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Refugee Status and Gender-Related Persecution

Dögg Sigmarsdóttir

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Thesis for 90 credits B.A. degree in Law at the Faculty of Law and Social Sciences

Declarations

I hereby declare that I am the sole author of this thesis and it is the product of my own research.

Dögg Sigmarisdóttir
Dögg Sigmarisdóttir

It is hereby confirmed that in my judgment this thesis meets the requirements for a

B. A. degree in Law at the Faculty of Law and Social Sciences

Rachael Lorna Johnstone
Rachael Lorna Johnstone

Útdráttur

Markmið lokaverkefnisins er að kanna hvort það teljist til ofsóknar, eins og hugtakið er skilið í grein 1A(2) í samningi Sameinuðu þjóðanna um réttarstöðu flóttamanna, þegar upprunaríki flóttamannsins veitir ekki næga vernd gegn kynbundnu ofbeldi sem beitt er af öðrum en ríkinu sjálfu og ofbeldið er vegna persónulegra ástæðna. Leitast er svara við tveimur spurningum hvað þetta varðar. Fyrri spurningin er, varðar vernd upprunaríkisins skilgreiningu hugtaksins “ofsókn”? Flóttakonur flýja oft undan ofbeldi frá einkaaðilum og þurfa að sýna fram á að þær séu ofsóttar þrátt fyrir að ríkisvaldið beiti ekki sjálfu ofbeldinu. Seinni spurningin er, þarf ástæðan fyrir ofsókninni að vera kynþáttur, trúarbragð, þjóðerni, aðild að sérstökum samfélagshóp eða pólitísk skoðun flóttamannsins? Þegar mál kvenna í flóttaríkinu eru tekin fyrir þá eiga þær oft í erfiðleikum með að sýna fram á að ofangreindar ástæður voru í huga einkaaðilans þegar þær voru beittar ofbeldinu og getur það komið í veg fyrir að þær njóti flóttamannaverndar. Dómsmál frá Ástralíu, Kanada, Bretlandi og Bandaríkjunum eru skoðuð með tilliti til þessa spurninga. Þó svo öll ríkin viðurkenni að einkaaðilar geti átt aðild að ofsókn flóttamanna, þá er niðurstaða þessa verks að enn sé lögð of mikil áhersla á þann sem ofsækir og innri vernd í upprunaríkinu í Bretlandi, Bandaríkjunum og Ástralíu þegar hugtakið “ofsókn” er skilgreint. Aðeins eitt ríkjanna, Bandaríkin, krefjast þess að ástæða ofsóknar einkaaðila grundvallist í kynþætti, trúarbragði, þjóðerni, aðild að sérstökum samfélagshóp eða pólitískri skoðun flóttamannsins.

Summary

The object of the thesis is to examine if failure of the country of origin to provide protection against gender-related violence from non-state actors, in circumstances where the motivation of the perpetrators is private, constitutes persecution of the kind referred to in Art 1A(2) of the Convention. Two questions are brought up in this context. First, is internal state protection relevant to the definition of the term “persecution”? This is important in gender-related claims by women who often face serious harm by non-state agents and need to show that they are persecuted even though state authorities are not inflicting the harm. Secondly, does the motive of the perpetrator have to relate to Convention reasons? When women face violence by private citizens, e.g. family members or husbands, the difficult requirement of establishing the motive of the perpetrator while in the state of refuge becomes a barrier to the recognition of refugee status. It is concluded that even though the four jurisprudences considered, the U.K., the U.S., Australia and Canada, follow “the protection view” in rewarding refugee protection, there is too much emphasis in all states except Canada on the persecutor and internal state protection when the term “persecution” is defined. But only in the U.S. is it required that the motivation of the non-state perpetrator is on account of one of the Convention reasons.

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1. Introduction

An increased awareness of violence against women has been raised in the international community.¹ Last year, the following statement was made in a UN Expert Group Meeting report on indicators to measure violence against women:

“Violence against women is one of the most systematic and prevalent human rights abuses in the world. It is directed against a woman because she is a woman or affects women disproportionately. Such gender-based violence against women is a form of discrimination and deeply rooted in power imbalances and structural relationships of inequality between women and men. Violence against women is a global phenomenon, occurring in every continent, country and culture. It harms families, impoverishes communities and reinforces other forms of inequality and violence throughout societies.”²

Gender is not included as an independent enumerated ground for a well-founded fear of persecution for the recognition of refugee status in the United Nations Convention relating to the status of Refugees 1951³. Gender neutrality of international refugee protection has proven to be a significant obstacle for the protection of female asylum seekers. It has been criticized that the protection of civil and political rights in the public sphere is overemphasized and that these rights are more readily assigned to men. This is thought to have reduced or even excluded the protection of female refugee-claimants that suffer from gender-based persecution.⁴

The current state of the refugees in the world is not the same as it was when the Refugee Convention was adopted in 1951. More effective protection to refugees has been somewhat secured by dynamic interpretation of the Convention’s text. But, increased state security concerns, the costs of asylums to states and fears of “uncontrolled”

¹ For example the UN General Assembly (UNGA) adopted in late 2006 a resolution on “Intensification of efforts to eliminate all forms of violence against women”. One of its aims is to examine causes and consequences of violence against women in order to assist states in assessing the scope, prevalence and incidence of violence against women. See UNGA, 2006, “Intensification of efforts to eliminate all forms of violence against women”, 19 December 2006, A/RES/61/143.

² UN, 2007, “Indicators to measure violence against women” Report of the Expert Group Meeting 8 – 10 October 2007, Geneva, Switzerland, p. 5.

³ Hereafter it will be referred to as “the Refugee Convention” or merely as “the Convention” in the text, in footnotes it is referred to as “1951 Convention”.

⁴ Nancy Kelly, 1993: 626-629.

migration in today's era of globalization can be reflected in policy reforms that include more restrictive procedures for gaining refugee status. In recent years there has been a smaller outflow of refugees, but a great number of refugees face problems concerning forced internal displacement. By the close of 2006 the global figure of persons concerned to the UNHCR⁵ was 32.9 million, noting that this number had increased by 54 percent from the end of 2005, thereof were 9.9 million refugees⁶ Women are around half of the refugee population and the UNHCR has addressed the protection challenges faced especially by women and girl refugees, such as sexual and gender-based violence.⁷

The object of this thesis is to examine if failure of country of origin to provide protection against gender-related violence by non-state actors, in circumstances where the motivation of the perpetrator is private, constitutes persecution of the kind referred to in Art 1A(2) of the Convention. Two questions are brought up in this context. First, is internal state protection relevant to the definition of the term "persecution"? This is important in gender-related claims by women who often face serious harm by non-state agents and need to show that they are persecuted even though state authorities are not inflicting the harm. Secondly, does the motive of the perpetrator have to relate to Convention reasons? When women face violence by private citizens, e.g. family members or husbands, the difficult requirement of establishing a Convention reason as a motive of the perpetrator while in the state of refuge becomes a barrier to the recognition of refugee status.

The first thing covered here is a general introduction to refugee protection with consideration of what makes women different as refugees. Persecution is not defined in the Convention and no reference is made to the perpetrator. Much is therefore dependent upon interpretation of states applying the refugee definition. The governing rules on interpretation are addressed in the third chapter. The definition of a refugee is considered in the fourth chapter. Persecution and gender is the subject of the last two

⁵ These include refugees, returnees, stateless and internally displaced persons

⁶ The population of concern to UN High Commissioner for Refugees comprises of 32.9 million people, refugees form 30.1 % of this number and internally displaced persons 38.9%. Over 60% of the total number are persons from Asia and Africa. See: UNHCR, *The State of the World's Refugees 2006. Human displacement in the new millennium*, 2006, p. 1-7. Accessed 18. April 2008 at: <http://www.unhcr.org/static/publ/sowr2006/toceng.htm>; and UNHCR, 2006 UNHCR Statistical Yearbook, 2006, "Chapter II: Population Levels and Trends", pp. 23-34. Accessed 18. April 2008 at: <http://www.unhcr.org/cgi-bin/tehis/vtx/home/opendoc.pdf?id=478ce0532&tbl=STATISTICS>.

⁷ UNHCR, *Handbook for the Protection of Women and Girls*, January 2008. Accessed 18. April 2008: at <http://www.unhcr.org/protect/PROTECTION/47cfae612.html>.

chapters, the first one focusing more on a general and theoretical questions on the matter and the second one is a comparison on the definition of persecution and motives of perpetrators in case law in Australia, Canada, the U.K. and the U.S.

2. The Refugee Protection and Women

2.1 Non-Discrimination Principle of the Refugee Convention

The Refugee Convention and the 1967 Protocol Relating to the Status of Refugees⁸ govern international refugee status. The Refugees Convention was the second binding human rights treaty promulgated by the United Nations. As a new international instrument in 1951 it was meant to address the refugee problem after the Second World War by defining the legal status of refugees. In the preamble to the Refugee Convention it is stated that the high contracting parties should consider the principle that human beings shall enjoy fundamental human rights and freedoms without discrimination embodied in the Charter of the United Nations and the Universal Declaration of Human Rights (UDHR).⁹

The legal regime of refugee law has been described as giving incomplete protection to refugees whose fundamental human rights and freedoms have been breached.¹⁰ Refugees are normally entitled to claim the benefit of relevant human right treaties when seeking international protection.¹¹ The fundamental human rights and freedoms that the Refugee Convention assures should not be used to deny other universal rights embodied in other legal instruments.¹² If a contracting state has obliged itself to uphold other rights and benefits to refugees that do not form a part of the Convention, then nothing in it shall be deemed to impair those rights and benefits.¹³

The Refugees Convention contains three types of provisions. Firstly, there are provisions that provide the basic definition of who is a refugee and when a person ceases to be a refugee. Secondly, provisions concern the legal status of refugees and their rights and duties in their country of refuge. Lastly there are other provisions that deal with the

⁸ Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267 (1967). Hereafter it is referred to in the text and footnotes as “1967 Protocol”.

⁹ 1951 Convention, Preamble.

¹⁰ Guy Goodwin-Gill & Jane McAdam, 2007: 1.

¹¹ James C. Hathaway, 2005: 64-65.

¹² The Supreme Court of Canada asserted this view in the case of *Suresh v. Canada*, (2002) 1 SCR 3.

¹³ 1951 Convention, Art. 5.

implementation of the instruments from the administrative and diplomatic standpoint, e.g. on co-operations with the Office of UN High Commissioner for Refugees in the exercise of its functions and to facilitate its duty of supervising the applications of the provisions of these instruments.¹⁴ It is Article 1A(2) that provides the definition of a refugee, as amended by the 1967 Protocol, it stipulates that the term “refugee” shall apply to any 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 the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.”¹⁵

There is an article in the Refugees Convention on non-discrimination, obliging contracting states to apply the provision of the Convention to refugees without discrimination. However the non-discrimination clause only refers to a ban on discrimination as to race, religion or country of origin.¹⁶ Gender is not included and the Refugees Convention refers to refugees as being male throughout. Through a dynamic interpretation of the Convention, by looking at the purpose and object found in the preamble, it can be said that it should provide protection to refugees from serious harm inflicted for reasons of personal status, be it race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁷

2.2 *The UNHCR*

The Office of the United Nations High Commissioner for Refugees (“the UNHCR”) was established as of 1 January 1951 by a UN General Assembly resolution.¹⁸ The role of the office is to provide international protection to refugees¹⁹ under the protection of the

¹⁴ UNHCR, 1992: § 12.

¹⁵ 1951 Convention, Art. 1A(2) as amended by 1967 Protocol, Art. I(2).

¹⁶ 1951 Convention, Art. 3.

¹⁷ Rodger Haines, 2003: 344. See also, 1951 Convention, Preamble. UDHR, Art. 2 and ICCPR, Art. 26.

¹⁸ UNGA, “The Statute of the Office of the United Nations High Commissioner for Refugees”, UN. doc. A/RES/428 (V). 14 Dec. 1950. See also the 1951 Convention, Art. 35.

¹⁹ The refugees protected by the UNHCR are persons defined especially as under the competence of UNHCR without regards to any dateline or geographic limitation (“mandate refugees”), which is different from the refugee protection provided by the Convention to refugees (“statutory refugees”).

United Nations.²⁰ The High Commissioner is required among other things to promote the conclusion and ratifications of international conventions for the protection of refugees and to supervise their application.²¹ Contracting states are supposed to co-operate in the determination of refugee status with the High Commissioner.²² The UNHCR publishes guidelines that are meant to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field, complimenting the UNHCR Handbook on procedure and criteria for determining refugee statuses under the Refugees Convention and its 1967 Protocol. According to the prescribed co-operation of the states parties, consideration of legal interpretative guidelines by the office should be considered relevant to the determination of refugee status, even though the guidelines are not legally binding upon states. States are free to choose how they implement their obligations according to international law at the domestic level, provided that the treaty, in this case the Refugee Convention, does not prescribe a specific conduct and that the state reaches the required results of the it.²³

2.3 Responsibility of Contracting States

Contracting states make the assessment on who is a refugee in their jurisprudence. With their actions they should not create a refugee outflow and should cooperate with other states in resolving such situations.²⁴ A fundamental principle of international protection of refugees is that international protection should serve as “surrogate protection”. This creates the assumption that the state of origin is capable of protecting the claimant unless proven otherwise.²⁵ The focus is on the state of origin and its capacity of protection. This increases the burden on the claimant and international protection only comes into play when there is no alternative option remaining for the claimant.²⁶

The claimant needs to show failure in State protection to gain international refugee protection. There are four possible situations where this occurs:

²⁰ UNGA, “The Statute of the Office of the United Nations High Commissioner for Refugees”, UN. doc. A/RES/428 (V). 14 Dec. 1950, Art. 1.

²¹ UNGA, “The Statute of the Office of the United Nations High Commissioner for Refugees”, UN. doc. A/RES/428 (V). 14 Dec. 1950, Art. 8.

²² 1951 Convention, Art. 35 and 1967 Protocol, Art. II.

²³ Walter Kälin, 2001: 427.

²⁴ Guy Goodwin-Gill & Jane McAdam, 2007: 2.

²⁵ *Canada (Attorney General) v. Ward* (1993) 2 SCR 689.

²⁶ Guy Goodwill-Gill & Jane McAdam, 2007: 10.

1. Persecution committed by the state concerned;
2. Persecution condoned by the state concerned;
3. Persecution tolerated by the state concerned; and
4. Persecution not condoned nor tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.²⁷

A refugee claimant must show that she is unable or owing to such fear, unwilling to avail herself of the protection of her country of origin.²⁸ To be unable to avail oneself of state protection refers to circumstances beyond the influence of the applicant. This can also be applicable in circumstances where protection by the state of origin is denied to the applicant.²⁹ On the other hand to be unwilling to avail oneself of state protection refers to refusal of an available protection. This refusal justifies the fear of the applicant. If fear as the reason for the unwillingness to make use of available protections is not “well-founded,” then the need for an international protection as a refugee is not considered necessary.³⁰

To deny refugee status, the level of state protection available needs to meet the standard that the risk to the refugee claimant is reduced so that the fear of persecution on Convention grounds is no longer well-founded. The protection provided by the state needs to 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.”³¹ In other words, the protection cannot bear discrimination and it needs to be effective. If not, and the state of refuge still does not provide protection to the refugee, then there exists a breach of the non-refoulement obligation of the Convention.³² A formal protection of human rights in the state of origin is not enough, e.g. protection enshrined in legislation, if it is not effective. But, the state of origin is not required to eliminate all risk of harm to the claimant. As for any other person in the jurisdiction the claimant is also in some risk of harm that the State cannot be required to provide protection against. The Refugee Convention only assigns protection for victims

²⁷ Rodger Haines, 2003: 332.

²⁸ 1951 Convention, Art. 1A(2).

²⁹ UNHCR, 1992: § 97-98.

³⁰ UNHCR, 1992: § 100.

³¹ Rodger Haines, 2003: 333.

³² 1951 Convention, Art. 33(1).

of persecution that relates to their civil and political status, as the refugee definition states.³³

A claimant is not required to risk her life seeking an ineffective protection of a state, simply to demonstrate the ineffectiveness. This is a standard set both by cases in Canada³⁴ and in the U.S.³⁵ The House of Lords determined the meaning of state protection under U.K. jurisdiction in the case of *Horvath*³⁶. The protection test was found to be a practical standard, which takes proper account of the duty which the state owes to all its nationals, and when evaluating the sufficiency of state protection it is not to be measured by the existence of a real risk of abuse of rights but the availability of a system of protection of the citizen and a reasonable willingness by the state to operate it.³⁷

2.4 Protection of Female Refugees

Women and girl-children have not at all times enjoyed equal protection of the Refugees Convention, despite the fact that the principle of non-discrimination has firmly been established as one of the fundamental principles to the concept of human rights.³⁸ UNHCR Executive Committee calls on all states to work towards fair and appropriate treatment of refugee women and has stressed the importance of a more detailed knowledge and understanding of the special needs of refugee women in the international protection fields, and of gathering statistical, sociological and other data concerning refugee women and girls to identify and implement appropriate mechanisms to ensure their effective protection.³⁹ Kneebone categorises the types of harms that are especially feared by women in three: (i) sexual violence such as rape or sexual torture by the government; (ii) punishment for breach of social or moral codes or harm feared that is based on “cultural” practices, e.g. female genital mutilation; and (iii) domestic abuse, sometimes referred to as “private” persecution because the persecutor is a family member or a close associate.⁴⁰

³³ A more detailed account is made in chapter 4 and 5 on persecution and the criteria for refugee status.

³⁴ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689, at p. 724.

³⁵ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 286. Reference to the case of *Fiadjoe v Attorney General of the U.S.*, (2005) 411 F. 3d 135, (3rd Cir.), at 160-163.

³⁶ *Horvath v Secretary of State for the Home Department* (2002) 3 WLR 379.

³⁷ *Horvath v Secretary of State for the Home Department* (2002) 3 WLR 379, at 388 and 398.

³⁸ Rodger Haines, 2003: 320. On principle of non-discrimination see for example UDHR, Art. 2, ICCPR, Art. 2(1) and ICESCR Art. 2(2).

³⁹ EXCOM Conclusions no. 39 (1985); no. 46 (1987) and 64 (1990).

⁴⁰ Susan Kneebone, 2005: 20.

The recognition of the part of non-state agents in persecutions has paved the way for many female refugees who are faced with discrimination related to their gender. The fact that the Refugee Convention has not provided protection to women equally as to men is not only limited to international right of refugees, but has been criticized by feminists to be a problem of the whole human rights regime and its pseudo claim of “gender-neutrality”. The classic rights-bearer is a public figure and human rights have more concerned protections from the dangers associated with activities engaged in by men. The whole rights thinking, as feminists have argued, “rests upon the political conception of the division of life into public and private spheres; rights are particularly associated with the public sphere from which, historically, women have been systematically excluded, and not associated with the private sphere, which is where women have been most obviously oppressed and in need of protection.”⁴¹

It is more common that females experience persecution that does not occur in the “public sphere” of societies. But, persecution in a “private sphere” where harm is inflicted by husbands, family members or other non-state agents can be no less political than a public protest and can also be closely related to social and religious mores of society. Cases of domestic violence within the privacy of the home to which women are subjected can clearly be seen as a political acts relating to the rights and interests of women as a group and their gender roles, even though the women’s fight is not fought inside public political bodies and her dialogue is a private one. A more banal example is simply looking at the political angle of the arrangements of basic house chores and how this reflects the power relationship between the sexes.

This is not easily combined with the public/private division central to Western political thought, dating back to pre-classical Greek city-states, where the free men/soldiers dominated the public sphere while the women’s sphere was the private sphere, the home. The results from this is thought to have contributed to the contemporary international human rights regime, which privileges rights in the public sphere, more readily assigning rights to men than women.⁴² Feminists have for example criticised that despite the fact that decades ago gender-related violence was recognised as violations of international law

⁴¹ Chris Brown, 2002: 128. See further discussion in the chapter “Human rights: universalism and the feminist critique.” at pp. 124-130.

⁴² Chris Brown, 2002: 110-111.

and human rights abuses, violence such as rape and sexual violence was not analyzed as a core human rights violation until in the last years. The recognition of the issues of rape and sexual violence in the conflicts in Yugoslavia and Rwanda, where it was used as a weapon in the conflicts, has changed the direction of refugee law significantly in this respect.⁴³

The refugee definition of the Convention does give scope to recognize both state and non-state agents as actors of persecution, according to the UNHCR.⁴⁴ The agent of persecution may be the government or its official authorities. Normally persecution is related to action by the state authorities. But, the harm can be inflicted by individuals or groups that are not government agents, if the infliction is done with the explicit or implicit government complicity. A persecutor may also inflict harm and have no affiliation with the government in doing so, for example private individuals that persecute members of a particular social group out of personal reasons. It can also be that sections of the population act contrary to standards established by the laws of the country concerned. Such discriminatory or other offensive acts can amount to persecution if they are knowingly tolerated by the authorities or if authorities either refuse or are unable to offer effective protection to the persecuted, according to the UNHCR.⁴⁵

On establishing a causal link between the risk of persecution and the Convention grounds the UNHCR states that if there is persecution by a non-state actor, where the persecution is shown to be motivated by one of the Convention grounds, the claimant meets the criteria of a refugee and the causal link is established. Where persecution by a non-state actor is unrelated to the Convention grounds, then the inability or unwillingness of the state to protect the claimant has been thought relevant. The reasons for the lack of protection from the state then have to relate to reasons of a Convention ground.⁴⁶ The evaluation of persecution thus has mainly involves the assessment of the seriousness of the harm faced in the country of origin and on the ability and willingness

⁴³ Deborah E. Anker, 2002: 141; UN Security Council, 2000, “Resolution 1325”, UN doc. S/RES/1325, 31 October 2000; and Susan Kneebone, 2005: 9.

⁴⁴ UNHCR, 2002: § 19.

⁴⁵ UNHCR, 1992: § 65.

⁴⁶ UNHCR, 2002: § 21.

of the state of origin to respond effectively to that risk.⁴⁷ By interpreting the Convention in this way it should give protection to women faced with gender-related persecution by non-state actors upon return to the country of origin. A closer account is made in the next chapter on the rules that govern the interpretation of the Convention.

3. Interpretation of the Refugee Convention

3.1 General rules on Interpretation

The Vienna Convention on the Law of Treaties approach has been recognized by the International Court of Justice as embodying customary norms of treaty interpretation, constituting a general expression of the principles of customary international law relating to treaty interpretation.⁴⁸ The norms contained in the Vienna Convention therefore govern not only contracting states, but also all States when it comes to treaty interpretation. The general rule of interpretation as embodied in the Vienna Convention is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.⁴⁹

⁴⁷ Rodger Haines, 2003: 329. This view is shared with Haines by the scholars Hathaway and Anker. It is also supported by decisions in the cases of *R v Immigration Appeal Tribunal, Ex parte Shab and Islam* (1999) 2 AC 629, *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489 in UK, and in Australia in the case of *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1.

⁴⁸ *Kasikili/Sedula Island (Botswana v. Namibia)*, Preliminary Objections, (1996) ICJ Rep 803, at 812; *Territorial Dispute (Libyan Arab Jamabiriya v Chad)*, (1994) ICJ Rep. 6, at 21; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, (1991) ICJ Rep 53, at 69. See also James C. Hathaway, 2005: 48.

⁴⁹ 1969 Vienna Convention on the Law of Treaties, Art. 31:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The main principle is to give primacy to the written text of the Refugees Convention, but the context, object and purpose of the treaty must also be considered.⁵⁰ Since many of the key terms of the Refugees Convention are vague, undefined and open to interpretation, bodies that apply it have also supported their interpretation with the use of preparatory work or *travaux préparatoires* to the Convention.⁵¹ This is explicitly permitted in the Vienna Convention.⁵² James C. Hathaway has criticized that for too long “an anachronistic fixation with literalism” has been used in treaty interpretation. He claims that there has been insufficient attention paid to the duty to read treaty text in line with the context, object, and its purpose. But, he also draws attention to the fact that regarding decisions concerning refugee law, the rejection of literalism as the core treaty interpretation has been especially approved in judicial reviews.⁵³

In the Preamble of the Refugees Convention regarding interpretation of its texts the object and purpose of extending the protection given to refugees by the international community should be considered, in addition to assuring the widest protection exercise of fundamental rights and freedoms to refugees. Reference is made to the Charter of the UN and the UDHR on the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.⁵⁴

The ICJ has pointed out the importance of seeking conceptual concordance among closely connected treaties, determining that an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In terms of human rights law the ICJ adjudicated that: “Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application.”⁵⁵ Where the Refugee Convention falls short on definition of fundamental terms such as

⁵⁰ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 230. This is taken from a case from New Zealand, N.Z.A.R. 545, Refugee Appeal No. 71427/99 (New Zealand). There judges referred to the words of J. McHugh who preferred ordered yet holistic approach taken by Zekia in *Golder v United Kingdom* (1975) 1 EHRR 524, 544 (ECHR).

⁵¹ Guy Goodwin-Gill & Jane McAdam, 2007: 9.

⁵² 1969 Vienna Convention on the Law of Treaties, Art. 32. The article provides: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (2) leads to a result which is manifestly absurd or unreasonable.”

⁵³ James C. Hathaway, 2005: 49 and 52-53.

⁵⁴ 1951 Convention, Preamble.

⁵⁵ James C. Hathaway, 2005: 66. Reference to the case of *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, (1997) ICJ Rep 7, at 114-115, per Judge Weeramantry.

“persecution”, reliance on other human rights instruments in interpretation that serve the purpose and object of providing the widest possible protection to refugees is completely justified and has been practiced through the years.⁵⁶

The general rule to respect the object and purpose of a treaty in interpretation is not as clear, as that of considering the context and the text of a treaty. The Vienna Convention does not elaborate on how to apply this rule, but preparatory work has been used in this purpose. The historical purpose and objective of a treaty as it was made during the drafting of a treaty may not reflect that changes in human rights standards that have emerged through the years and which may affect the object and purpose of a treaty.⁵⁷ Chief Justice Brennan of the High Court of Australia made one of the earliest open acknowledgements in state practice on a broad, interactive understanding of treaty interpretation:

“In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules...Although the text of a treaty may itself reveal its objects and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the history of its negotiations and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.”⁵⁸

In U.K. the House of Lords have explicitly stated that a mere focus on words alone could lead to an unsound understanding of the Refugee Convention, if there is no account made to the historical goals underpinning the Convention. In the case of *R v. Secretary of State for the Home Department, ex parte Adan* the House of Lords stated that “one is more likely to arrive at the true construction of Article 1(A)(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the

⁵⁶ Other international human rights instruments have been useful in providing a broader context and aiding a correct interpretation of the Refugee Convention assuring its protective effects. These are for example Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965); ICCPR (1966); ICESCR (1966); CEDAW (1979) and Optional Protocol (2000); CAT (1984); Convention on the Rights of the Child (CRC) (1989). See Heaven Crawley and Trine Lester, 2004: 5-6.

⁵⁷ James C. Hathaway, 2005: 55.

⁵⁸ *Applicant “A” and Ano’r v. Minister for Immigration and Multicultural Affairs*, (1997) 190 CLR 225, per Brennan CJ. See also discussion of James C. Hathaway, 2005: 52-53.

framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.”⁵⁹

The approach taken by the House of Lords to refugee law supports the evolutionary principle while simultaneously adhering to historical intention of the drafters, with some exceptions though. In a decision made in 2003 Lord Bingham argued that the Convention must be seen as a living instrument, where the meaning is constant but the application may change over time. But, he also thought that as an international human rights convention it should not forever be determined by the intentions of those who originally framed it. He supported the observation that the Convention will eventually become anachronism if it is not seen as a living thing that takes into account the movement of international opinion in human rights and refugee affairs and the changing circumstances of the present and future world.⁶⁰

To use state practice as evidence in interpreting the Refugee Convention can have its disadvantages, given the specific nature of the Convention in constraining state conduct. As with other human rights treaties they are meant to put limits on state powers for the benefit of individuals. The effects of the Convention could be severely diminished if the states themselves are left alone with the power to determine their own obligations through interpretation. The co-operating principle between the contracting states and the UNHCR, which publishes guidelines on interpretation that can compliment the state practice in interpretation, makes it more likely that the effects, purpose and object of the Convention do not suffer if states mainly serve to limit their responsibility in refugee protection.

3.2 Gender-Sensitive Interpretation

The UNHCR published a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status

⁵⁹ *R v. Secretary of State for the Home Department, ex parte Adan*, (1999) 1 AC 293.

⁶⁰ *Sepet and Bulbul v. Secretary of State for the Home Department*, (2003) UKHL 15, at § 11 per Lord Bingham. The reasoning of Bingham was adopted from Sedley J in *R v. Immigration Appeal Tribunal, ex parte Shah*, (1997) Imm AR 145, at 152. Bingham also approved of the observation of Laws LJ in *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, (1999) 3 WLR 1274, that “it is clear that the signatory states intended that the Convention should affront continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument.”

of Refugees in 1992.⁶¹ The Handbook is supposed to be of guidance to governments of contracting states in determining refugee status.⁶² Statements made by the UNHCR and UNHCR's Executive Committee have gained the status of evidence of subsequent agreements between parties on the meaning of the treaty, but they are not legally binding interpretations. The Handbook has been used as a part of the context of the Convention and used according to Art. 31(2) of the Vienna Convention. It has also been included in interpretation as evidence of international practice within Art. 31(3) (b) of the Vienna Convention.⁶³ The third position is the location of the Handbook within Art. 31(3) (a), as a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.⁶⁴

The UNHCR proposes procedural practices that are gender-sensitive in order to ensure that a proper consideration is given to women claimants. The General Assembly and the Executive Committee of UNHCR's Programme both recognize this principle.⁶⁵ The problem of gender-related claims is often that they are dismissed because the gender dimension of their claim is not considered relevant from the beginning. As Haines points out both gender and sex are an inherent aspect of the questions whether the claimant meets the refugee definition when an inquiry into the characteristics and circumstances of the individual claimant is made.⁶⁶ The gender-sensitive analysis has to be from the very start of considering the claim. The interpretation approach endorsed by the UNHCR of the refugee definition is a holistic, gender-sensitive interpretation that takes into account the seeker's personality, background and personal experiences, with an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin.⁶⁷

The use of interpretation guidance by UNHCR and the Executive Committee as the context of the treaty or as agreement established by the parties therefore also contributes

⁶¹ UNHCR, 1992. Hereafter it will be referred to as "the Handbook" in the text.

⁶² UNHCR, 1992: § 222.

⁶³ James C. Hathaway, 2005: 54, including footnote nr. 146. Reference is made to the case of *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, (1999) 3 WLR 1274.

⁶⁴ James C. Hathaway, 2005: 54-55, including footnote no. 146.

⁶⁵ UNHCR, 1992: § I (2), Executive Committee, 1985, Conclusion No. 39 (Refugee Women and International Protection); 1993, Conclusion No. 73 (Refugee Protection and Sexual Violence); 1995, Conclusion No. 77 (g), (General Conclusion of International Protection); 1996, Conclusion No. 79 (o) (General Conclusion on International Protection); 1997, Conclusion No. 81 (t), (General Conclusion on International Protection).

⁶⁶ Rodger Haines, 2003: 325.

⁶⁷ UNHCR, 2002: § IIA(6)-(8).

to a developing object and purpose of the treaty usually found in the records of the drafting process leading to the final version of a treaty. Interpreting the Convention according to the published guidelines of the UNHCR and the Executive Committee declarations seems to support the interpretation method of applying the rules provided by the Vienna Convention in unity.

Two general approaches have been taken by states to ensure a gender-sensitive application of refugee law and the definition of a refugee. The first one is where states have incorporated into legislation the legal interpretative guidance and/or procedural safeguards. Second approach is where states have developed gender-sensitive policies and legal guidelines on interpretation and application for decision makers in refugee cases.⁶⁸ In all the states considered here, the U.S, the U.K., Canada and Australia, gender guidelines have been adopted on refugee determination with relation to gender-sensitivity. These are not legally binding but are meant to be guiding when adjudicating in refugee cases.⁶⁹ Now a closer look will be taken on the refugee definition itself.

4. The Refugee Definition

4.1 Perspectives on the Refugee

The international community has been struggling to solve the refugee problem for a considerable time now. The problem has not remained the same through the decades, for example the increased problem concerning internally displaced persons seen in the last 15 years. The situation of women as refugees and the risks they face of gender-related violence has gained further recognition in the last 20 years, demonstrating the need to develop the refugee definition.⁷⁰ The international law developed in the early twentieth century did not recognize individuals as subjects of international rights and obligations.⁷¹ One solution to the refugee problem lies in determining which individuals

⁶⁸ Heaven Crawley and Trine Lester, 2004: 1-2.

⁶⁹ The Canadian Immigration and Refugee Board has developed Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (March 1993) with latest amendment in 1996; US Immigration and Nationality Service has produced Considerations for Asylum Officers Adjudicating Asylum Claims from Women (June 1995); Australian Department for Immigration and Multi-Cultural Affairs produced Guidelines on Gender Issues for Decision-makers (July 1996); UK Home Office published guidance on Gender Issues in the Asylum Claim as a part of Asylum Policy Instruction (March 2004) with latest amendments in 2006.

⁷⁰ Susan Kneebone, 2005: 9.

⁷¹ This is a part of the norms of the Westphalia system embodied in the Treaties of Münster and Osnabrück from 1648, by the end of the Thirty Years War. One of the norms set for the international

should get international protection and assistance as refugees by states, as is done in the Convention.

The “individualistic perspective” on refugees in the Convention rejects a group determination of refugee status. A refugee is defined as a person who is in search of an escape from perceived injustice or fundamental incompatibility with his home state. This perspective provides a means of facilitating international movement for those in search of personal freedom and securing their fundamental rights. The focus is not on which political or social category a potential refugee belongs to, but on the merits of each applicant’s case. Refugee status is gained by evaluating the individual’s personal characteristics and convictions and the tenets of the political system in his country of origin and their compatibility in light of the claimants search for a life free from fear over his life, personal freedom and liberty.⁷² The liberal concept of a “rights-bearing mobile individual” has construed the definition of the refugee, but it has been argued that women are often less mobile than their male counterparts and that their claims are not as compatible with the notion of “civil and political status”.⁷³

The “individualistic” concept of the refugee achieved pre-eminence from the mid-twentieth century. It is reflected in Article 1A(2) of the Refugee Convention in 1951, where the term “refugee” shall apply to any person who:

“As a result of events occurring before 1 January 1951 and 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 the protection of that country; or who, not

sphere by the Westphalia system were that sovereign states were the only actors bearing rights and obligations but human beings had no standing in the international society. This has changed and today contemporary international law has assigned legal status to individuals through international human rights conventions. For further discussion on the Westphalia system see: Chris Brown, 2002: 19-37.

⁷² James C. Hathaway, 1991: 2-6. Reprinted in Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 24-26. There were also the ‘juridical’ and the ‘social’ concept of a refugee developed earlier, which did not gain the same status as the ‘individualistic’ concept. The juridical perspective is that refugees are treated as such because their membership in a group of persons effectively deprived of de jure formal protection of the government of its state of origin. This reflects an anomaly in the international system. The social perspective on refugees is that they are helpless casualties of broadly based social or political occurrences, which separate them from their home society. This perspective is focused on ensuring refugees safety and well being. Not only assisting persons because they were without a formal national legal protection, but also to assist victims of social and political events, which resulted in de facto loss of state protection.

⁷³ Susan Kneebone, 2005: 8.

having a nationality and 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.”⁷⁴

The refugee definition has not changed much since it was embodied in the Convention in 1951. The 1967 Protocol had a limited impact on the definition of a refugee. Formally it universalized the definition of refugee status by eliminating the requirement that a refugee claim had to relate to a pre-1951 event in Europe. This earlier requirement was a direct response to the Second World War. As the preamble to the 1967 Protocol states, new refugee situations have arisen since the Convention was originally adopted and date requirement of 1 January 1951 would not provide an equal status to all refugees covered by the original definition in the Convention.⁷⁵ Other than that, there were no major changes to the substantive content of the definition by the 1967 Protocol. Refugees whose flight is not motivated by persecution rooted in civil and political status are still excluded from the rights regime established by the Convention.

The Convention definition of a refugee bears characteristics that James Hathaway identifies as embracing pro-Western political values. He refers to it as a strategic conceptualization of the definition and that this can be shown in that protection is only available to cover persons who are motivated to flee from their states by pro-Western political values. By including only persons who have been disfranchised by their state on grounds of race, religion, nationality, membership of a particular social group or political opinion, ideological dissidents to international protection were made by Western states, which condemned the Soviet bloc politics through international law. The precise formulation of the persecution also meant that it could not be used to the political advantage of the Soviet bloc. The Western countries were more vulnerable in areas of economic and social rights than in political and civil rights, thus economic and social rights were not included as a ground for persecution that entitled one to refugee status. In the opinion of Hathaway, the Refugees Convention adopted an incomplete and politically partisan human right rationale, serving the strategic political objectives of the Western states.⁷⁶

⁷⁴ 1951 Convention, Art. 1A(2).

⁷⁵ 1967 Protocol, Preamble.

⁷⁶ James C. Hathaway, 1991: 6-11. Reprinted in Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 35-36.

The criteria that a refugee needs to meet are by no doubt limited. Women that have experienced persecution that is on ground of their gender, e.g. rape, female genital mutilation, transgression of social mores, have faced barriers in gaining protection. The political nature of the definition and the historic association of the political with the public sphere where holders of rights are predominantly men, as discussed earlier, can partially explain the lack of protection to refugee women. The marginalization of women has been attributed not only to the definition itself but also to procedural and evidential barriers in the determination process and the lack of appropriate consideration of their claims.⁷⁷

The San Remo Expert Roundtable concluded that the problem with gender-related claims was that gender-sensitive interpretation was not properly introduced in the determination process. A plausible explanation to this problem is that the refugee definition is a highly political one and that women are too often perceived as apolitical beings. Their claims for asylum bear the risk of being viewed as exclusively personal and without a political character because their persecution is more often experienced in the private sphere as opposed to the public sphere where politics are thought to thrive.⁷⁸ The pro-Western political character of the refugee definition would not be a limit to women's claims if it were rightly recognized that the persecution suffered by women in the private sphere, often a result of the unequal status of women in societies to men, is no less of a deprivation of the same rights connected with human dignity as of those persecuted in the public sphere.

4.2 Refugee Status

To gain refugee status a person needs to meet the Convention's criteria included in the definition of a refugee. In the Handbook of UNHCR the provisions of the Refugees Convention who define who is or is not a refugee are divided into three different clauses: "inclusion", "cessation" and "exclusion" clauses. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. The cessation clauses set the conditions under which a refugee ceases to be a refugee. The exclusion clauses find what

⁷⁷ Heaven Crawley and Trine Lester, 2004: 17.

⁷⁸ Musalo, Karen, Jennifer Moore & Richard A. Boswell, 2007: 829-830.

circumstances exclude a person from the applications of the Refugee Convention, even though she meets the criteria defined in the inclusion clauses.⁷⁹

When a refugee claimant seeks refugee protection under the Convention, then she must not only meet the standards of a well-founded fear of persecution, proving past events, but also convince those adjudicating that there will occur future events from which the claimant needs protection. Generally, authorities evaluate the risk of persecution at the moment the decision is made, in light of all items known at the time of the decision. This approach is justified by the cessation clause, Art. 1C(5) in the Refugee Convention, where a refugee ceases to have her status because the circumstances with which she gained status have ceased to exist.⁸⁰

Determining refugee status is done in two steps, the relevant facts of a person's case are ascertained and the definitions in the Refugees Convention and the 1967 Protocol are then applied to these facts. Once a person fulfils the criteria contained in the definition, she is a refugee. According to the UNHCR this occurs prior to the time at which her refugee status is formally determined. The act of recognizing a person as a refugee does not make her a refugee, but is only recognized because she is a refugee.⁸¹ That is, whether a person is or is not a refugee depends not on the evaluation by the state authorities but on whether or not her circumstances meet the relevant criteria. Recognition confirms her status; but the status exists independently of – and prior to- recognition.

This view on that an external recognition does not make a person a refugee does seem a bit obscure, since the identification of a refugee is strictly categorized along political lines. How can one be a refugee without the external recognition, since this status is ultimately a question of international legal protection? Without such recognition one is simply a person illegally residing in a state other than her state of origin. This statement by UNHCR also in a way supports that whoever is a “true” refugee should meet the criteria in the Convention, leaving out that the refugee definition is a highly political one that excludes a number of persons who have substantial fears over their lives on other grounds than the enumerated ones in the Convention and would understandably seek refuge in another country.

⁷⁹ UNHCR, 1992: § 31.

⁸⁰ Jean-Yves Carlier, 1997: 697 and 1951 Convention, Art. 1C(5)-(6).

⁸¹ UNHCR, 1992: § 28.

4.2.1 Well-Founded Fear

As a general legal principle the burden of proof lies on the person submitting a claim, but refugee cases often entail statements by the claimant that are not susceptible of proof. In such circumstances where the applicant's account appear credible, she should be given the benefit of the doubt unless there are good reasons not to, according to the UNHCR.⁸² But, the statements of the applicant must always be coherent and plausible and not contrary to general known facts.⁸³ When adjudicating in cases of refugee claims, the adjudicator is required to make future predictions on the basis of past events. UNHCR has stated that the standard of proof for a well-founded fear should be met when an applicant can establish to a reasonable degree, that it would be intolerable to continue a stay in the country of origin.⁸⁴

The phrase "well founded fear of being persecuted" as it is analyzed in UNHCR's Handbook is picked out as the key phrase of the definition of a refugee bearing the main elements of a refugee character. These criteria are thought to primarily require an evaluation of the applicant's statements involving the subjective element of fear in the person, rather than a judgment on the situation prevailing in the country of origin. The fear of an applicant has also to qualify as being well-founded; being afraid is not enough to be recognized as a refugee. The objective situation that is the cause of fear and the subjective element of fear are both elements that must be taken into consideration when determining if well-founded fear exists.⁸⁵ The UNHCR found that in common law countries it is supported that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. For the standard of a well-founded fear of persecution, it is enough that it is proven to be reasonably possible.⁸⁶

In Canada a well-founded fear of persecution is met if there is a reasonable chance of persecution. A reasonable chance is then more than a "minimal or mere possibility", but less than a 50% chance of persecution. The degree of "reasonable chance" is set between

⁸² UNHCR, 1992: § 196.

⁸³ UNHCR, 1992: § 196, 204.

⁸⁴ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 208.

⁸⁵ UNHCR, Handbook: § 37-38.

⁸⁶ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 193, See UNHCR, Position Paper: Note on Burden and Standard of Proof in Refugee Claims 3 (1998).

upper and lower limits. The upper limits being 50% chance of persecution and the lower limit being a minimal or mere possibility.⁸⁷ In case a refugee claimant does not have a subjective fear, but should according to the facts of the case, in such absence her claim should not be defeated because the “definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent.”⁸⁸ The U.K. has a very similar standard. It does not accept the requirement of well-founded fear as based on the standard “more likely than not”. A well-founded fear is rather described in terms of “reasonable degree of likelihood”, “reasonable chance” and “serious possibility”.⁸⁹

Under Australian jurisprudence a “real chance” of persecution is required. That means a substantial risk as distinct from remote chance of persecution, but it might also be identified if there is less than 50% chance of the feared persecution occurring. The U. S. Supreme Court addressed the degree of risk in the *Cardoza-Fonseca* case in 1987, so that “one can certainly have a well-founded fear of an event happening where there is less than 50% chance of the occurrence taking place.” It was even declared that a risk of around 10% could be sufficient for a well-founded fear.⁹⁰

The fear itself is the subjective element of the standard. The well-foundedness is the objective element. Which element is predominant or whether each weight is valued equally is not always readily ascertainable in actual refugee decisions.⁹¹ The High Commissioner stresses that the criteria for a refugee status should be applied in a spirit of justice and understanding not influenced by the personal consideration that the applicant might be an “undeserving case”.⁹² The predominant motive for the refugee application is the applicant’s fear. The opinions and feelings of the applicant are under evaluation by the authority that deals with her application. The credibility of the person is thus necessary. The personal and family background, if she is a member of a particular racial, religious, national, social or political group and her own interpretation and personal

⁸⁷ Jean-Yves Carlier, 1997: 189-190 and 696-697. Citing the cases of *Adjei v. Canada (Minister of Employment and Immigration)*, (1989) 2 F.C. 680 and *Ponniah v. Canada (Minister of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 241.

⁸⁸ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 193. This reasoning is drawn from the case *Yusuf v Canada* (1992) 1 F.C. 629 at 632.

⁸⁹ *R v Secretary of State for the Home Department, Ex parte Sivakumaran*, (1988) A.C. 958, at 944 per Lord Keith.

⁹⁰ *INS v Cardoza Fonseca*, (1987) 107 SC 1207.

⁹¹ Jean-Yves Carlier, 1997: 695.

⁹² UNHCR, 1992: § 202.

experiences of her situation are all under inspection. Thus gender does inevitably enter the definition procedure from the very beginning.

4.2.2 *The Nexus Requirement*

There are five different grounds of persecution identified in the Convention, race, religion, nationality, membership of a particular social group and political opinion. To gain a refugee status the claimant needs to show that the well-founded fear of persecution is on one or more of these grounds, known as the nexus requirement. Gender is not included as one of the grounds, never the less the need for protection from gender-related violence has been recognized. In case the refugee definition is not interpreted in a correct way, including the context, purpose and object of the Convention, in a gender-inclusive and gender-sensitive interpretation, then this can reinforce gender biases leading to the marginalization of women in the refugee contexts.⁹³

It is suggested by Haines and Spijkerboer that if the Convention would be amended adding gender as a sixth ground for persecution, it might have the unintended effect to further marginalize women if it would be interpreted as an implicit concession that currently gender-related persecution has no place in refugee law.⁹⁴ Anker argues as well that simply adding gender or sex to the enumerated grounds would not solve the problem of refugee women who fear harm unique to or disproportionately affecting women.⁹⁵ Nowadays the mainstream view on the problem of marginalization of women as refugees is not that the refugee definition does not include gender-related persecution. Rather the focus is shifted from the Convention's text to decision makers that have not incorporated gender-related claims of women into their interpretation of the existing enumerated grounds and that they have failed to recognize the political nature of women's claims and to respond to women's experiences.⁹⁶

One of the enumerated grounds in Article 1A(2) of the Refugees Convention is "membership of a particular social group". This ground is not defined in the Convention

⁹³ Rodger Haines, 2003: 326.

⁹⁴ Rodger Haines, 2003: 327. Haines quotes T. Spijkerboer, 1994, *Women and Refugee Status: Beyond the Public/Private Distinction*, Emancipation Council, The Hague, p. 68.

⁹⁵ Deborah E. Anker, 2002: 139.

⁹⁶ Rodger Haines, 2003: 327; San Remo Expert Roundtable Summary Conclusions, 2001: § 4; and Deborah E. Anker, 2002: 138-139.

itself and has been depicted as the ground with the least clarity of the five grounds. Increasingly refugee claimants that fear persecution by non-state actors have invoked it.⁹⁷ Contracting states have recognized women, families, tribes, homosexuals and occupational groups as constituting as particular social groups for the purposes of the Refugee convention.⁹⁸ These cases have developed and broadened the scope of the convention, providing protection to individuals who were perhaps not thought of as individuals included in the refugee problem during the drafting of the Convention.

Gender-related claims are often associated with the Convention ground of membership in a particular social group, but they commonly have other dimensions to them as well. A woman that is motivated to flee because she does not conform with her social role in a Muslim society, e.g. dress-code or marital status as governed by sharia law, is making a political claim that is also related to the Islam religion. The gender dimension to her claim is perhaps most easily included in the ground of her membership in a particular social group, but that does not mean that she does not rest her case on any other grounds.

The category of social groups in the Convention is an open-ended one not excluding before hand other groups to be considered than those already recognized. There is no “closed list” of what groups fall within this category and the UNHCR advises that the term “membership of a particular social group” should be read in an “evolutionary manner”, taking into account changes in social circumstances of societies and the evolving international human rights norms.⁹⁹ This category should not render the other grounds superfluous and that the text required that limitation should be involved in the term “particular social group”.¹⁰⁰

One limit already set for the scope of the ground of “membership of a particular social group” by the UNHCR is that the group cannot be defined exclusively by the fact that it is targeted for persecution.¹⁰¹ This means that if there is nothing in common with the members of the group that the persecution itself, so that without the threat of

⁹⁷ UNHCR, 2002a: § 20.

⁹⁸ UNHCR, 2002a: § 1.

⁹⁹ UNHCR, 2002a: § 3.

¹⁰⁰ See for example Lord Steyn’s reasoning in *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at pp. 643.

¹⁰¹ UNHCR, 2002a: § 2. See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629

persecution its members could not be an identifiable group, this would not be a social group for the purpose of the Convention. It would lead to the circular reasoning that one is persecuted on the ground of being persecuted, which makes the ground of “social group” encompass everyone suffering persecution.¹⁰² The UNHCR has proposed to the House of Lords in the U.K. that the meaning of a “particular social group” would encompass individuals who “believe in or are perceived to believe in values and standards which are at odds with the social mores of the society in which they live”.¹⁰³

A common understanding of a “particular social group” can be that of a number of persons with a similar background, habits or social status that form a group on those grounds.¹⁰⁴ The group may be persecuted because of different grounds also giving a ground for the persecution, e.g. race, religion or political opinion. The group may not conform to the government’s policies and be persecuted because of that, but merely being a member of a particular social group does not automatically give a substantive claim to a refugee status.¹⁰⁵ In an Executive Committee Conclusion from 1985 it was recognized that states, in the exercise of their sovereignty could interpret “a social group” as to include women who face harsh or inhuman treatment for having transgressed social mores of their community.¹⁰⁶

The common law states have made the most detailed discussion of the social group ground.¹⁰⁷ Despite that its application is not always consistent and conflicting interpretations have been adopted within jurisdictions like the U.S.¹⁰⁸ In Australia, where a “social perception” approach on particular social groups is followed the group must be distinguished from the society and have a common attribute, so the external perception of the group is important.¹⁰⁹ In Australia it was recognized that women in Pakistan could constitute a particular social group in the case of *Khawar*¹¹⁰ that was recognizable and

¹⁰² This is also supported in case law, e.g. *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at pp. 639 and 656. and *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 A.L.J.R. 381, at 401.

¹⁰³ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at 644.

¹⁰⁴ UNHCR, 1992: § 77.

¹⁰⁵ UNHCR, 1992: § 79.

¹⁰⁶ Executive Committee Conclusion no. 39 “Refugees, Women and International Protection” (XXXVI).

¹⁰⁷ Unfortunately this paper does not give scope to address the issue of interpretation between jurisprudences of the ground of “membership in a particular social group” in detail.

¹⁰⁸ T. Alexander Aleinikoff, 2003: 263-311.

¹⁰⁹ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 264-266.

¹¹⁰ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1. Khawar claimed that in Pakistan she was a victim of a serious and prolonged domestic violence

distinct by characteristics existing independently from the persecution, either by males or by the government.¹¹¹ At the narrowest the group could be recognized as married women living in a household, which did not include a male blood relations to whom the woman might look for protection against violence by the members of the household.¹¹²

In the Canadian case of *Ward* there were 3 categories identified of 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.¹¹³

In this case it was established that gender could form a basis of a particular social group, as a type of the first category of social groups. The Canadian approach to social groups has been described as the “protected characteristic” approach where the group definition is mostly concerned with innate characteristics shared by its members, but not on how the group is perceived in society as in Australia.¹¹⁴

In the U.K. the case of *Shah and Islam* the issue of determining social groups when gender is related to the persecution feared was addressed. The Lords reasoned in a way that reflected both the “protection approach” concerned with protected characteristics of the claimants and a more “social approach” that external recognition of the group in its society is examined, as analysed by Aleinikoff.¹¹⁵ The case concerned two women from Pakistan who had been forced by their husbands to leave their homes in Pakistan. Upon return they feared that they would be falsely accused of adultery and therefore would face the risk of criminal proceeding for sexual immorality where the penalty might be

perpetrated by her husband and members of his family and that the police authorities there failed to investigate or lay charges in respect of complaints by women of domestic violence against them. She claimed to have a well-founded fear of persecution on grounds of her membership in a particular social group.

¹¹¹ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 2 and 14, per Judge Gleeson

¹¹² *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 2, per Judges Gummow and McHugh. There was one judge dissenting, Callinan J. who stated that it had not been established that the applicant feared persecution (however defined) for reasons of membership of a particular social group, see 210 CLR 1, at 2.

¹¹³ *Canada (Attorney General) v. Ward* (1993) 2 S.C.R. 689, at p. 739.

¹¹⁴ T. Alexander Aleinikoff, 2003: 270.

¹¹⁵ T. Alexander Aleinikoff, 2003: 274.

death by flogging or stoning. It was important in their claims that the State would not offer them any protection.¹¹⁶

The majority of the Lords deciding the case identified their group as Pakistani women.¹¹⁷ A narrower group was also proposed, one that was defined by the fact that the women were set apart from society that was their gender, the suspicion of adultery and their unprotected status in Pakistan.¹¹⁸ The discrimination they faced on ground of their sex made it possible to conclude that women in Pakistan were a particular social group for the purposes of the Convention. One Lord dissented and found that Islam and Shah were not members of a particular social group because those proposed relied on the persecution and the group needed to exist independently from it.¹¹⁹ Cohesiveness of the group was made irrelevant to its identification in this case and that not every member of the group needed to be persecuted to demonstrate persecution on grounds of a specific social group.¹²⁰

There is inconsistency within the U.S. courts on the interpretation of a “social group”. The *Acosta standard* was set by the Board of Immigration Appeals in 1985, stating that a “particular social group” refers to a group of persons who all share a common, immutable characteristic and that this can include sex as well, applying the doctrine of *ejusdem generis* meaning “of the same kind”.¹²¹ This definition affected the *Ward* judgement in Canada, as can be read from the categories outlined above, but does not include the voluntary association. The Ninth Circuit Court of Appeals has on the other hand required “the existence of a voluntary association of the group members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.”¹²² But, this court of Appeal has not upheld this standard very firmly.¹²³ By applying the *Acosta standard* a social group based on gender has been recognized in the U.S.¹²⁴ For example, the social group in *Kasinga* was identified as “young women of the

¹¹⁶ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629.

¹¹⁷ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at pp. 643-644 per Lord Steyn; pp. 652-654 per Lord Hoffmann; p. 658 per Lord Hope of Craighead.

¹¹⁸ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at 658-659 per Lord Hutton.

¹¹⁹ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at 664-665, per Lord Millet.

¹²⁰ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at pp. 643-645, per Lord Steyn; pp. 651-652, per Lord Hoffmann; at pp. 657-658, per Lord Hope of Craighead

¹²¹ *Matter of Acosta*, 19 I. & N. Dec. 211, at 233-234.

¹²² *Sanchez-Trujillo v INS* (1986) 801 F 2d 1571 (9th Cir.), at 1576.

¹²³ *Hernandez-Montiel v INS* (2000) 225 F 3d 1084 (9th Cir.).

¹²⁴ *Fatin v INS* (1993) 12 F 3d 1233 (3rd Cir.).

Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”. The characteristics of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” were ones that Kasinga could not change, and the characteristic of having intact genitalia was thought to be so fundamental to her identity as a young woman that she should not be required to change it.¹²⁵

5. Persecution and Gender

5.1 *What is Persecution?*

Even though the refugee definition has its limits it does provide for international protection for certain types of claimants. One of the requirements that a refugee needs to meet is to show that she bears a well-founded fear of being persecuted. The dominant view as explained by Hathaway is that “refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard.”¹²⁶ The Convention does not provide protection against all kinds of serious harm, so a contracting state is not obliged to provide refugee protection unless the type of harm is of a specific kind that falls within the duty of protection by a contracting state.

Which nature of harm qualifies an individual for refugee protection under international and domestic standards? Harm can be physical, as in beating and torture. Harm can also be a discrimination resulting in the limitation of political and civil rights and opportunities, economic deprivations, or prosecution and punishment inflicted by the state of origin. International law can assist in determining the persecutory nature of an act according to the UNHCR¹²⁷ and the UDHR, ICCPR and CEDAW have for example been used for this purpose, defining rape and other gender-related violence such as female genital mutilation, domestic violence and trafficking as persecution.¹²⁸

There is no universally accepted definition of the concept of persecution in the Convention or in any other international law instruments. Actions that deny human dignity in any key way and the sustained or systematic denial of core human rights is a

¹²⁵ *Fauziya Kasinga, In re v INS* (1996) 21 I. & N. Dec. 357 (BIA), at 365-366.

¹²⁶ Karen Musalo, Jennifer Moore and Richard A. Boswell, 2007: 231. This is from a New Zealand case law, and the judges cite Hathaway, *The Law of Refugee Status* (1991): 104-108.

¹²⁷ UNHCR, 2002: § 9.

¹²⁸ UNHCR, 2002: § 9 and 18. See also UNHCR, 1992: § 51.

widely accepted standard that has been applied to identify persecution. Usually it is the international bill of rights that gives meaning to “human dignity” and “human rights” in this context.¹²⁹ One example of a formed definition of persecution is “the sustained or systematic failure of State protection in relation to one of the core entitlements recognized by the international community.”¹³⁰ The *Ward* case as interpreted by James Hathaway states that persecution may be defined as “the sustained or systemic denial of basic human rights demonstrative of a failure of state protection.”¹³¹ This approach can be described as the “human rights based approach” on persecution that incorporated into the concept what states can be expected to protect, that is what might be considered as the due diligence of states in human rights matters of their citizens.

The relative indeterminacy of the concept of persecution is not necessarily a disadvantage. A distilled meaning of persecution in line with a dictionary definition of the concept could lead to a sterile and mistaken interpretation of persecution that disregards the purpose and object of the Convention.¹³² Example of a dictionary definition is “to pursue with malignity or injurious action especially to oppress for holding a heretical belief”¹³³ or “[t]he action of persecuting or pursuing with enmity and malignity; especially the infliction of death, torture or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it”¹³⁴. This interpretation approach to the Convention’s text is thought to carry with it at least two disadvantages. The definition can focus too much on the persecutor’s intents, but not on the effect of the persecution on the victim. Also, to follow a dictionary definition for interpretation “is an approach which lends itself to an unseemly ransacking of dictionaries for the *mot juste* appropriate to the case at hand”.¹³⁵ This can also become a problem when treaties are

¹²⁹ UDHR, ICCPR and the ICESCR (in virtue of almost a universal accession of these). Also, the Convention on the Elimination of All forms of Racial Discrimination, the CEDAW, and the Convention on the Rights of the Child. See Rodger Haines, 2003: 328.

¹³⁰ Rodger Haines, 2003: 327. This has been applied in *Horvath v. Secretary of State for the Home Department*, UK House of Lords (2001) 1 AC 489 at 498, 501, 512 and 517; and by Kirby J in *Minister for Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, (2002) 187 ALR 574, and (2002) HCA 14; 210 CLR at § 111; and in the New Zealand case Refugee Appeal No. 71427/99 (2000), N.Z.A.R. 545.

¹³¹ James C. Hathaway: 1991: 104-105 and 112. See also *Canada (Attorney General) v Ward* (1993) 2 SCR 689, at 733; and this definition was approved in *Horvath v Secretary of State for the Home Department*, (2001) AC 489 at 495, 501, 512 and 517 and by Kirby J in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) HCA 14; 210 CLR 1, at § 111.

¹³² Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 231. See the discussion in the New Zealand case, Refugee Appeal No. 71427/99 (2000), N.Z.A.R. 545

¹³³ *R v Immigration Appeal Tribunal*, ex parte Jonah (1985) Imm AR 7, at 13.

¹³⁴ *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 284 per Gummow J.

¹³⁵ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 231. See the discussion in the New Zealand case, *Refugee Appeal No. 71427/99* (2000) N.Z.A.R. 545.

authenticated in two or more languages, where the text is equally authoritative in each language.¹³⁶

5.1.1 Defining Persecution by Art. 33 of the Refugee Convention

A human rights based definition of persecution was given earlier but what has also been used to define persecution is each refugee case by the UNHCR is Art. 33(1) in the Convention. The article is on prohibition of expulsion or return (“refoulement”) and states that:

1. No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹³⁷

From this article on non-refoulement it has been inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.¹³⁸

The scope of persecution is further widened by the UNHCR by the inclusion of serious violations of human rights other than a threat to life or freedom for the same reasons included in Art. 33 would also constitute as persecution. There is no clear margin set by the UNHCR on what exactly amounts to persecution or what serious violations of human rights include. The interpretation of the concept is though to be subject to unavoidable variations considering the differences of “psychological make-up” of each applicant and circumstances of each case, including particular geographical, historical and ethnological context. UNHCR even states that it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status.¹³⁹ This seems to give decision makers a wide margin of appreciation and a considerable freedom in policy making in refugee matters.

¹³⁶ Vienna Convention, Art. 33(1).

¹³⁷ 1951 Convention, Art. 33.

¹³⁸ UNHCR, 1992: § 51

¹³⁹ UNHCR, 1992: § 52-53.

5.2 Gender-Related Persecution

Women often experience persecution differently from men.¹⁴⁰ Harmful practices that rest on historic, tradition, religious or cultural grounds that breach international human rights and freedoms were for long unnoticed. With the development in international human rights law and more awareness¹⁴¹ the norm is that neither tradition nor cultural reasoning can justify breaches of fundamental freedoms and human rights.¹⁴² Suffering and abuse would not constitute culturally authentic values and cultural relativism cannot justify such treatment, not in any context be it culture, tradition or religion.¹⁴³ As the UN Declaration of Elimination of Discrimination Against Women states in Art. 1: “Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity”.¹⁴⁴

The Declaration on the Elimination of Violence Against Women obliges states not to invoke any custom, tradition or religious consideration to avoid their obligation to eradicate violence against women.¹⁴⁵ Practices such as female genital mutilation, bride burnings, forced marriages, rape and domestic violence are a violation of liberty and the security of the person, degrading to women and reflect the inherent subordinate standing of women in many societies. As international human rights treaties address, the right of women to safety, dignity of life, and freedom from cruel, inhuman or degrading treatment or punishment should be secured as for every human being.¹⁴⁶

5.2.1 Definition of Gender

When analyzing the nature of gender-related persecution it is important to understand what gender refers to. Gender is defined in the guidelines of UNHCR as “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.”¹⁴⁷ The biological determination of the sex of a person does therefore not stand for the same as the term gender, but forms a part of it. The meaning of gender is

¹⁴⁰ Executive Committee, Conclusion, 1993, No. 73 (XLIV), Refugee Protection and Sexual Violence, § d and e. See also Executive Committee, 1995 Conclusion No. 77; 1996, Conclusion No. 79; 1997, Conclusion No. 81; 1999, Conclusion No. 87.

¹⁴¹ For example by international tribunals such as the ones for the former Yugoslavia and Rwanda.

¹⁴² UNHCR, 2002: § II A (5).

¹⁴³ Rodger Haines, 2003: 333.

¹⁴⁴ UN Declaration of Elimination of Discrimination Against Women, Art. 1. See also Art. 1 of CEDAW.

¹⁴⁵ UNGA, 1993, “Declaration on the Elimination of Violence Against Women”, Art. 4.

¹⁴⁶ CEDAW, Art. 5(a), UDHR, Art. 5 and ICCPR, Art 7 .

¹⁴⁷ UNHCR, 2002, § I (3).

interrelated with the society and the culture that women and men live in. Culture and societies are not static and thus the meaning of gender also evolves and changes over time.

Gender is determined as not only defining the socially or culturally constructed roles women have in a society, but the relationship between both men and women. Gender-related persecution can therefore be claimed equally by men and women, even though women more often do so. Examples that the UNHCR gives of gender-related claims are acts of sexual violence, family or domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.¹⁴⁸

In the words of Heaven Crawley “[g]ender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and culturally specific, so that what it is to be a ‘woman’ or a ‘man’ varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences.”¹⁴⁹ Here Crawley focuses on where the power lies and this is relevant to refugee claims, since being persecuted involves the lack of power over one’s life and to be subordinated to those who hold the power. ‘

It is important to look at the relations of power between the sexes to understand and evaluate women’s claims, considering that the disproportionate allocation of power between the sexes might be a part of the persecution. The drafters of the Convention were concerned with those who were powerless against the mistreatment of their governments and therefore had the right to seek refuge in another state, but as Kälin has demonstrated there is no evidence that the Convention’s drafters meant especially to protect victims of persecution by non-state actors, nor to exclude them from the scope of the refugee definition.¹⁵⁰

¹⁴⁸ UNHCR, 2002: § I (3).

¹⁴⁹ Rodger Haines, 2003: 325. He is quoting: H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001), pp. 6-7.

¹⁵⁰ Walter Kälin, 2001: 418-421.

The power imbalance can indicate the political nature of a woman's claim and her legal status as well. Women's claims seem more often to be considered in social and cultural terms because of the narrow construction of the political opinion ground in the Convention and that women are largely represented as a part of a family unit, as mothers, wives and sisters in need of male protection instead of as individuals.¹⁵¹ But, as the Convention definition of a refugee demands, the discrimination needs to rise to the level of persecution if one is to be considered a refugee.

5.2.2 Difference between Gender-Discrimination and Gender-Related Persecution

Legally speaking, the term "gender-related persecution" has no definite legal meaning to it. When gender is a relevant consideration in the determination of refugee status, the feared persecution can be referred to as a gender-related persecution.¹⁵² When women are persecuted because of their identity and status as women, it would constitute gender-related persecution.¹⁵³ Gender-related persecution is persecution relating to gender-discrimination. Different treatment of various groups does not always amount to discrimination and discrimination does not always constitute persecution, but it would if discrimination leads to a threat to life or freedom. The measure of discrimination needs to lead to severe consequences of a substantially prejudicial nature for the person concerned if it is to amount to persecution, as the UNHCR defines it.¹⁵⁴

Violence that amounts to gender-related persecution should be interpreted widely, including violence that can result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, according to Haines. And persecution should not be limited to only violence that occurs in public life, but also in private life, which is more often the case for women and jurisprudences that follow the protection view¹⁵⁵ on the refugee protection have supported this.¹⁵⁶ When a woman claims refugee status in a given jurisprudence because

¹⁵¹ Susan Kneebone, 2005: 8-10, 29-32; 37-41.

¹⁵² UNHCR, 2002: § I (1).

¹⁵³ Rodger Haines, 2003: 326.

¹⁵⁴ UNHCR, 2002: § 14.

¹⁵⁵ An account on the difference between the protection view and the accountability view is made in chapter 6.1 below.

¹⁵⁶ Rodger Haines, 2003: 330. Haines quotes here the UN General Assembly, "Declaration on the Elimination of Violence Against Women", 20 Dec. 1993, UN doc. A/RES/48/104, 23 Feb. 1994, Art. 1. This is supported in case law: *R. v. Secretary of State for the Home Department, ex parte Sasitharan*, English High Court (Queen's Bench Division) (1998) Imm AR 487 at 489-90 per Sedley J; *Abdulaziz Faraj v. Secretary of State for the Home Department*, English Court of Appeal (1999) INLR 451 at 456; *Khawar v. Minister for*

of fear of persecution that relates to her gender at the hands of a non-state actor, how persecution is defined with relation internal protection in the state of origin and if the motive of the perpetrator needs to relate to the Convention reasons matter a great deal in order to gain refugee status. These two objects will be examined in the following chapter, by comparing case law from Australia, Canada, the U.K. and the U.S.

6. International Refugee Protection and Gender-Related Persecution

6.1 Recognition of Gender-Related Persecution

Women often have less direct relationship with the State and access to protection can be gendered. There is evidence that women are more likely than their male counterparts to experience or fear persecution by individuals who are not directly connected to the State, and furthermore they may be less able to obtain the protection of the State against such harm.¹⁵⁷ “Much of the violence committed against women is committed by non-state agents. It is perpetrated by husbands, fathers, boyfriends, in-laws, and, in the case of female genital mutilation, women in the local community”.¹⁵⁸ The UNHCR Gender Guidelines emphasize that State protection cannot be assumed on the basis that a certain act is illegal, in practice the protection has to be effective. Legislation alone does not guarantee protection.¹⁵⁹

The fact that persecution by non-state agents is recognized is supported by the logic that international protection is supposed to serve as compensation for the lack of effective national protection, also where the State is willing but unable to provide the protection. This view has been described as “the protection view”. On the other hand there is the “accountability view” on refugee protection that claims that persecution by non-State agents does not meet the criteria to permit refugee status, because persecution only exists when the state can be held accountable for human rights violations.¹⁶⁰ Strictly speaking a non-state actors cannot infringe human rights since only the state has the duty to respect human rights, and can therefore be the sole persecutor under international refugee law.

Immigration and Multicultural Affairs, Federal Court of Australia (1999) 168 ALR 190, § 37, upheld on appeal in *Khawar case*.

¹⁵⁷ Heaven Crawley and Trine Lester, 2004: 55.

¹⁵⁸ Heaven Crawley and Trine Lester, 2004: 57.

¹⁵⁹ UNHCR, 2002: § 11.

¹⁶⁰ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 287; and Walter Kälin, 2001: 417.

In the case of harm inflicted by non-state actors it is persecuting by failing to protect the victim, according to the protection view.¹⁶¹

The majority of states follow the protection approach of the interpretation of the Refugee Convention.¹⁶² Now a comparison will be made on the definition of persecution and the requirement of a motive of perpetrators in Australia, Canada, the U.K. and the U.S. The definition of a refugee from the Convention as amended by the 1967 Protocol is applied in Australia¹⁶³, Canada¹⁶⁴ and the U.K.¹⁶⁵ However the definition is not worded the same in U.S. law¹⁶⁶, a refugee is not a person who has a well-founded fear of persecution *for reasons of* the five ground, but *on account of* one of the five grounds. This is further discussed below.

6.1.1. Is the lack of internal state protection relevant to the definition of persecution?

There seems to be no coherent or consistent jurisprudence on the persecution definition.¹⁶⁷ As the UNHCR acknowledges prior attempts to form a universal definition of persecution have not been successful.¹⁶⁸ There is no reference to the agent of persecution in Art 1A(2) of the Convention and the development of the concept has been in the hands of the individual jurisprudences. Kälin finds that it is not an interpretation in accordance with the Vienna Convention Art. 31(1), in good faith in accordance with the ordinary meaning of the term in its context and in the light of its objects and purpose, when the word “persecution” is defined by referring to the source of persecution. Any direct responsibility of the state cannot be read from the Convention text, according to him, and it would be adding an additional requirement to the refugee definition that cannot be justified either with the wording of the refugee definition or the original intention of the drafters.¹⁶⁹

¹⁶¹ Daniel Wilsher, 2003: 72.

¹⁶² Heaven Crawley and Trine Lester, 2004: 57.

¹⁶³ 1958 The Migration Act, § 36(3)-(5) refers to the protection obligations of Australia in the Convention and 1967 Protocol to refugees.

¹⁶⁴ 2001 Immigration and Refugee Protection Act, § 2(1)(96).

¹⁶⁵ The Convention definition as amended by 1967 Protocol of a refugee is not included in the U.K. legislation, but explicit reference is made to it in 2002 Nationality, Immigration and Asylum Act, § 18(3), 1993 Asylum and Immigration Appeals Act, § 8(2) and 2006 Immigration, Asylum and Nationality Act, § 12(2)(a).

¹⁶⁶ Immigration & Nationality Act of 1952 8 U.S.C. (2000), § 101.

¹⁶⁷ Guy Goodwin-Gill, *The Refugee in International Law*, 1983: 38 (1st ed.) reprinted in Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 230.

¹⁶⁸ UNHCR, 1992: § 51.

¹⁶⁹ Walter Kälin, 2001: 418, 425-427.

In the case of *Khawar*¹⁷⁰ the Australian judges did not agree on whether the definition of persecution should relate to ineffective state protection in the country of origin. In Judge Gleeson's view, the failure in state protection would amount to persecution if the state had a duty to act. He did not see why persecution could not be identified in combined effects of conduct of two or more agents, non-state agents and the state inaction.¹⁷¹ Judges McHugh and Gummow did not want to include internal state protection in the persecution definition, but preferred looking at whether the claimant is faced with discrimination in the country of origin that amounts to persecution. If state authorities deny fundamental rights that are otherwise enjoyed by other citizens it would constitute a form of selective or discriminatory treatment amounting to persecution by state authorities.¹⁷²

In the same case of *Khawar*, Judge Kirby resorted to a dictionary definition of persecution¹⁷³, but stated he would not support a definition that included the intention of the persecutor since that could not be combined with the purpose and the content of the Convention. He further stated that the Convention was meant to redress violence of basic human rights demonstrative of a failure of state protection. He firmly rejected that persecution required affirmative harassment by state agents and it should be sufficient that there is risk of serious harm to the claimant and a failure of the state to protect.¹⁷⁴

There was one judge dissenting in *Khawar*, Judge Callinan. He defined persecution as involving a deliberate act and a mere inaction of state authorities to protect, as he describes as "a lack of enthusiasm to enforce legislation against the perpetrators of domestic violence, could not be considered persecution."¹⁷⁵ Whether the definition of

¹⁷⁰ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1.

¹⁷¹ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 12-13, per Gleeson J.

¹⁷² *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 27, per McHugh and Gummow JJ.

¹⁷³ The definition defined as: "to pursue with harassing or oppressive treatment; harass persistently" and "to oppress with injury or punishment for adherence to principles". Here Judge Kirby cited *The Macquarie Dictionary*, 3rd ed (1997), p. 1601 and *The Macquarie Dictionary Federal Edition* (2001), vol 2, p. 1423. See: *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 35, per Kirby J.

¹⁷⁴ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 37-39, per Kirby J.

¹⁷⁵ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1, at 46-47. He cites Hill J (dissenting) *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501, at 504.

persecution is defined in terms of discriminatory actions by state authorities or failure of state protection, both give scope to include gender-related violence inflicted by non-state actors as persecution. Though it must be harder to show a selective discrimination by authorities, rather than mere inaction to protect. But, even though the judges did not agree on whether a failure to protect the victim constituted persecution, they all included actions or inactions of state authorities of the victim to identify the persecution. The relevance of who the perpetrator is always comes into the formulation.

The *Zalçali* decision by the Canadian Federal Court of Appeal addressed the definition of a refugee as referring to the fear of persecution, without saying that the persecution must be by the government. In the same decision the words “is unable” were read as being governed by the objective criteria verified “independently of the fear experienced, and so independently of the acts which prompted that fear and their perpetrators. Seeing a connection of any kind between “is unable” and complicity by the government would be to misread the provision.”¹⁷⁶ It can be read from this decision that persecution, the act that prompted the fear, does not have to include the state inaction or the perpetrator.

It was adopted by the Supreme Court of Canada in the *Ward case*¹⁷⁷ that “[p]ersecution” under the Convention includes situation where the state is not in strictness an accomplice to the persecution but simply unable to protect its citizens.”¹⁷⁸ State complicity is not necessary and a state’s inability to protect is a sub-set of state complicity.¹⁷⁹ The reasoning in *Ward* indicates that there is more concern for the harm done to the victim of persecution, in defining persecution, than defining the term by including the internal state protection of the state of origin. “The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution.”¹⁸⁰, as for here the term persecution is not used as the internal state protection is inherent to it.

¹⁷⁶ Walter Kälin, 2001: 424, he cites *Zalçali v Canada (Minister of Employment and Immigration)*, (1991) A.C.W.S.J. Lexis 17678, at 23-24.

¹⁷⁷ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689. Ward claimed refugee status in Canada citing a fear of persecution because of his membership in a particular social group in Northern Ireland, a para-military terrorist group (the Irish National Liberation Army) that had sentenced him to death. Ward claimed that Ireland was unable to protect him and on those grounds sought refugee protection in Canada.

¹⁷⁸ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689 at 717.

¹⁷⁹ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689 at 714. Here they cite the case of *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129.

¹⁸⁰ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689 at 716.

The principle of surrogate protection that was established in the *Ward case* has been used to develop the term persecution in the U.K. that bears resemblance to Judge Gleeson's definition in *Khawar*. In the U.K. the definition of persecution has been put forward as "persecution = serious harm + failure of state protection". If the state fails to protect for Convention reasons, then such inaction would constitute persecution.¹⁸¹ As Lord Hoffmann explained in the case of *Shah*¹⁸², the failure of authorities to provide protection is an element in the persecution.¹⁸³ Ill treatment by a non-state actor can be considered persecution as long as the state is unwilling to provide protection was also confirmed in the case of *Adan*¹⁸⁴. This was later described as the "protection theory", recognising persecution by non-state agents for the purposes of the Convention in any case where the state is unwilling or unable to provide protection.¹⁸⁵

Lord Hope of Craighead supported the *Shah* definition of persecution in the case of *Horvath*¹⁸⁶ and further developed it by stating that "in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. [...] [I]n the case of allegations of persecution by non-state agents the failure of state to provide protection is nevertheless an essential element."¹⁸⁷

¹⁸¹ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at 653. The case concerned two Pakistani women who claimed to have been forced to leave their homes by their husbands and be at risk of being falsely accused of adultery in Pakistan, where they would be unprotected by the state and would face the risk of criminal proceedings for sexual immorality if they were returned. They claimed refugee status because of a well-founded fear of being persecuted for reasons of their membership in a particular social group.

¹⁸² *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629.

¹⁸³ *R v Immigration Appeal Tribunal, Ex parte Shah and Islam* (1999) 2 AC 629, at 653-654, per Lord Hoffmann.

¹⁸⁴ *Adan v Secretary of State for the Home Department*, (1999) 1 A.C. 293. This case concerned a Somali asylum seeker who feared attack by warring clans who targeted their rivals and there was no government in place to protect him. Here Lord Lloyd described the two tests that a refugee needs to meet, the fear test and the protection test. The fear test examines if a person is outside her country of origin owing to a well-founded fear of persecution for a Convention reason. The protection test examines if the person is unable or unwilling because of his fear to avail herself of protection of her country. See: *Adan v Secretary of State for the Home Department*, (1999) 1 A.C. 293 at 304.

¹⁸⁵ *R v Secretary of State for the Home Department, Ex parte Adan* (2001) 2 A.C. 477, at 491-492. This has also been confirmed later in *HC v Secretary for the Home Department* (2005) 149 S.J.L.B. 92 (Court of Appeal, Civil Division).

¹⁸⁶ *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489. This case concerned a Slovak Roma who feared serious harm to him and his family by skin-heads that the State (the Slovakian police) could not protect them against.

¹⁸⁷ *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489, at 497, per Lord Hope of Craighead and at 515-516, per Lord Clyde.

Non-state agents cannot persecute *per se* by this definition, since state involvement is always required. By including state's failure to act in the term persecution the protection to victims of non-state perpetrator is more than in jurisdictions that only provide refugee protection where the state of origin needs to be held accountable for inflicting the serious harm. However this reasoning from the surrogate protection principle established in *Ward* does not seem to be a necessary in defining persecution as including the failure of state protection as an essential element to it. The principle was said to be one on protection, but not on persecution.¹⁸⁸

In the U.S. it was first articulated in 1981 that persecution could be perpetrated by non-state actors, *if* state authorities could not or would not control it.¹⁸⁹ In *Acosta* the two significant aspects were noted to the construction of the term "persecution". "First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome.^[190] [...] Thus physical injury arising out of civil strife or anarchy in a country did not constitute persecution. [...] Second, harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control."¹⁹¹ The judges in *Acosta* presumed that the term "persecution" in the definition of a refugee¹⁹² was intended by Congress be used as adopted in the judicial and administrative construction of the term prior to the enactment of the Refugee Act of 1980, when the term was left undefined.¹⁹³ In a more recent case of *Pavlova*¹⁹⁴ before the Second Circuit Court of Appeals state involvement in claiming persecution was also made relevant and that private act may be persecution *if* the government has proved unwilling to control such actions.¹⁹⁵ So the definition of persecution can be said to rest on a failure of internal state protection in the country of origin when non-state actors perpetrate it.

¹⁸⁸ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689 at 716.

¹⁸⁹ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 283. There is reference made to the case of *McMullen v INS* (1981) 658 F.2d 1312 (9th Cir.).

¹⁹⁰ *Matter of Acosta*, 19 I. & N. Dec. 211, at 222. Citing the case of *Matter of Diaz*, 10 I&N Dec. 199 (BIA), at 204.

¹⁹¹ *Matter of Acosta*, 19 I. & N. Dec. 211, at 222. Citing *e.g. McMullen v INS*, 17 I&N Dec. 542, at 544-545

¹⁹² Refugee Act of 1980, § 101(a)(42)(A).

¹⁹³ *Matter of Acosta*, 19 I. & N. Dec. 211, at 223.

¹⁹⁴ *Pavlova v. INS* (2006) 441, F3d 82 (2nd Cir.). The case concerned a Russian woman who sought asylum because of a fear of persecution because of membership in the Baptist faith by the Russian National Unity (a non-state agent), which the Russian government was unwilling to control.

¹⁹⁵ In *Pavlova v INS* (2006) 441, F3d 82 (2nd Cir.), at 91. There is a citation to *Ivanishvili v U.S. Dept of Justice*, (2006) 433 F3d 332, at 342 (2nd Cir.).

The aim of refugee law is not to hold states responsible for human rights violations, but to function as a remedy for refugees.¹⁹⁶ It has been argued by Wilsher that the *Horvath* definition of persecution renders the application of Art. 1A(2) less coherent and the Convention less effective as a humanitarian instrument. By making internal state protection relevant to the identification of persecution adds an additional burden on refugee claimants, when it should be enough to relate it to the question on the well-founded fear for Convention reasons and define persecution simply by the serious harm suffered regardless of who the perpetrator is.¹⁹⁷

The protection by Wilsher's approach to persecution would not be less to women fearing gender-related persecution, if the failure of state protection would be considered on the well-foundedness of the claim and would be connected to the Convention reasons by that. Then the fear of persecution would be said to be well-founded for Convention reasons irrespective of who inflicts the harm. The need to include internal state protection in the definition of persecution in Australia, the U.K. and the U.S. does not seem to be justified by the surrogate principle, or the refugee definition in Art. 1A(2). By doing so there is an unnecessary emphasis on who is behind the persecution, whether it is a non-state actor or a discriminatory or ineffective state authority.

6.1.2. Does the motive of the perpetrator have to relate to Convention reasons to constitute persecution? Considering that "the motive or intent of the persecutor was never meant to be a *controlling* factor in either the definition or the determination of refugee status"¹⁹⁸, as Goodwin-Gill and McAdams have addressed, makes it even more frustrating that this factor has been an obstacle for women seeking refugee status. They further state that it distorts the natural meaning of the language and adds evidentiary burdens for the claimant if persecution for Convention reasons is read as "the infliction of suffering *because of or on account of* the victim's race, beliefs or nationality, etc".¹⁹⁹ In the four

¹⁹⁶ Deborah E Anker, 2002: 135.

¹⁹⁷ Daniel Wilsher, 2003: 68-70, 82-83.

¹⁹⁸ Guy S. Goodwin-Gill & Jane McAdam, 2007: 100-101.

¹⁹⁹ Guy S. Goodwin-Gill & Jane McAdam, 2007: 101-102. They do not deny that intent is relevant to the existence of a well-founded fear of the claimant. But with regards to persecution what should be examined is if the harm visited or feared would amount to persecution and if it falls within the category of protected interests. The only motive considered should be of fear of the refugee herself.

jurisprudences considered the evidentiary burdens on the claimant are not the same regarding motive of the persecutor.

In Australia there was a legislation amendment in 2001 that clarified that the essential and significant reason for the persecution needed to be a Convention reason and that persecution had to involve systematic and discriminatory conduct.²⁰⁰ The Australian High Court stated in *Khawar* that either the non-state perpetrator's motives or the reason for the state's failure in protection would constitute persecution deserving refugee protection.²⁰¹ Prior to *Khawar* there were cases before the Federal Court of Australia concerning domestic violence that showed the court did not consider it a sufficient basis for a refugee status where the harm or threat of harm resulted in a personal relationship with another person, and the inability of the state to prevent domestic violence was not motivated for a Convention reason.²⁰²

The Canadian courts focus on the effects of the persecution on the claimant, but the intentions of the perpetrators by their acts are not relevant to establish persecution.²⁰³ There persecution should not be viewed as the persecutor's personal motives.²⁰⁴ In *Ward* it was though noted that the perspective of the persecutor is what was determinative in inciting the persecution.²⁰⁵ So the persecutor is not left entirely out of the concept, but the claimant is not requested to prove the motive of the persecutor.

If the motive of the perpetrator is to inflict serious harm on the refugee claimant because of Convention reasons, then that would amount to persecution deserving refugee protection in the U.K. It is however not necessary if the reason for failure of state protection can be shown to be of Convention reasons. It is enough to show connection to Convention reasons either by the state authorities or the non-state actor inflicting the harm.²⁰⁶ The definition of persecution, persecution = serious harm + failure of state protection, brings the motive of the state for failing to protect as the causal link between

²⁰⁰ 2001 Migration Legislation Amendment Act (No. 6), §91R.

²⁰¹ *Minister for Immigration and Multicultural Affairs v. Khawar and Others Applicants* (2002) HCA 14; 210 CLR 1.

²⁰² Department of Immigration and Multicultural and Indigenous Affairs, 2001: 95. There is citation to the cases of *Miloserska v MIMA* (1999) FCA 1414 and *MIMA v Ndege* (1999) FCA 783.

²⁰³ Donald, Jeanne and Dirk Vanheule, 1997: 180. Reference made to the case *Cheung v. Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214.

²⁰⁴ *Incirciyan v. Minister of Employment and Immigration* (1987) I.A.B.D. M87-1541X

²⁰⁵ *Canada (Attorney-General) v Ward* (1993) 2 SCR 689, at 693.

²⁰⁶ *R v Immigration Appeal Tribunal, ex parte Shah and Islam* (1999) 2 AC 629, at 646, 648, 653, 654.

persecution and the Convention reasons. In the case of *Horvath*²⁰⁷ it was recognized that reasons for the infliction of harm by the perpetrator might well differ from the reasons for the unavailability of state protection.²⁰⁸ The burden to show the motive of the non-state actor for inflicting the harm under U.K. jurisprudence is therefore not necessary.

In U.S. law the definition of a refugee is not worded in the same way as in the Convention: instead of defining a refugee as a person with well-founded fear of persecution *for reasons of* race, religion, nationality, political opinion, or membership in a particular social group, she is defined as a person with well-founded fear *on account of* the same grounds.²⁰⁹ The need to show that the persecutor has the inclination to punish the claimant to overcome a belief or characteristic of the victim was made relevant for gaining refugee status in *Acosta*.²¹⁰ And later in the case of *Elias-Zacarias*²¹¹ the Supreme Court confirmed the requirement of proving evidence of the intent of the perpetrator to refugees under U.S. jurisprudence. It was a measure taken because of a fear that a floodgate of refugees would open if the requirement would not be high enough.²¹² The motivation for the persecution must be to overcome or punish a protected characteristic of the victim.²¹³ What needs to be established is that the persecution is inflicted on a refugee claimant on account of a characteristic or perceived characteristic of the claimant. It is the characteristic of the claimant, not of the persecutor that is relevant.²¹⁴

Currently it is though recognized that a perpetrator can have more than one motive but at least one has to be related to the five grounds.²¹⁵ In the decision in *Pitcherskaia*²¹⁶ the 9th Circuit Court of Appeal rejected that persecution rested on a subjective, malignant or

²⁰⁷ *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489.

²⁰⁸ *Horvath v Secretary of State for the Home Department* (2001) 1 AC 489, at 515-516.

²⁰⁹ Immigration & Nationality Act of 1952 8 U.S.C. (2000), §101(a)(42): “[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”.

²¹⁰ *Acosta*, In re (1985) 19 I & N 211. See discussion of Guy S. Goodwin-Gill & Jane McAdam, 2007: 101.

²¹¹ *INS v Elias-Zacarias*, (1992) 502 US 478.

²¹² *INS v Elias-Zacarias*, (1992) 502 US 478, at 478. This fear is though to be unreasonable, for example in women's claims arising from domestic violence, because there are enough the safeguards built into the definition of refugee already as covered in Helen P. Grant's article “The floodgates are not going to open, but will the U.S. border?”, See Helen P. Grant, 2007.

²¹³ *INS v Elias-Zacarias*, (1992) 502 US 478, at 482.

²¹⁴ Case of *INS v Elias-Zacarias*, (1992) 502 U.S. 478, at 481-483.

²¹⁵ Karen Musalo, Jennifer Moore & Richard A. Boswell, 2007: 292. With reference to the Real ID Act of 2005 (Pub. L. No. 109-13, 119 Stat. 231).

²¹⁶ *Pitcherskaia v. INS* 1997 118 F.3d 641 (9th Cir.).

punitive intent, as was noted in *Acosta*²¹⁷ and *Mogharrabi*²¹⁸. It favoured rather the ruling in *Kasinga*²¹⁹ and stated that “[t]he fact that a persecutor believes the harm he is inflicting is “good for” his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. [...] Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as “curing” or “treating” the victims.”²²⁰

When it comes to establishing a nexus the U.S. sets an evidentiary burden on the claimant to establish that the motive of the perpetrator for the persecution is on account of the Convention reasons. Fortunately Canada, the U.K. and Australia are not as strict on this requirement, though the legislation in Australia seems to indicate a more restrictiveness than shown in *Khamar*. The U.S. Supreme Court has set a standard that can be very hard to reach by women who for example fear domestic violence at the hands of their husbands and need to show that their motive was on account of *e.g.* their membership in a particular social group.²²¹

7. Conclusion

The refugee definition is limited and contains undefined concepts that are crucial to apply in rewarding refugee protection. By interpretation it is possible to move the definition close to the object and purpose of the Convention to maximize its effects and respond to the marginalization of women refugee claimants. Still there is nothing that binds states to interpret the Convention in a gender-sensitive way and include gender-related persecution. This would not be possible if gender-related persecution would have been included by the drafters in the Convention as one of the grounds for a well-founded fear. Then again if such an amendment to the Convention would be made now the political aspect of gender-related persecution is somewhat disregarded. The signatory states would also not have to approve of such an amendment and by doing so they could

²¹⁷ *Acosta*, In re (1985) 19 I & N 211 (BIA), at 226.

²¹⁸ *Mogharrabi*, In re (1987) 19 I & N 439 (BIA), at 466.

²¹⁹ *Kasinga*, In re (1996) Int. Dec. BIA 3278, at 12.

²²⁰ *Pitcherskaia v. INS* 1997 118 F.3d 641 (9th Cir.), at 648.

²²¹ One example is the case of *R-A-*, (1999) 22 I. & N. Dec. 906 (BIA), where Rodi Alvarado a woman from Guatemala fleeing from domestic violence at the hands of her husband, was not thought to have established a nexus by establishing a lack of state protection. She also needed to establish a nexus to the Convention grounds by the motivation of the persecutor, her husband. See *R-A-*, (1999) 22 I. & N. Dec. 906 (BIA), at 922.

view it as rejecting all together refugee protection to those fearing gender-related persecution.

To gain refugee status is thought primarily to require an evaluation of the applicant's statements involving the subjective element of fear in the person, rather than a judgment on the situation prevailing in the country of origin. There is no reference made to the persecutor in the Convention. All four jurisprudences considered here do acknowledge that non-state actors can be those inflicting the harm, but the internal protection of the state of origin is in one way or another related to the definition of persecution in all states except Canada. Partly this is because of the human rights based approach to persecution. By such a definition the state is necessarily connected to the term, since strictly speaking the state is the only actor who is accountable to human rights violations. Inevitably this creates a barrier for women who face serious and persistent harm from private citizens when considering that the human rights regime rests on a gender-biased ground rooted in the public/private division and they need to show that the state is failing to protect their core human rights. An even greater emphasis is put on the persecutor in the U.S. where evidence of the motive of the persecutor is required to determine persecution in refugee law.

If persecution would not be defined as the sustained and systemic denial of core human rights, but rather as serious and sustained harm that the victim faces upon return to her home country that violates basic aspects of human dignity, then the perpetrator can equally be the state or a non-state actor. Of course the human rights could be considered for this purpose as the preamble to the Convention states. The focus would simply be on the gravity of the situation faced by the claimant upon return irrespective of state involvement in the persecution. By this at least one of the barriers faced by refugee women would be lowered making the Convention more effective for those in need of protection against gender-related persecution. This can be done through interpretation of the Convention definition of a refugee, however that is not a guarantee of effective protection since states are not obliged to follow it as they would if the term "persecution" would have been defined in such a way in the Convention.

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