002), at 562.

[479] UNHCR Gender Guidelines, supra n. 4, para. 2.

studied countries indicates that most common forms of gender-specific persecution may (at least in principle), under certain circumstances, constitute persecution. Particularly rape and other sexual violence as well as FGM seem to be accepted as serious enough harm either in the policy or practice of all states.[480] Domestic violence, or alternatively, violence within the family, seems to be the issue that has given rise to the most varying interpretations. Still, various forms of serious physical violence and abuse, sexual abuse, and rape that have taken place in the domestic context have repeatedly been held to amount to persecution. Indeed, usually the difficult issue in domestic violence cases is not (anymore) whether the abuse reaches the threshold of "serious harm", but rather the problematic questions relate to the availability of state protection, the nexus to a convention ground as well as the interpretation relevant convention ground.

Concerning the issue of agents of persecution, it can be noted that while there is a general consensus that serious harm inflicted by private persons falls within the scope of the Convention refugee definition where the state is *unwilling* to provide protection against such acts. Arguably, many gender-related claims arise from situations where the state is not willing to afford protection against the feared abuse. A look at gender-related asylum claims accepted in the common law countries (which adhere to the 'protection approach') affirms that most such claims are essentially about state unwillingness to provide protection—not state inability. Still, the impact of the difference in interpretation should not be underestimated. In relation to situations of civil war, collapse of state, or plain incapacity of the government to provide protection, there is certainly a significant gap in protection caused by differing interpretations of the refugee definition. Furthermore, also in cases relating to state unwillingness to provide protection there are considerable differences in application concerning the required standard of protection, as well as whether and to what extent the applicant is required to seek state protection against private harm.

The nexus, or link, to a Convention ground provides for a further area of differing interpretations. Whereas Canada and the UK adhere to the UNHCR's understanding

---

[480] Concerning rape see also Crawley, supra n. 215, 44; and D. E. Anker, 'Boundaries in the filed of human rights: Refugee law, gender, and the human rights paradigm', 15 *Harvard Human Rights Journal* (2002) 133, at 140.

of the causal link, the US position has been that a causal link must be established to the persecutor. There are, however, cases also to the contrary (e.g., *Matter of Kasinga*), and as the US position in gender-related claims seems to 'under reconstruction' it remains to be seen whether the *Kasinga* approach will be developed to bring the US in line with the UNHCR's understanding of nexus.[481] As discussed above, the nexus issue has been particularly problematic in domestic violence cases. The European civil law countries seem to lack an approach to the question.

Finally, as to membership of a particular social group as a Convention ground for persecution it can be concluded that the common law countries all adhere to the so-called protected characteristics test, while the European civil law countries (so far) lack an accepted test for defining a particular social group. Further, there are also some differences between the common law countries' application of the protected characteristics test, for example, as to whether the feared persecution may contribute to the definition of the social group. In addition, concerning the question of women as a particular social group, all other countries in this study with the exception of Sweden recognise that gender may be a defining characteristic of a social group. However, also Sweden is considering revising its position on this question.

In conclusion, an attempt is made at identifying certain tendencies in the application of the Convention refugee definition. The common law countries (Canada, UK, US) seem to have adopted a more inclusive (as opposed to restrictive) interpretation of the concept of persecution in gender-related cases. The common law countries have also adopted a more generous view of the particular social group ground for persecution, and with the exception of the US, to the causal link in cases of non-state persecution. By contrast, the European civil law countries in this study seem to be united by quite a strict, conservative understanding of the refugee definition. Germany and Sweden stand alone (so far) on the issues of inability to provide protection and gender-based social groups, respectively. Generally, it seems that more attention to issues relating to interpretation of the refugee definition has been devoted both in case law and policy of the common law countries. This is quite evident, for example, when comparing the Swedish gender guidelines with their British or Canadian equivalents.

[481] Musalo, supra n. 152, at 799-804.

It should also be noted that all the common law countries studied here have adopted gender guidelines, whereas Sweden is the only civil law country to do so. Courts and administrative bodies in the common law countries, particularly the House of Lords in the UK and the Supreme Court in Canada, also tend to consult jurisprudence of the other common law countries relatively frequently. Further, the short and often vague reasoning in refugee cases in the studied civil law countries, particularly Sweden and Finland, makes it hard to determine on what grounds each decision has been made. In addition to the abovementioned points, Finland and Sweden are united by the low rates of recognition of Convention refugees, 0.4 % and 1 %, respectively, in 2002.[482] Also, the fact that there have been so few gender-related claims in Sweden, and particularly Finland, makes it difficult to draw any far-reaching conclusions concerning the practice of these countries. In addition, the vague reasoning of particularly Finnish and Swedish decisions makes it difficult to determine on what grounds the decision has been made.

Still, it seems that there is quite a clear line between the approach taken in the common law countries on one hand, and the civil law countries on the other. Further, there does not seem to be some kind of an European approach to the refugee definition—at least so far; it remains to be seen what effects the draft EU refugee status directive will have in this regard. The draft EU refugee status directive may provide some remedy to the restrictive interpretations in Germany, Sweden and Finland regarding, amongst others, interpretation of persecution, in particular as it clearly recognises non-state actors as actors of persecution. The draft directive should also be seen as a positive development as it affirms that sexual violence as well as FGM may amount to persecution, and explicitly includes gender-related harm as persecution. Still, the recent amendments to the Commissions original draft dilute the significance of the draft directive for gender-related cases. The current definition of membership of a particular social group is certainly a setback. Also the implicit reference to nexus in Article 12(2) of the revised draft may thwart the positive effects of the inclusion of non-state persecution, particularly in regard to domestic violence

---

[482] See http://www.uvi.fi/doc/tilastot/tpp_02.pdf; http://www.migrationsverket.se/pdffiler/statistik/statistik_3.pdf; http://www.refugees.org/world/countryindex/finland.cfm; and http://www.refugees.org/worldcountryindex/sweden.cfm; sites last visited 9 Dec. 2003.

cases. On the national level the Finnish Government Bill for a new Aliens Act, which is currently under consideration in Parliament, may prepare the way to less a restrictive interpretation of the refugee definition in cases of gender-related persecution. Particularly the explicit mention of particular social group as a possible ground of persecution in cases of gender-related persecution must be seen as a positive development. Still, despite the possibilities arguably offered by the Government Bill, there are considerable challenges to be met. The asylum officers at the Directorate of Immigration must receive proper training regarding gender-aspects of refugee claims, and the generally conservative reading of the refugee definition must be revised also on other points.

The various approaches to gender-related persecution can be compared as follows:

	Gender-specifc forms of persecution	**Approach to failure of state protection in cases of non-state persecution**	**Causal link in cases of non-state persecution**	**Approach to gender-based social groups**
United States	Most forms have been accepted	Protection approach	To persecutor	Accepted
Canada	Most forms have been accepted	Protection approach	Either to persecutor or to failure of state protection	Accepted
United Kingdom	Most forms have been accepted	Protection approach	Either to persecutor or to failure of state protection	Accepted
Germany	Some forms have been accepted	Accountability approach	Approach unclear	Accepted (rarely applied)
Sweden	Some forms have been accepted	Protection approach	Approach unclear	Not accepted
Finland	Hardly any forms have been accepted in practice, some forms in principle accepted	Protection approach	Approach unclear	Accepted (rarely, if ever, applied)

4.2 Trends and recommendations

This study has identified two main problems in relation to applying the refugee definition in gender-related claims for refugee status; first, the problems caused by the differing interpretations of the refugee definition in different countries; and second, the lack of a gender-sensitive interpretation of the refugee definition. Due to the wide scope of this study, and the differing nature of asylum procedures, legislation and policy in the studied countries, it appears difficult to issue any specific recommendations. Instead some more general ideas, aimed at improving the understanding and position of female asylum seekers, are presented.

a. Common standards for refugee status determination. One of the main problems caused by the differing interpretations of the refugee definition is that different standards of protection are applied in different countries; the outcome of an asylum application may be completely different depending on which country the applicant happens to apply asylum in. Thus, it would be highly desirable to achieve a common standard for applying the refugee definition. Such a standard should, however, aim at improving the existing protection—not lowering already existing standards by defining some kind of 'lowest common denominators'. Generally, efforts aimed at a common standard for refugee status determination (such as the EU developments) should thus be seen as positive. However, as illustrated by the draft EU refugee status directive in its current form, there is a risk that the outcome of such efforts may water down standards in countries that have achieved a higher than average level of protection.

b. Increased gender-sensitivity. Further, as has been discussed in this study, the existing international legal framework for granting refugee status, the 1951 Refugee Convention, is, when properly applied, able to encompass women's claims for asylum and various types of gender-related persecution. Despite certain critique, the recent UNCHR guidelines on gender-related persecution and membership of a particular social group provide an internationally accepted framework for interpreting the refugee definition. Thus, in addition to the UNCHR Handbook, these guidelines should be used as guidance in national determination of refugee status. The various elements of the refugee definition should therefore be given a gender-sensitive interpretation in accordance with the UNHCR guidelines. Arguably some of the

countries discussed in this study already apply such an interpretation of the refugee definition in accordance with the UNCHR guidelines, some (such as Canada) in relation to most elements of the refugee definition, others only to some. In addition to increasing the gender-sensitivity of the refugee status determination process, and interpreting the refugee definition in a gender-sensitive way, it would be desirable that states adopt an analytical and structured approach to decision making in all kinds of refugee cases. In order to achieve this it would be important to provide clear reasoning in asylum decisions, particularly at the appellate level.

On a more pragmatic level, the UNHCR guidelines should be distributed as widely as possible, and national gender-guidelines should be developed where needed. In order for the UNHCR guidelines to be effectively utilised by national asylum officers it would be important that both guidelines would be translated to the relevant national languages, German, Swedish and Finnish, and distributed efficiently. In addition, merely issuing guidelines—whether the UNHCR guidelines, or national—is not sufficient. Proper training should be arranged to asylum officers, both regarding the gender-sensitive interpretation of the refugee definition, and the special difficulties of women's asylum applications. Concerning national guidelines, the role of national NGOs as initiative-takers should be emphasised. For example, the UK IAA gender guidelines are based on guidelines written by a British NGO, the Refugee Women's Legal Group. Where the relevant government authorities lack the will or resources to develop guidelines, it would be desirable that NGOs would take the initiative. It would also be important to ensure that also lawyers representing asylum seekers receive proper training regarding gender-related persecution, in particular concerning new developments in refugee law. It is vital that the legal representative of an asylum seeker is aware of all the aspects of her client's case, including gender-related ones, and has the proper background knowledge to be able to represent her/his client properly.

c. Understanding constructions of gender. The human rights framework has been necessary for the development of recognition of gender-related asylum claims. Gender-related asylum claims have also been "a major vehicle for the articulation and

acceptance of the human rights paradigm" within the refugee law context.[483] Similarly, as regards the refugee definition, it could be argued that the main results of the increasing number of gender-related asylum claims are the increased attention afforded to non-state persecution and membership of a particular social group. Arguably, the developments regarding non-state persecution have been positive, and have benefited also a wider group of asylum seekers, in a wide range of situations. It has, however, been argued that using the social group ground may deny the meaningfulness of women's experiences, and the genuine political character of women's actions, as well as marginalize women's asylum claims to their own sub-category, lying at the margins of the refugee definition. Gender-based social groups tend to reproduce the perceived difference between "normal cases" and "women's gender-specific cases." As Spijkerboer argues, "the normal cases are associated with men, assertivity, politics and the mind; the special [gender-specific] cases are associated with women, vulnerability, culture and the body." Further, gender-specific cases tend to be viewed as legally more problematic than "normal" cases.[484] The predominant association of gender-related claims with the social group ground has been particularly visible in Sweden where the abovementioned provision in the Aliens Act was enacted specifically as women could not be seen as constituting a social group. Certainly, this provision has led to some degree of marginalization of gender-related claims.

d. Reconsidering underlying perceptions of culture. Further, as indicated above, women's actions and experiences tend to be related to their culture. For example, even though domestic violence claims have been the most difficult type of gender-related claims, there seems to be a distinction between violence within the family of a culturally specific kind, such as honour killings, forced marriages or dowry deaths, and "ordinary wife abuse." It seems that the claims that relate to certain, "foreign" cultural practice are more easily accepted than those forms of violence which are also

---

[483] Anker, supra n. 480, at 138.

[484] Spijkerboer supra n. 75, 129. As an example Spijkerboer refers to German case law where an established line of case law holds compulsory circumcision of Christian men in the Turkish army as persecution, but not gender-specific persecution. On the contrary FGM is usually seen as the typical form of gender-specific persecution, and the first positive decisions in FGM cases were hailed as significant leaps forward.

prevalent in the state granting asylum. Thus, various forms of violence or discrimination against women (honour killings, FGM, marriage practices, etc.) are often construed in terms of culture—rather than gender roles, or gender subordination.[485] Alternatively, the violence or discrimination in question may be viewed as a matter of the general situation of the country, 'as normal for the circumstances', that is, from a cultural relativist point of view. Thus, the victims are not seen as being "singled out" for persecution, or what is cultural is not considered political.[486] Thus, perceptions of culture and ethnicity in gender-related claims may lead to completely opposite results depending on the viewpoint. The question is how much, and it what way do cultural considerations really affect decision-making in gender-related cases? Another interesting question put forward by Thomas Spijkerboer is why western governments are increasingly more willing to issue relatively liberal guidelines on refugee women, while western asylum policies more generally tend to become more restrictive. Spijkerboer's answer is that women play a central role in the new, post Cold War south-west conflict, in building 'fortress Europe.' By granting asylum to third world women fleeing the west illustrates the "brutal nature of the Third World;" the treatment of women is being used "an indicator of progress," and illustrates the "clash of civilisations."[487] Some of the American decisions in domestic violence cases seem to indicate that Spijkerboer may be on the right track.

Still, in the same way as refugee law has benefited from developments within the ambit of human rights, also refugee law has potential to contribute to the elaboration of human rights norms, and deepen understandings—if, as Deborah Anker notes, it is

---

[485] See Sinha, supra n. 252, comparing the US cases of *Matter of Kasinga*, *In re R. A.* and *In re S. A.*. See particularly citation of the In re S. A. case where the BIA held that "we find that because of the religious element in this case, the domestic abuse suffered by the respondent is different from that described in Matter of R- A-." Sinha, at 1591. See also S. Musarrat Akram, 'Orientalism revisited in asylum and refugee claims', 12 *IJRL* 7 (2000).

[486] See Spijkerboer, supra n. 72, 132. It must be emphasised that when a person is seeking asylum, she distances herself from at least certain aspects of her culture, society or religion with her flight. Whatever the cultural consensus may be, the purpose of refugee law is to protect an individual who wishes to dissociate herself from such a consensus. See also Anker, supra n. 480, at 145; A. C. Helton & A. Nicoll, 'Female Genital Mutilation as ground for asylum in the united States: The recent case of In re Fauziya Kasinga and prospects for more gender sensitive approaches', 28 *Columbia Human Rights Law Review* (1997), 375, at 384-385.

[487] Spijkerboer, supra n. 75, 189, 197-201.

embraced as a part of human rights law.[488] Human rights law and refugee law should essentially be seen as complementary, human rights law providing for a framework of prevention and redress, and refugee law providing for palliative solutions and surrogate protection where the preventive task of the human rights system has failed. Thus, despite its shortcomings—and as some argue, more or less hidden agendas—refugee law has capacity to provide relief for individual women facing persecution.

[488] Anker, supra n. 480, at 143.

LITERATURE

INTERNATIONAL TREATIES, DECLARATIONS & RESOLUTIONS

Treaties

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 Dec. 1984, 1465 *UNTS* 86, entry into force 26 Jun. 1987

Convention relating to the Status of Refugees, Geneva, 28 July 1951, 189 *UNTS* 150, entry into force 22 April 1954

Protocol relating to the Status of Refugees, New York, 31 Jan. 1967, entry into force 4 Oct. 1967, 606 *UNTS* 267

Convention on the Rights of the Child, New York, 20 Nov. 1989, 28 *ILM* 1456 (1989), entry into force 2 Sept. 1990

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, *ETS* 5, 213 *UNTS* 222, entry into force 3 Sept. 1953, as amended by *ETS* 155

Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 Dec. 1979, 1249 *UNTS* 13, entry into force 3 Sept. 1981

International Covenant on Civil and Political Rights, New York, 16 Dec. 1966, 999 *UNTS* 171, entry into force 23 Mar. 1976

International Covenant on Economic, Social and Cultural Rights, New York, 16 Dec. 1966, entry into force 3 Jan. 1976, 993 *UNTS* 3

International Convention Elimination Racial Discrimination, New York, 7 Mar. 1966, 660 *UNTS* 195, entry into force 4 Jan. 1969

OAU Convention of the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 Sept. 1969, 1001 *UNTS* 46

Optional Protocol to the Convention on the Elimination of Discrimination against Women, Adopted by UN GA Res A/54/4, 6 Oct. 1999, entry into force 22 Dec. 2000

Resolutions, declarations and reports

Universal Declaration of Human Rights, 10.12.1948, UN GA res. 217 A (III)

Cartagena Declaration on Refugees, Cartagena, 1984, OAS/Ser.L/V/II.66, doc. 10, rev. 1, 190-93

Declaration on the Elimination of Violence against Women, 20.12.1993, UN GA res. 48/104, 48 UN GAOR Supp. (No. 49), 217, UN Doc. A/48/49

UNHCR documents

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (hereafter UNHCR Handbook), Geneva, 1979

UNHCR, Executive Committee Conclusion *No. 39 (XXXVI) – 1985 Refugee women and international protection*, UN doc. A/AC.96/673, para. 115(4)

UNHCR, Executive Committee Conclusion *No. 73 (XLIV) 1993 – Refugee protection and sexual violence*, UN doc. A/AC.96/821

UNHCR Division of International Protection, 'Gender-related persecution: An analysis of recent trends, 9 *International Journal of Refugee Law, Special Issue*, 79 (1997), 99

UNHCR, *Opinion of UNHCR regarding the question of 'non-State persecution,' as discussed with the Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House) on 29 Nov. 1999*, UNHCR Berlin, Nov. 1999 (available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd)

UNHCR, *Summary of Conclusions: Gender-related persecution*, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 6

UNCHR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02

UNHCR, *Guidelines for international protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HRC/GIP/02/01, 7 May 2002

UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 Jul. 2003

NATIONAL LEGISLATION, GUIDELINES AND POLICY INSTRUMENTS

Australia

Refugee and Humanitarian Visa Applicants—Guidelines on Gender Issues for Decision Makers, Department of Immigration and Multicultural Affairs, Jul. 1996

Canada

Guidelines on Women Refugee Claimants Fearing Gender-related Persecution, Issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993, reprinted in 5 *IJRL* 2 (1993), 278-97

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 Board, 25 Nov. 1996

Interpretation of the Convention Refugee Definition in the Case Law, Immigration and Refugee Board—Legal Services, 31 Dec. 2002

Compendium of Decisions—Guideline 4 Women refugee claimants fearing gender-related persecution, Update, Immigration and Refugee Board, Feb. 2003

European Union

Joint Position of the European Union of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty of the European union on the harmonized application of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, ECOJ L63, 13 Mar. 1996, p. 2

Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, Brussels, 12 Sept. 2001, COM(2001)510

Finland

Ulkomaalaislaki [Aliens Act] *N:o 378/1991*, 22 Feb. 1991, as amended by Act 537/1999

Hallituksen esitys Eduskunnalle ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi [Government proposal for Aliens Act and some related acts], HE 28—2003

Suomen Perustuslaki [Constitution of Finland], *N:o 731/1999*, 11 Jun. 1999, entry into force 1 Mar. 2000

Työhallinnon julkaisu 178: Maahanmuuttajanaiset Suomessa [Publication 178: Migrant women in Finland], Pakolais- ja siirtolaisuusasiain neuvottelukunta [Committee on Refugee and Migration Issues], Työministeriö [Ministry of Labour] 1997

Ulkomaalaisvirasto, *(Yksintulleen) alaikäisen turvapaikanhakijan haastatteluohjeistus* [Guidelines for interviewing separated minor asylum claimants], November 2001

Sisäasiainministeriö [Ministry for the Interior, Finland], *Turvapaikkaohje* [Asylum guidelines], 17 Jan. 2003, Dnro SM-2003-124/Ka-23

Germany

Basic Law for the Federal Republic of Germany, 23 May 1949, (Federal Law Gazette, p. 1)

(BGBl III 100-1), most recently amended by the amending law dated 26 July 2002 (BGBl I, p. 2863) available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd, site visited 20 Nov. 2003

Asylum Procedure Act, (*Asylverfahrengesetz*) 16 Jul. 1982, as amended in 1997

The Netherlands

Work Instruction no. 148: Women in the Asylum Procedure, Dutch Immigration and Naturalisation Service (IND), translation reprinted in T. Spijkerboer, *Gender and Refugee Status*, Ashgate, 2000

Sweden

Regeringens Proposition 1996/97: 25—Svensk Migrationspolitik i ett globalt perspektiv

Utlänningslag, SFS nr: 1989:529, 8 Jun. 1989, as amended by SFS 2003:153, available at http://rixlex.riksdagen.se

Riktlinjer för utredning och bedömning av kvinnors skyddsbehov, [Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection], Migrationsverket, Praxisenheten, Sweden, 2002 (hereafter Swedish Gender Guidelines).

Migrationsverket, *Migrationsverket och kvinnofrid*, August 2002

United Kingdom

Immigration and Asylum Act of 1999

Nationality, Immigration and Asylum act of 2002

Immigration Rules (HC 395) 23 May 1994

Asylum Gender Guidelines, Immigration Appellate Authority, UK, Nov. 2000

United States

Immigration and Nationality Act, available at http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-21?f=templates&fn=document-frame.htm#slb-act

INS Proposed rules, Asylum and withholding definitions, 7 Dec. 2000, US Federal Register, Vol. 65, No. 236, *65 FR 76588*

Memorandum: *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, p. 1 (hereafter INS Gender Guidelines). Also reprinted in 7 *IJRL* (1995), 700-19

CASE LAW

European Court of Human Rights

T.I. v. UK, 7 Mar. 2000, Application No. 43844/98

Osman v. United Kingdom, 28 Oct. 1998, ECHR Reports 1998-VIII

H.L.R. v. France, 1997, 29 Apr. 1997, ECHR Reports 1997-III

Australia

High Court of Australia

Applicant A v. Australia (MIEA), HC, [1998], INLR 1

Chen Shi Hai v. MIMA, [2000] HCA 19, 13 Apr. 2000

MIMA v. Khawar, High Court of Australia, 11 Apr. 2002, [2002] HCA 14

Canada

Supreme Court

Ward v. Canada (Attorney General), 30 Jun. 1993, 2 SCR [1993] 689

Chan v. Canada (MEI), 19 Oct. 1995, 3 SCR [1995] 593

Federal Court

Adjei v. Minister of Employment and Immigration, [1989] 2 FC 6680

Arguello-Garcia v. Canada (MEI), 21 Imm. L.R. (2d) 285 [1993] (FCTD)

Badran v. MCI, FCTD, 29 Mar. 1996, no. IMM-2472-95

Chan v. Canada (MEI), [1993] 3 FC 675

Cheung v. Canada (MEI), [1993] 2 FC 314

Donna Hazel Fouchong v. Canada (Secretary of State), 18 Nov. 1994, No. IMM-7603-93

Elizabeth Aurora Hauayek Mendoza v. MCI, 24 Jan. 1996, No. IMM-2997-94,

Faustina Annan v. Minister of Citizenship and Immigration of Canada, 6 Jul. 1995, [1995] 3 FC 25 (TD),

Loferne Pauline Cuffy v. Canada (MCI), 16 Oct. 1996, No. IMM-3135-95

Lydia Oritseweyinmi Adodo v. Canada (MCI), 25 Oct. 2001, [2001] FCT 1159

MEI v. Marcel Mayers, 5 Nov. 1992, [1993] 1 FC 154

Mohamed Hussein Moustapha Daghmash v. MCI, 19 Jun. 1998, No. IMM-4302-97

Namitabar v. Canada, [1994] FC 42

Narvaez v. Canada (MCI), [1995] 2 FC 55 (TD)

Patricia Gonzales-Cambana v. MCI, 24 Jan. 1997, No. IMM-933-96

Quang Lai v. MEI, 20 May 1994, no. IMM-307-93

Salamata Sawadogo v. Canada (MCI), 17 May 2001, No. IMM-4162-00,

Zalzali v. Canada (MEI), FC, 30 Apr. 1991, [1991] ACWSJ LEXIS 17678

Immigration and Refugee Board

CRDD A96-00453 et al., 8 Dec. 1997, RefLex Issue 85, 2 Mar. 1998

CRDD A99-00937 et al., 16 Aug. 2000

CRDD M95-13161, 13 Mar. 1997

CRDD M98-09327, 25 Aug. 1999

CRDD MA0-00006, 26 Nov. 2001

CRDD MA1-00356, 18 Dec. 2001, RefLex Issue 192, 11 Jul. 2002

CRDD MA1-02054 et al., 21 Dec. 2001

CRDD T93-07375, 18 Jan. 1994

CRDD T-93-12197 et al., 3 Jul. 1994

CRDD T95-00479, 5 Jul. 1996

CRDD T97-03141, 27 May 1998

CRDD T98-04876, 14 Sept. 1999, RefLex Issue 128, 8 Dec. 1999

CRDD T99-14088, 2 Jun. 2000

CRDD TA0-00844, 42 Mar. 2001

CRDD TA0-13595 et al., 21 Aug. 2001

CRDD U93-08214, RefLex Issue 76, 14 Oct. 1997

CRDD U96-03318, 9 Jun. 1997

RPD MA1-07954 et al., 26 Aug. 2002.

RPD MA2-04725, 3 Jan. 2003, RefLex Issue 206, 20 Feb. 2003

RPD MA2-04891 et al., 12 May 2003

RPD MA2-10373, 30 May 2003, RefLex Issue 220, 4 Sept. 2003

RPD TA2-00795, 2 Dec. 2002

RPD TA2-02714, 9 May 2003

Finland

Supreme Administrative Court

KHO 29 Feb. 2000/401, Dnro 1039/3/99

France

Conseil d'Etat

Essakh Dankha, Conseil d'Etat, 27 May 1983, case no. 42.074

Kechemir, Conseil d'Etat, 1 Dec. 1997, case no. 184053

Ourbih, Conseil d'Etat, SSR, Decision no. 171858, 23 Jun. 1997

Commission des Recours des Réfugiés

Re: Aminata Diop, CRR decision no. 164078, 18 Sept. 1991, case summary IJRL/0097, 4 IJRL (1992), 92-4

Mlle Kinda, CRR decision no. 366892, 19 Mar. 2001

M. et Mme Sissoko, CRR (SR) decision nos. 361050 and 373077, 7 Dec. 2001

CRR decision no. 369776, 7 Dec. 2001

CRR decision no. 332531, 29 Jan. 1999

CRR decision no. 336988, 7 May 1999

CRR decision no. 350323, 11 Jul. 2000

CRR decision no. 334606, 6 May 1999

Germany

Federal Constitutional Court

Urteil von 18 Dec. 2002, 2 BvF 1/02—2 BvF 1/02 -, 25 S., M 286, 2 BvF 1/02

Urteil von 10 Aug. 2000, 2 BvR 260/98

Administrative Courts

Verwaltungsgericht Berlin, Urteil von 23 Aug. 2001, VG 34 X 66.01—(15 S., M1303)

Verwaltungsgericht Berlin, Urteil von 3 Sept. 2003, VG 1 X 23.03—(12 S., M4222)

Verwaltungsgericht Aachen, Urteil von 12 Aug. 2003, 2K 1140/02.A—(18 S., M4086)

Sweden

Aliens Appeals Board

UN 31-93, 1 Mar. 1993

UN 328-97, 20 Mar. 1997

Government decisions

reg. 85-98, 28 May 1998

United Kingdom

House of Lords

Adan v. SSHD, 2 Apr. 1998, [1999] 1 AC 293

Horvath v. SSHD, 6 Jul. 2000, [2001] 1 AC 489

Islam v. SSHD; R. v. IAT and Another, ex parte Shah (Conjoined Appeals), 25 Mar. 1999, [1999] 2 All ER 545

R. v. Secretary of State for the Home Department, ex parte Sivakumaran et al, 1987, [1988] All ER 193

R. v. SSHD, ex parte Adan; R v. same, ex parte Aitseguer, 19 Dec. 2000, [2001] 2 WLR 143

Court of Appeal (Civil division)

Lazarevic v. SSHD, [1997] Imm AR 251

Manyi Tataw v. Immigration Appeals Tribunal, 18 Jun. 2003 [2003] EWCA Civ 925

McPherson v. SSHD, 19 Dec. 2001, UK CA [2001] EWCA Civ 1955

Montoya v. SSHD, 9 May 2002, [2002] EWCA Civ 620

Noune v. SSHD, 6 Dec. 2000, No. C2000-2669

R. v. SSHD, ex parte Adan, Subaskaran & Aitseguer, 23 Jul. 1999, [1999] 4 All ER 774

Savchenkov v. SSHD, [1996] Imm. AR 28

Skenderaj v. SSHD, 26 Apr. 2002, [2002] EWCA Civ 567

Immigration Appeals Tribunal

Chaudhary + 2 v. SSHD, 21 Mar. 2003, UK IAT [2002] 07369

Hashim v. SSHD, 16 Jul. 2002, [2002] UK IAT 02691

SSHD v Muchomba, 2 May 2002, [2002] UK IAT 01348

SSHD v. Adhiambo, 7 Aug. 2002, [2002] UK IAT 03536

SSHD v. Kircicek, 28 Nov. 2002, [2002] UK IAT 05491

SSHD v. Naseem, 11 Nov. 2002, [2002] UK IAT 05177

SSHD v. Njeri, 7 Apr. 2003, [2002] UK IAT 08114

Yake v. SSHD, 19 Jan. 2000, UK IAT 00TH00493

United States

Supreme Court

INS v. Cardoza-Fonseca, 467 US 407 (1987)

INS v. Elias-Zacharias, 502 US 478 (1992)

Courts of Appeal

Adelaide Abankwah v. INS, No. 98-4394 (2nd Cir. 1999)

Aguirre-Cervantes v. INS, No. 99-70861 (9th Cir. 2001)

Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997)

Avetova-Elisseva v. INS, 213 F.3d 1192 (9th Cir. 2000)

Campos-Guardado, 809 F.2d 285 (5th Cir. 1987)

Chand v. INS, 222 F.3d 1066 (9th Cir. 2000)

Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993)

Fisher v. INS, 79 F.3d 955 (9th Cir. 1996)

Geovanni Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000)

Lazo-Majano v. INS, 813 F.2d 1432 (9th cir. 1987)

Lopez-Galarza v. INS, 99 F.3d 954 (9th Cir. 1996)

McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981)

Mgoian v. INS, 184 F.3d, 1036 (9th Cir. 1999)

Philomena Iweka Nwaokolo v. INS, No. 02-2964 (7th Cir. 2002)

Sanchez-Trujillo v. INS, 801 F.2d 1571 (2nd Cir. 1986)

Sangha v. INS, 103 F.3d 1482 (9th Cir. 1997)

Shoafera v. INS, 228 F.3d 1070 (9th Cir. 2000)

Zubeda v. Attorney General, 333 F.3d 463 (3rd Cir. 2003)

Board of Immigrations Appeals

In re Fauziya Kasinga, Interim Decision no. 3278, BIA, 13 Jun. 1996

In re R. A., Interim Decision no. 3403, 11 Jun. 1999

In re S.A., Interim Decision no. 3433, 27 Jun. 2000

Matter of Acosta, (1985) 19 I & N 211

Matter of C.Y.Z., 21 I&N 915 BIA 1997

Matter of Chang, 20 I&N Dec. 38, BIA 1989

Matter of Y.T.L., Interim Dec. No. 3492, 22 May 2003

ARTICLES AND BOOKS

Aleinikoff, T. A., 'Protected characteristics and social perceptions: An analysis of the meaning of 'membership of a particular social group', in E. Feller, V. Türk & F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's*

Global Consultations on International Protection, Cambridge University Press, 2003, 263

Ankenbrand, B., ‘Refugee women under German asylum law’, 14 *International Journal of Refugee Law* 45 (2002)

Anker, D. E., ’Women refugees: Forgotten no longer?’, in J-Y. Carlier & D. Vanheule (eds.), *Europe and Refugees: A Challenge?*, Kluwer Law International, 1997, 125

Anker, D., ‘Refugee status and violence against women in the “domestic sphere”: The non-state actor question’, 15 *Georgetown Immigration Law Journal* (2001), 391

Anker, D. E., ‘Refugee law, gender, and the human rights paradigm’, 15 *Harvard Human Rights Journal* (2002), 133

Armstrong, P. A., ‘Female Genital Mutilation: The move towards the recognition of violence against women as a basis for asylum in the United States’, 21 Maryland Journal of International Law and Trade (1997), 95

Bexelius, M., *Kvinnor på flykt: En analys av svensk asylpolitik ur ett genusperspektiv 1997-2001*, Rådgivningsbyrån för asylsökande och flyktingar, 2001

Binder, A., ‘Gender and the “membership in a particular social group’ category of the 1951 Refugee Convention’, 10 *Columbia Journal of Gender and Law* (2001), 167

Carlier, J-Y., Vanheule, D., Hullmann, K. & Peña Galiano, C. (eds.), *Who is a Refugee? A Comparative Case Law Study*, Kluwer Law International, 1997

Cipriani, L., ‘Gender and persecution: protecting women under international refugee law’, 7 *Georgetown Immigration Law Journal* (1993), 511

Coll, G. & Bhabha, J., Asylum law and practice in Europe and North America: A comparative analysis, Federal Publ., 1992

Connors, J., ‘Legal aspects of women as a particular social group’, 9 *IJRL Special Issue*, 114 (1997)

Crawley, H., *Refugees and Gender: Law and Process*, Jordans, 2001

Crawley, H., *Women as Asylum Seekers: A Legal Handbook*, Immigration Law Practitioners’ Association (ILPA) & Refugee Action, 1997

Daley, K., & Kelley, N., ‘Particular social group: A human rights based approach in Canadian Jurisprudence’, 12 *International Journal of Refugee Law* 148 (2000)

Daugherty, M. G., ‘The Ninth Circuit, the BIA, and the INS: The shifting state of the particular social group definition in the Ninth Circuit and its impact of pending and future cases’, 41 *Brandeis Law Journal* (2003), 631

Dorkenoo, E. , & Elworthy, S., *Female Genital Mutilation: Proposals for change*, 3rd ed., Minority Rights Group, 1992

Dorkenoo, E., *Cutting the rose—Female Genital Mutilation: The practice and its prevention*, 2nd ed., Minority Rights Group, 1995

Edminster, S., *Recklessly risking lives: Restrictive interpretations of “Agents of persecution” in Germany and France*, World Refugee Survey 1999, www.refugees.org/world/articles/wrs99_agentspersecution.htm.

ECRE, *Non-state Agents of Persecution and the Inability of the State to Protect—The German Interpretation*, ECRE, London, Sept. 2000 (available at http://www.unhcr.ch/cgi-bin/texis/vtx/rsd)

ELENA, *Research Paper on Non-State Agents of Persecution*, ECRE, London 1998—updated 2000 (available at www.ecre.org/research/nsagents.pdf)

Fastrup Ervik, H., ‘Flyktingbeskyttelse av kvinner på flukt fra vold og diskriminering. FNs Flyktingkonvesjon og forpliktelsene etter FNs Kvinnokonvensjon i lys av Norsk praksis’, 21 *Mennesker & Rettigheter* 3 (2003), 307

Folkelius, K., & Noll, G., ‘Affirmative exclusion? Sex, gender, persecution and the reformed Swedish Aliens Act’, 10 *International Journal of Refugee Law* 607 (1998)

Foster, M., ‘Causation in context: Interpreting the nexus clause in the Refugee Convention’, 23 *Michigan Journal of International Law* (2002) 265

Fullerton, M., ‘A comparative look at refugee status based on persecution due to membership of a particular social group’, 26 *Cornell International Law Journal*, 1993, 505

Goldberg, P., ‘Analytical approaches in search of consistent application: A comparative analysis of the Second Circuit decisions addressing gender in the asylum law context’, 66 *Brooklyn Law Review* (2000), 309

Goodwin-Gill, G. S., ‘The margin of interpretation: Different of disparate?’, 11 *International Journal of Refugee Law* 730 (1999)

Goodwin-Gill, G., ‘Judicial reasoning and ‘social group’ after Islam and Shah’, 11 *International Journal of Refugee Law* 537 (1999)

Goodwin-Gill, G., *The Refugee in International Law*, 2nd ed., Clarendon Press, 1996

Grahl-Madsen, A., *The Status of Refugees in International Law*, Vol. I Refugee Character, Sijthoff, 1966

Gunning, I. R., ‘Arrogant perception, world-travelling and multicultural feminism: The case of female genital surgeries’, 23 *Columbia Human Rights Law Review* 2 (1992), 189

Haines, R. QC, ‘Gender-related persecution’, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, E. Feller, V. Türk & F. Nicholson (eds.), 319

Hathaway, J. C., *The Law of Refugee Status*, Butterworths, 1991

Hathaway, J. C., *Michigan Guidelines on the International Protection Alternative*, 21 *Michigan Journal on International Law* 1 (1999), 131

Hathaway, J. C., *The Michigan Guidelines on Nexus to a Convention Ground*, 2nd Colloquium on Challenges in International Refugee Law, Ann Arbor, Michigan, USA, Mar. 2001, available at http://www.refugee.org.nz/Michigan.html

Hathaway, J., 'What's in a label?', 5 *European Journal of Migration and Law* 1 (2003), 1

Helton, A. C., 'Persecution on account of membership in a social group as a basis for refugee status', 15 *Columbia Human Rights Law Review* 39 (1983)

Helton, A. C. & Nicoll, A., 'Female Genital Mutilation as ground for asylum in the united States: The recent case of In re Fauziya Kasinga and prospects for more gender sensitive approaches', 28 *Columbia Human Rights Law Review* (1997), 375

Hyndman, P., 'The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil Applicants', 9 *Human Rights Quarterly* (1987), 49

Connors, J., 'Legal aspects of women as a particular social group', 9 *International Journal of Refugee Law, Special Issue*, 114 (1997)

Johnsson, A. B., 'The international protection of women refugees: A summary of principal problems and issues', 1 *International Journal of Refugee Law* 221 (1989)

Kälin, W., 'Gender-related persecution', in V. Chetail & V. Gowlland-Debbas, *Switzerland and the International Protection of Refugees*, Kluwer Law International, 2002, 111

Kälin, W., 'Non-state agents of persecution and the inability of the state to protect', 15 *Georgetown Immigration Law Journal* (2001), 415

Kelley, N., 'The Convention refugee definition and gender-based persecution: A decade's progress', 13 *International Journal of Refugee Law* 559 (2002)

Kelley, N., 'Internal flight/relocation/protection alternative: Is it reasonable?', 14 *International Journal of Refugee Law* 4 (2002)

Kelly, N., 'Gender-related persecution: assessing the asylum claims of women', 26 *Cornell Journal of International Law* 3 (1993), 625

Kelly, N., 'Guidelines for women's asylum claims', 6 *International Journal of Refugee Law* 4, 517 (1994)

Kelson, G. A., 'Gender-based persecution and political asylum: The international debate for equality begins', 6 Texas Journal of Women and the Law (1996), 181

Knight, S. M., 'Reflections on Khawar: Recognizing the Refugee from Family Violence', 14 *Hastings Women's Law Journal* (2003), 27

Koso-Thomas, O., The circumcision of women: A strategy for eradication, Zed Books Ltd, 1987

Kourula, P., *Broadening the Edges—Refugee Definition and International Protection Revisited*, Martinus Nijhoff Publ., 1997

Lambert, H., 'The conceptualisation of 'persecution' by the House of Lords: *Horvath v. Secretary of State for the Home Department*', 13 *IJRL* 1/2 (2001), 16

Lambert, H., *Seeking Asylum—Comparative Law and Practice in Selected European Countries*, Martinus Nijhoff Publ., 1995

Lee, K., 'Female Genital Mutilation: Medical aspect and the rights of children', 2 *International Journal of Children's Rights* 1 (1994), 35

Lewis, H., 'Between Irua and "Female Genital Mutilation": Feminist human rights discourse and the cultural divide', 8 *Harvard Human Rights Journal* (1995), 1

Macklin, A., 'Cross-border shopping for ideas: A critical review of United States, Canadian, and Australian approaches to gender-related asylum claims', 13 *Georgetown Immigration Law Journal* (1998) 25

Macklin, A., 'Refugee women and the imperative of categories', 17 *HRQ* 213 (1995)

Marx, R., ‘The notion of persecution by non-state agents in German jurisprudence’ 15 *Georgetown Immigration Law Journal* (2001), 447

Marx, R., ‘the criteria of applying the “Internal Flight Alternative” test in national refugee status determination procedures’, 14 *International Journal of Refugee Law* 179 (2002)

Mawani, N., ‘Introduction to the Immigration and Refugee Board Guidelines on Gender-related persecution’, 5 *International Journal of Refugee Law* 240 (1993)

Musalo, K., & Knight, S., ‘Steps forward and steps back: Uneven progress in the law of social group and gender-based claims in the United States’, 13 *International Journal of Refugee Law* 51 (2001)

Musalo, K., Moore, J. & Boswell, R. A., *Refugee Law and Policy: A Comparative and International Approach*, 2nd ed., Carolina Academic Press, 2002

Musalo, K., ‘Revisiting social group and nexus in gender asylum claims: A unifying rationale for evolving jurisprudence’, 54 *DePaul Law Review* (2003) 777

Musarrat Akram, S., ‘Orientalism revisited in asylum and refugee claims’, 12 *International Journal of Refugee Law* 7 (2000)

Müller, K., ‘Geschlechtsspezifische Verfolgung’, in *Asylmagazin 1-2/2002*

Neal, D. L., ‘Women as a social group: Recognizing sex-based persecution as grounds for asylum’, 20 *Columbia Human Rights Law Review* (1988), 203

Nicholson, F. & Twomey, P. (eds.), *Refugee Rights and Realities—Evolving International Concepts and Regimes*, Cambridge University Press, 1999

Passade Cisse, B., ‘International law sources applicable to Female Genital Mutilation: A guide to adjudicators of refugee claims based on a fear of Female Genital Mutilation’, 35 *Columbia Journal of Transnational Law* (1997), 429

Phuong, C., ‘Persecution by third parties and European harmonization of asylum policies’, 16 *Georgetown Immigration Law Journal* (2001), 81

Pretzell, A. & Hruschka, C., 'Non-state agents of persecution: A protection gap in German Asylum Law?' 15 *Tolley's Immigration , Asylum and Nationality Law* No. 4 (2001), 221

Randall, M., 'Refugee law and state accountability for violence against women: A comparative analysis of legal approaches to recognising asylum claims based on gender persecution', 25 *Harvard Women's Law Journal* (2002), 281

Rousseau, C., Crepeau, F., Foxen, P. & Houle, F., 'The complexity of determining refugeehood: A multidiciplinary analysis of the decision-making process of the Canadian immigration and refugee board', 15 *Journal of refugee studies*, 1 (2002), 43

Schaffer, H., 'Domestic violence and asylum in the United States: In re R- A-', 95 *Northwestern University Law Review* (2001), 779

Sinha, A., 'Domestic violence and U.S. asylum law: Eliminating the "cultural hook" for claims involving gender-related persecution', 76 *New York University Law Review* (2001), 1562

Slack, A. T., 'Female circumcision: A critical appraisal', 10 *Human Rights Quarterly* 4 (1988), 437

Spijkerboer, T., *Women and refugee status: Beyond the public/private distinction*, Emancipation Council, The Hague, 1994

Spijkerboer, T., *Gender and Refugee Status*, Ashgate, 2000

Steinbock, D. J., 'The refugee definition as law: Issues of interpretation', in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, in Nicholson, F. & Twomey, P. (eds.), 13

Sternberg, M. R., von, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law—Canadian and United States Case law Compared*, Martinus Nijhoff Publ., 2002

Symposium: 'Shifting grounds for asylum—Female Genital Surgery and sexual orientation', 29 *Columbia Human Rights Law Review* 2 (1998), 467

Tiedemann, P., 'Protection against persecution because of 'membership of a particular social group' in German law', 2000, available at http://www.refugee.org.nz/PaulT.htm, site last visited 11 Dec. 2003

Türk, V., 'Non-state agents of persecution', in V. Gowlland-Debbas (ed.) *Switzerland and the International Protection of Refugees*, Kluwer Law International, 2002, 75

UNHCR Division of International Protection, 'Gender-related persecution: An analysis of recent trends, 9 *IJRL Special Issue*, 79 (1997)

Vermeulen, B., Spijkerboer, T., Zwaan, K. & Fernhout, R., *Persecution by third parties*, University of Nijmegen, Centre for Migration Law, May 1998, Commissioned by the Research and Documentation Centre of the Ministry of Justice of The Netherlands

Vidal, M., '"Membership of a particular social group" and the effect of *Islam and Shah*', 11 *International Journal of Refugee Law* 528 (1999)

Warren, P. F., 'Women are human: Gender-based persecution is a human rights violation against women', 5 *National Journal of Constitutional Law* 2 (1995), 279

Wikrén, G. & Sandesjö, H., *Utlänningslagen med kommentarer*, 7nde upplagan, Nordstedts Juridik, 2002

Wilsher, D., 'Non-state actors and the definition of a refugee in the United Kingdom: Protection, accountability or culpability?', 15 *International Journal of Refugee Law* 68 (2003)

Yeo, C., 'Agents of the state: When is an official of the state an agent of the state?', 14 *International Journal of Refugee Law* 509 (2002)

SELECTED INTERNET RESOURCES

Government sites (including jurisprudence)

Canada: Citizenship and Immigration Canada: http://www.cic.gc.ca/

Canada: Federal Court: http://www.fja.gc.ca/en/cf/decisions.html

Canada: Immigration and Refugee Board: http://www.irb.gc.ca/

CIRB Reflex: http://www.irb.gc.ca/en/decisions/reflex/

Canada: Supreme Court: http://www.scc-csc.gc.ca/

Finland: Directorate of Immigration: http://www.uvi.fi

Germany: Bundesamt für die Anerkennung ausländischer Flüchtlinge: http://www.bafl.de/

Germany: Bundesverwaltungsgericht: http://www.bverwg.de

Sweden: Aliens Appeals Board: http://www.un.se

Sweden: Migration Board: http://www.migrationsverket.se

UK: Immigration and Nationality Directorate: http://194.203.40.90/

UK: Immigration Appellate Authority: http://www.iaa.gov.uk/

US: Board of Immigration Appeals precedent decisions: http://www.usdoj.gov/eoir/efoia/ bia/biaindx.htm

US: Citizenship and Immigration Services: http://uscis.gov/graphics/index.htm

IGOs

UNHCR RefWorld: http://www.unhcr.ch

NGOs & research institutions

Asylumaid/Women's Rights Resource Project: http://www.asylumaid.org.uk/

Canadian Council for Refugees: http://www.web.net/~ccr/fronteng.htm

Center for Gender and Refugee Studies: http://www.uchastings.edu/cgrs/

Centre for Refugee Studies: http://www.yorku.ca/crs/

European Council for Refugees and Exiles: http://www.ecre.org/

Refugee Council: http://www.refugeecouncil.org.uk/

Refugee Law Center: http://www.refugeelawcenter.org/

Refugee Legal Centre: http://www.refugee-legal-centre.org.uk/

Refugee Women's Legal Group: http://www.rwlg.org.uk/

U.S. Committee for Refugees: http://www.refugees.org/

Case law sites, resource portals

Asylumlaw.org: http://www.asylumlaw.org/

Australasian Legal Information Institute: http://www.austlii.edu.au/

British and Irish Legal Information Institute: http://www.bailii.org

Canadian Legal Information Institute: http://www.canlii.org/

Electronic Immigration Network: http://www.ein.org.uk/

Eurasylum: http://www.eurasylum.org/portal/DesktopDefault.aspx

Informationsverbund Asyl: http://www.asyl.net/

Refugee Case Law Site: http://www.refugeecaselaw.org/Refugee/Default.asp

Women's Human Rights Resources: http://www.law-lib.utoronto.ca/Diana/refugee/refugee.htm