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**Gender-based Persecution
and the 'particular social group' Category -
an Analysis**

by

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**A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfilment of the requirements of the degree Master of Laws (LL.M.).**

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ABSTRACT

This thesis addresses the problems related to the assessment of gender-based claims of persecution under the international definition of 'refugee'. The 1951 *United Nations Convention Relating to the Status of Refugees* does not list 'gender' as one of the persecution grounds that entitle a person to seek refuge. In attempting to solve this apparent dilemma, the 'membership of a particular social group' category was long considered to be the appropriate assessment framework.

While nowadays the other four enumerated Convention grounds - race, religion, nationality, and political opinion - have increasingly received regard, the approach to gender-based persecution has so far been neither systematic, nor consistent. Moreover, the most critical interpretative hurdles continue to arise in the context of the 'membership of a particular social group' category.

This study therefore examines the link between the two concepts of gender-based persecution and the 'membership in a particular social group' category. For this purpose, both concepts are first considered independently (Parts II and III). Following this, the larger part of the analysis is assigned to the examination of the international case law concerning gender-based claims (Part IV) which shall determine if and how gender-based persecution can appropriately be accommodated under the 'membership of a particular social group' category.

RÉSUMÉ

Ce mémoire aborde les problèmes reliés à l'évaluation des demandes de refuge basées sur la persécution en raison du sexe selon la définition internationale de « réfugié ». La *Convention relative au Statut des réfugiés* de 1951 ne catalogue pas le sexe comme un critère de persécution permettant à une personne de demander refuge. Afin de résoudre ce dilemme, la catégorie que l'on qualifie « d'appartenance à un groupe social » fut longtemps considérée comme étant le cadre approprié afin d'évaluer les demandes.

De nos jours, les quatre autres critères énumérés dans la Convention - la race, la religion, la nationalité et les opinions politiques - sont de plus en plus utilisés alors que l'approche concernant la persécution basée sur le sexe n'est pas systématique ou consistante. En outre, des problèmes importants surgissent constamment dans le contexte de l'interprétation de la catégorie « d'appartenance à un groupe social ».

Cette étude examine le lien entre les deux concepts de la persécution basée sur le sexe et la catégorie « d'appartenance à un groupe social ». En conséquence, les deux concepts sont abordés indépendamment (Parties II et III). Puis, une majeure partie de l'analyse portera sur la jurisprudence internationale concernant les demandes de refuge basées sur le sexe (Partie IV), ce qui déterminera comment ce type de persécution peut s'accommoder sous la catégorie « d'appartenance à un groupe social ».

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I. Introduction

A substantial proportion of the currently estimated 22.3 million refugees in the world are women¹. While some of these women flee persecution which is not gender-specific, others flee a particular form of persecution which targets them as a female. Examples of such persecution may include domestic violence, female genital mutilation, severe discrimination, forced abortion or forced sterilisation. Albeit the fact that these forms of persecution have not just recently occurred but have, for the most part, existed for centuries, they were not considered when the international definition of 'refugee' was formulated. According to Article 1 A.2. of the 1951 *United Nations Convention Relating to the Status of Refugees*², the term 'refugee' applies to any person who:

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

Persecution or well-founded fear of persecution on the basis of gender is thus not expressly taken into consideration. Neither does the definition of 'non-discrimination' in Article 3 of the *Refugee Convention* include the category of sex³.

When international awareness of women refugees, their situations and needs began to rise in the 1990's, it seemed like the international law of refugees was not prepared - and did

¹United Nations High Commissioner for Refugees, *UNHCR 1999 global report - Achievements and Impacts*, online: UNHCR Homepage <<http://www.unhcr.ch/fdrs/gr99/toc.htm>>.

² *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 and 1967 *Protocol relating to the Status of Refugees*, 4 October 1967, 606 U.N.T.S. 267. For ease of reference, the term *Refugee Convention* will hereinafter include both the Convention and Protocol unless the Protocol is explicitly mentioned.

³ Article 3 of the *Refugee Convention* reads as follows :
“Non-Discrimination

not have the means - to deal with their claims. Up until this point, the traditional categories of persecution had already become fairly precisely defined by means of scholarly and judicial interpretation, but apart from one exception, the interpretative outcome did not appear to embrace the kinds of persecution that the discussion centred around. The said exception was the 'membership of a particular social group' category. Especially jurisprudence on the interpretation of the term 'social group' was sparse⁴ which seemed to open the way for the inclusion of gender-based persecution into the definition of 'refugee' under the *Refugee Convention*.

As a consequence, a massive body of jurisprudence concerning gender-related persecution emerged and to a large degree, these decisions were preoccupied with the question of how to (re-)interpret the 'social group' category in order to "adjust" it to the challenges brought about by gender-based persecution. Unfortunately, this development was marked by an obvious lack of consistency in the decision-making of different jurisdictions and courts. As a result, the adjudication of gender-based asylum claims remained without any noticeable concept and unpredictable. But moreover, it left women in the uncertainty of not knowing whether their claims for refugee status had the chance to succeed.

More recently, the focus on this one single category for the assessment of gender-based claims of persecution has declined and attention has increasingly been drawn to the other four categories of race, nationality, religion and political opinion. Scholars have argued

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

⁴ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996) [hereinafter: Goodwin-Gill, *The Refugee in Int'l Law*] at 48; David L. Neal, "Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum" (1988) 20 Colum. H.R. L. Rev. 203 at 204.

that 'membership of a particular social group' is not, or not always, the appropriate category in which to classify claims of gender-based persecution⁵. But despite this change of view, it is clear that a more or less large number of claims will continue to be decided on the basis of the ground of 'membership of a particular social group' whereas the problems in the interpretation and application of this category remain the same.

In February 1996, the UNHCR held a *Symposium on Gender-Based Persecution* in Geneva, the purpose of which was to examine comparative practices among countries which have significant experience in assessing gender-related refugee claims in order to improve protection for women who fear persecution on gender-related grounds⁶. Within the framework of this Symposium it was further proposed that a consistent approach is needed as far as gender-based persecution is concerned, followed by the suggestion that a reasoned definition of the 'particular social group' may be drawn from existing jurisprudence⁷.

The goal of this analysis mainly reflects these aspirations expressed by the UNHCR: the work seeks to clarify the connection, and to a certain extent the (inter-)dependence, of gender-based persecution and the 'membership of a particular social group' category. For this purpose, **Part II** and **III** of the analysis will provide independent comprehensive explanations of both the convention ground in question and the incident which, in the legal sense, is commonly identified as 'gender-based persecution'. These clarifications shall then serve to identify the correlation between these concepts which will be accomplished by way of a comparison and analysis of the existing international

⁵ See Parts III.1.b) and IV.4., below.

jurisprudence on gender-based persecution. **Part IV** of this paper will hence analyse decisions from different jurisdictions concerning such issues as domestic violence, female genital mutilation and severe discrimination or subordination of women. Also, it will examine the possibility to universally regard **women** as a social group, as it has been proposed by many authors and discussed in a small number of court decisions. It will be probed whether this approach holds any legitimacy and whether it carries any potential to build a basis for a uniform application of the 'membership of a particular social group' category in cases of gender-based persecution.

⁶ Julie Bissland and Kathleen Lawand, "Report of the UNHCR Symposium on Gender-Based Persecution" (1997) *Int'l J. Ref. L. Special Issue 1997: UNHCR Symposium on Gender-Based Persecution*, 11.

⁷ *Ibid.* at 20.

II. The interpretation of 'membership of a particular social group'

1. The scope of the international definition of 'refugee'

The refugee definition contained in the *Refugee Convention* is of singular importance because it is the only refugee accord of global scope and at the same time the primary standard of refugee status⁸. To date, 132 states have become parties to both the 1951 *Refugee Convention* and its 1967 *Protocol*⁹.

Of the eight countries, whose jurisprudence will be considered in the course of this analysis, four countries have ratified the 1951 *Refugee Convention* (France, Germany, the Netherlands and the United Kingdom), three states have acceded to it (Australia, Canada and New Zealand) and one state is a State Party to the 1967 *Protocol* only, namely the United States¹⁰. This means that all of them, either directly or by means of implementation into their domestic law, have declared applicable the refugee definition as contained in the 1951 *Refugee Convention* and the 1967 *Protocol* which does not only enable the author to directly compare decisions from different countries, but which has also in the past lead courts to find inspiration and interpretative guidance from the UNHCR and in the case law of other jurisdictions.

⁸ James C. Hathaway, *The Law of Refugee Status* (Toronto, Vancouver: Butterworths, 1991) [hereinafter Hathaway, *The Law of Refugee Status*] at 6.

⁹ According to UNHCR information available online: UNHCR Homepage, Refworld, at <<http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/51engsp.htm>>. For a complete list of the States Parties to the Convention and the Protocol, see the annex at the end of this paper.

2. The *travaux préparatoires* to the *Refugee Convention* and the drafting process

The *Refugee Convention* originated from an initiative of the Commission on Human Rights, who, in 1947, adopted a Resolution by which it expressed the wish that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality as regards their legal and social protection and their documentation'¹¹. In 1951, a conference of plenipotentiaries was convened to consider an international agreement to provide legal protection to refugees and eventually the *Refugee Convention* became the first and most important international compact to adopt a universal refugee definition¹². While the first four grounds of the definition - race, religion, nationality and political opinion - were present in the draft convention considered by the conference of plenipotentiaries, the fifth enumerated ground for persecution, membership of a particular social group, was introduced by the Swedish delegate as a last minute amendment to the Convention¹³. In support of his amendment, the Swedish representative stated that

"[...] experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention makes no provision for such cases, and one designed to cover them should be accordingly included"¹⁴.

¹⁰ *Ibid.*; for more information about the domestic law of each of the states, see Goodwin-Gill, *supra* note 4 at 21ff.

¹¹ HRC Res., UN Doc. E/600. Referred to in Paul Weis, ed., *The Refugee Convention, 1951* (Cambridge: University Press, 1995) at 1.

¹² Paul Weis, "The Development of Refugee Law" (1982) Michigan YB of Int'l Leg. St. 27 at 29; Maryellen Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" (1993) 26 Cornell Int'l L.J. 505 at 508;

¹³ Hathaway, *supra* note 8 at 157.

¹⁴ *Travaux Préparatoires to the Refugee Convention* (Article 1), U.N. Doc. A/CONF.2/SR.3 at 14, 19 November 1951 and U.N. Doc. A/CONF.2/SR.19 at 14, 26 November 1951.

The amendment was adopted without further discussion¹⁵ and without any dissenting vote¹⁶. Since no record explaining the purpose or meaning of the term “particular social group” exists, scholars have come up with different interpretations of the drafters’ decision to accept the amendment.

According to an earlier interpretation, the social group category was to be seen as a clarification of the other four, more traditional, grounds¹⁷. But since this approach renders the category ‘membership of a particular social group’ largely superfluous, most scholars have adopted a different interpretation, claiming that the social group category was added in order to provide a “safety net” for asylum-seekers who, fleeing persecution, should qualify for refugee status but fail to fall neatly into one of the enumerated categories¹⁸. According to this second approach, the drafters intentionally created a residual category because they allegedly apprehended that persons or groups worthy of refugee status may appear whose persecution they could not foresee and therefore left the meaning of the social group category to be determined by future developments¹⁹. Finally, a third interpretation rejects the idea of the creation of a regime to address new, future injustices and instead relies on the fact that the Convention was initially designed to identify and protect refugees from known forms of harm²⁰.

¹⁵ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 157, n. 153.

¹⁶ However, eight abstentions were cast, see Fullerton, *supra* note 12 at 510; Article 1 of the draft convention then passed by a vote of twenty-two to zero with one abstention.

¹⁷ Guy S. Goodwin-Gill, “Entry and Exclusion of Refugees, The Obligation of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees” (1982) Michigan YB of Int’l Leg. St. 291 at 297 where he also states that “[e]xamples of persecution on social group grounds will often prove, on closer examination, to have a political basis.”

¹⁸ Neal, *supra* note 4 at 229; Arthur C. Helton, “Persecution on Account of Membership in a Particular Social Group as a Basis for Refugee Status” (1983) 15 Colum. H.R. L. Rev. 39 at 41.

¹⁹ Neal, *ibid*.

²⁰ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 159. Hathaway bases himself on the comments of the Swedish delegate who proposed the amendment, stating that: “Such cases [refugees who have been

However, in the light of the 50 years that have passed since the *Refugee Convention* was drafted and the numerous decisions of courts all around the world, developing the contemporary meaning of the term 'particular social group', the attempt to reveal the drafters' true intentions somewhat becomes of secondary importance. After all, the drafters may as well have simply been far more concerned with other issues - for example restricting the geographical and temporal scope of the refugee definition - than with discussing the categories of persecution²¹.

The speculations about the initial idea behind the amendment of the refugee definition have therefore more and more been replaced by scholarly and judicial interpretations of the 'membership of a particular social group' category as well as by the UNHCR and transnational refugee law policy.

3. The UNHCR's position on the 'membership of a particular social group' category

As the most comprehensive and probably most important UNHCR document on refugee status determination, the 1979 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*²² constitutes the first source of guidance on the interpretation of the *Refugee Convention*. While not formally binding on signatory states,

persecuted because they belong to a particular social group] existed, and it would be as well to mention them explicitly."; see also Richard Plender, "Admission of Refugees: Draft Convention on Territorial Asylum" (1977) 15 San Diego L. Rev. 45 at 52, who alleges that "[t]he addition was intended to ensure that the Convention would embrace those - particularly in Eastern Europe during the Cold War - who were persecuted because of their social origins".

²¹ Daniel Compton, "Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar" (1987) 62 Wash. L. Rev. 913 at 925; Fullerton, *supra* note 12 at 510.

²² Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (Geneva: 1979) [hereinafter: UNHCR Handbook].

the UNHCR *Handbook* has been endorsed by the states which are members of the Executive Committee of the UNHCR and has been relied upon by the courts of signatory states.

Unfortunately, though, the UNHCR *Handbook* does not address the interpretation of the term 'membership of a particular social group' at length. Regarding the phrase, it says:

"77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."²³

Since the language of these rather brief comments is general enough to open the way to different interpretations, the UNHCR *Handbook* has occasionally been criticised as unhelpful upon the precise issue at hand²⁴. By others, though, its ambiguity was welcomed as a factor that allows for flexibility in the identification of persecuted social groups²⁵.

In any case, the *Handbook's* considerations were not specific enough to offer clear and practical guidance to courts who had to deal with asylum claims that were based on persecution for reason of membership of a particular social group. As a consequence, the

²³ *Ibid.* at para. 77- 79.

²⁴ See *Sanchez-Trujillo v. Immigration and Naturalization Service*, 801 F.2d 1571 [1986] at 1576.

²⁵ Compton, *supra* note 21 at 929.

meaning of the 'particular social group' category began to be shaped by scholarly and jurisprudential interpretations.

4. The international jurisprudence: general principles concerning the social group category

It was not until the mid 1980's that courts around the world made attempts to define the range of the category of 'particular social group'. Rather, decisions were usually handled on their own particular facts and lacked guidance with respect to a more general interpretation of the category.

The first decision to contribute to the definition of the category in a key way was *In Re Acosta*²⁶, which was decided in 1985 by the United States Board of Immigration Appeals. In its method of interpretation, the Board mainly looked at the overall context of the refugee definition and compared the 'particular social group' category to the other four, more traditional grounds of persecution. With respect to the later ones, it found that:

"[e]ach of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."²⁷

Applying the doctrine of *ejusdem generis*²⁸, the Board then went on to interpret the phrase "persecution on account of membership in a particular social group" as

²⁶ *In Re Acosta*, I. & N. Interim Decision 2986 (March 1, 1985).

²⁷ *Ibid.* at para. 37.

²⁸ *Ejusdem generis* is Latin for "of the same kind or class" and means that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. *Black's Law Dictionary*, 7th ed., s.v. "ejusdem generis".

“persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”²⁹

As an example, the Board points to such innate characteristics as sex, colour and kinship ties, but also notes that in some circumstances, a past experience, such as former military leadership could qualify as the required shared characteristic. But whatever characteristic defines the group,

“it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or conscience.”³⁰

Excluded, therefore, are groups defined by a characteristic that is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic rights³¹. The approach proposed by the *Acosta* decision was welcomed by scholars as well as judges since it seemed to prove ample concern for the plight of persons whose social origins put them at a comparable risk to those in the other enumerated categories³². Apart from that, its standard was sufficiently open-ended to allow for evolution in much the same way as had occurred with the four other grounds but not so vague as to admit persons without a serious basis for claim to international protection³³.

What the *Acosta* decision did not provide, however, was a workable test for practitioners for recognising a social group claim. Such a test was instead developed one year later in

²⁹ *Ibid.* at para. 38.

³⁰ *Ibid.* at para. 39.

³¹ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 161.

³² *Ibid.*; Goodwin-Gill, *The Refugee in Int'l Law*, *supra* note 4 at 47. But see the critique by Maureen Graves, “From Definition to Exploration: Social Groups and Political Asylum Eligibility” (1989) 26 San Diego L.Rev. 739 at 787ff.

³³ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 161.

the case of *Sanchez-Trujillo v. Immigration and Naturalization Service*³⁴, where the court used a four-part test to evaluate the petitioners' social group claim:

- first, the cognizability of the group had to be established;
- second, petitioners needed to show they were members of that group;
- third, the group in question must have been the target of persecution on account of its characteristics and
- fourth, the court had to determine if "special circumstances" existed which warranted granting asylum on the basis of social group membership alone³⁵.

With regard to the cognizability issue, the court specified its findings by saying that

"the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members [...]"³⁶

The later specification is probably what earned the decision the most criticism as the requirement of a voluntary associational relationship does not immediately become apparent from the term 'social group' itself³⁷. Much of this criticism can also be found in the international jurisprudence as shows a decision that was taken several years later by the New Zealand Refugee Status Appeals Authority³⁸. As there was no preceding national decision to discuss the meaning of the 'particular social group' category, the

³⁴ *Sanchez-Trujillo*, *supra* note 24 [hereinafter: *Sanchez-Trujillo*].

³⁵ *Ibid.* at 1574-1577; see also Daniel Compton, *supra* note 21 at 920. The fourth step of the test is undoubtedly taken from paragraph 79 of the UNHCR *Handbook*, even though its formulation seems to give it a slightly different meaning.

³⁶ *Sanchez-Trujillo*, *supra* note 24 at 1576.

³⁷ Daniel Compton, *supra* note 21 at 923; Hathaway, *The Law of Refugee Status*, *supra* note 8 at 161 (note 182); Graves, *supra* note 32 at 769 and 775ff.

³⁸ New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 3/91, RE ZWD* (20 October 1992), online: New Zealand Refugee Law - RefNZ <<http://www.refugee.org.nz>>.

The decision is regarded as the Authority's principal decision on the interpretation of 'particular social group'.

court had to rely on the available international materials in order to develop its own interpretation of the convention ground. But instead of categorically rejecting the findings in *Sanchez-Trujillo*, the court modified its test in a way that would take the persecutor's perception into account rather than relying on the 'voluntary associational relationship' asked for in the American decision. It therefore proposed that

"the four part test developed in *Sanchez-Trujillo* is a useful tool for analyzing a social group claim provided this important proviso is taken into account. In our view the first and third steps of the test should be read together with the result that if one of the group's unifying 'first step' characteristics invites persecution, this characteristic should be enough to give the group cognizability for the purposes of refugee status. In short, the government's perception is an external factor which goes toward identifying the group."³⁹

In doing so, the court led back to the principles stated in *Matter of Acosta* but at the same time specified its reliance on those principles by pointing to the inter-relationship between the five recognised grounds of persecution and the notion of civil and political rights. This inter-relationship was forcefully articulated by Hathaway⁴⁰, a well-known Canadian scholar, to whose approach the court explicitly and agreeingly refers. In doing so, the court namely concluded that if the refugee claimant cannot link the harm feared to his or her socio-political situation and resultant marginalisation, the claim for refugee status must fail as refugee law requires that there be a nexus between who the claimant is or what he or she believes and the risk of serious harm in the home state⁴¹. This so called "anti-discrimination approach" found approval in subsequent New Zealand

³⁹ *Ibid.* at 37.

⁴⁰ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 136.

⁴¹ Refugee Appeal No. 3/91 RE ZWD, *supra* note 38 at 37.

jurisprudence⁴² and received even wider recognition when the Canadian Supreme Court, in 1993, decided in the matter of *Canada v. Ward*⁴³.

The reasoning of *Ward* - delivered by La Forest J. for the majority - formally relies on the basic principles underlying the *Refugee Convention*, one of which it recalls as "the international community's commitment to the assurance of basic human rights without discrimination"⁴⁴. It is then argued that this is reflected in the fact that the enumeration of specific foundations upon which the fear of persecution may be based to qualify for international protection parallels the approach adopted in international anti-discrimination law⁴⁵. For the purpose of interpreting the term 'membership of a particular social group', the court considered it therefore appropriate to "find inspiration in discrimination concepts"⁴⁶. Finally, by reference to the *Acosta* decision and the "immutable characteristic test" proposed therein, the court identified three possible categories of particular social groups under the "anti-discrimination approach":

- " (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."⁴⁷

According to the court's own explanations, the first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual

⁴² See, for example, New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 1312/93 RE GJ* (30 August 1995), online: New Zealand Refugee Law - RefNZ <<http://www.refugee.org.nz>>.

⁴³ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 [hereinafter: *Ward*].

⁴⁴ *Ibid.* at 733.

⁴⁵ *Ibid.* at 734.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 739.

orientation, the second would encompass, for example, human rights activists and, in line with *Acosta*, the third category acknowledges that one's past is an immutable part of the person, though the court notes that this branch was rather included for historical reasons.⁴⁸

The classification made in *Ward* has ever since been the major working rule for refugee status determination under the 'particular social group' category⁴⁹. However, two years after *Ward*, the Supreme Court felt that it had to modify its test with respect to the second category and its requirement of 'voluntary association'. In the decision of *Chan v. Canada*⁵⁰, La Forest J., writing for the minority, held that

"a refugee alleging membership in a particular social group does **not** have to be in voluntary association with other persons similar to him- or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with kindred persons.[...] [T]he question that must be asked is whether the appellant is **voluntarily associated with a particular status** for reasons so fundamental to his human dignity that he should not be forced to forsake that association. The association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right."⁵¹

Another clarification of the reasoning in *Ward* became necessary in *Chan*. What LaForest J. initially wanted to be understood as "the most simplified way to draw the distinction" between characteristics that may serve to identify a particular social group and those that do not - the opposing of "what one is against what one does"⁵² - had slowly evolved to replace the *Ward* categories. In his further commentary, LaForest J. therefore made it

⁴⁸ *Ibid.*

⁴⁹ The approach in *Ward* was, for example, accepted by the New Zealand Refugee Status Appeals Authority in Refugee Appeal No. 1323/93, *supra* note 42.

⁵⁰ *Chan v. Canada (Minister of Employment & Immigration)*, [1995] 3 S.C.R. 593 [hereinafter: *Chan*].

⁵¹ *Ibid.* at para. 87 (Emphasis added). As La Forest J. himself notes, the proper interpretation of the *Ward* test stems from an article by Audrey Macklin: "Canada (Attorney-General) v. Ward: A Review Essay" (1994), 6 Int'l J. of Refugee L. 362. The majority in *Chan* found that the applicant had no fear of persecution and therefore did not comment on the question of 'membership in a particular social group'.

clear that this distinction was not to be used as a hurdle claimants had to pass since this could lead to inadequate results. Instead, it only served a purpose for the assessment of a claim under the second category of the test⁵³.

While *Chan* has considerably widened the second branch of the *Ward* test, the approach advocated in these two decisions leaves the scope of the 'particular social group' category with some important limitations. Yet, the reason for this is not to be found in the underlying anti-discrimination concept, but rather in refugee law policy. As La Forest J. put it in *Ward*:

"Canada's obligation to offer a haven to those fleeing their homelands is not unlimited."⁵⁴

Not everywhere, though, did this limited approach find approval. In a 1997 decision of the High Court of Australia⁵⁵, Brennan C.J. rejected the idea that the *Refugee Convention* was intended to impose minimal obligations on the receiving State and that therefore the anti-discrimination notion was bound in its reach. Instead, he saw the object of the *Convention* in providing a protection "so far as possible of the equal enjoyment by every person of fundamental rights and freedoms" and therefore gave the term 'particular social group' a wide interpretation. As a consequence, he refused to treat the category as necessarily exhibiting an innate or unchangeable characteristic because:

"[b]y the ordinary meaning of the words used, a 'particular group' is a group identifiable by any characteristic common to the members of the

⁵² *Ward*, *supra* note 43 at 738.

⁵³ *Chan*, *supra* note 50 at 644.

⁵⁴ *Ward*, *supra* note 43 at 738. The sequence continues: "Foreign governments should be accorded leeway in their definition of what constitutes anti-social behaviour of their nationals. Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted. Surely there are some groups, the affiliation in which is not so important to the individual that it would be more appropriate to have the person dissociate him- or herself from it before Canada's responsibility should be engaged."

⁵⁵ "*Applicant A*" & *Anor v Minister for Immigration and Ethnic Affairs & Anor*, [1997] 142 A.L.R. 331 [hereinafter: "*A*" & *Anor*].

group and a 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large. [...] If a characteristic distinguishes a social group from society at large and attracts persecution to the members of the group that is so distinguished, I see no reason why a well-founded fear of that persecution might not support an application for refugee status."⁵⁶

A majority of the court agreed with this view and pledged for a wide interpretation of the term 'particular social group'⁵⁷. Especially Brennan C.J. based his judgement on the so called 'safety net' approach⁵⁸ which did, until then, not find much support in the jurisprudence. In fact, it was explicitly rejected in *Ward*⁵⁹.

The other issue of the case - on which the judges again were divided - was the question whether the common threat of persecution could be the shared characteristic defining a particular social group. The majority rejected this approach, mainly by arguing that such view was circular and that it would render the other four grounds of persecution superfluous. As McHugh J. put it:

"The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution."⁶⁰

Nevertheless, just like in the earlier New Zealand case, the persecutor's perception is not left out of consideration as McHugh J. acknowledges that,

"while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a social group."⁶¹

⁵⁶ *Ibid.* at 335.

⁵⁷ Apart from Brennan C.J., Dawson, McHugh and Kirby JJ. also argued in favor of a wide denotation, while Gummow J. held that "numerous individuals with similar characteristics or aspirations in my view do not compromise a particular social group of which they are members." *Ibid.* at 375.

⁵⁸ This approach was first advocated by Helton, *supra* note 18 at 45; McHugh J. and Kirby J., however rejected this idea, see *ibid.* at 356, respectively 394.

⁵⁹ *Ward*, *supra* note 43 at para. 63, 66.

⁶⁰ "*A*" & *Anor*, *supra* note 55 at 359; see also *Chan v. Canada*, *supra* note 50 at 677 with the same conclusion.

⁶¹ *Ibid.*

These general regards were confirmed in a judgement by the House of Lords⁶², which appears to be the most recent decision dealing at length with the meaning and definition of the term 'membership of a particular social group'. In *Islam*, the House of Lords called it "a common ground that there is a general principle that there can only be a 'particular social group' if the group exists independently of the persecution"⁶³. The Court also clarified the issue as to whether cohesiveness is a requirement for the existence of a particular social group and it was unanimously asserted that the answer to this be negative. In the words of Lord Steyn:

"Cohesiveness may prove the existence of a particular social group. But the meaning of 'particular social group' should not be so limited: the phrase extends to what is fairly and contextually inherent in that phrase."⁶⁴

Remarkably, the argument for this finding is based on the anti-discrimination approach advocated in *Ward*. As Lord Hope of Craighead explains:

"[I]n the context of article 1A(2) of the Convention, I do not think that [the group] needs to be self- generating. It may have been created, quite contrary to the wishes of the persons who are comprised in it, by society. Those persons may have been set apart by the norms or customs of that society, so that all people who have their particular characteristic are recognised as being different from all others in that society. This will almost certainly be because they are being discriminated against by the society in which they live as they have that characteristic."⁶⁵

In line with the jurisprudence in Canada, New Zealand and Australia, the House of Lords therefore rejected the requirement of a voluntary associational relationship within a group as introduced in *Sanchez-Trujillo*.

⁶² *Islam (A.P.) v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals), [1999] 2 A.C. 629 (H.L.) [hereinafter: *Islam*].

⁶³ *Ibid.* at 639.

⁶⁴ *Ibid.* at 643.

⁶⁵ *Ibid.* at 657.

Having analysed the aforementioned decisions, the question remains whether any kind of common denominator with respect to the interpretation of the convention ground 'membership of a particular social group' can be drawn thereof.

Clearly, although the presentation of the decisions was kept in chronological order, no unanimous approach to the issue has developed over time. As a consequence, the state of law in the jurisdictions that were considered is far from uniformity⁶⁶.

Notwithstanding these difficulties, some general observations shall serve to outline the main points of the discussion:

- a) In line with the view taken by the UNHCR, there is agreement among the courts that a 'particular social group' has to be defined by some common characteristic. The quality of this characteristic, however, is in dispute. Under the refugee law of Canada, the United States, New Zealand and the United Kingdom, only 'a characteristic that is either beyond the power of the individual to change or is so fundamental to individual identity or conscience that it should not be changed' will suffice to establish the existence of a 'particular social group'. In Australia, on the other hand, any common distinguishing characteristic can constitute the defining factor.
- b) Full agreement exists on the view that the persecution which is feared cannot be used to define a 'particular social group'.
- c) The approach taken by courts in the United States according to which the members of the group have to be closely affiliated with each other (existence of a 'voluntary associational relationship'), has not found support in any of the other jurisdictions. Nevertheless, *Sanchez-Trujillo* does represent the state of law in the United States today, even though some courts, as a closer look at other decisions will show later on, have sometimes simply neglected the requirement.

⁶⁶ *Islam*, *supra* note 62 at 657.

5. The European Union asylum policy

Another source for the interpretation of the 'particular social group' category in the international community can be found within the policy framework of the European Union. In March 1996, the Council of the European Union formulated guidelines on the harmonised application of the term 'refugee' among the Member States⁶⁷, since, under Article 29 of the *Treaty on the European Union*⁶⁸, asylum policy is regarded as a matter of common interest.

As the document expressly mentions the UNHCR *Handbook* as "a valuable aid to Member States in determining refugee status"⁶⁹, it is not surprising to find that the interpretation of the term 'particular social group' very much resembles the UNHCR comments cited earlier⁷⁰.

Under section 7.5. ("social group") of the guidelines, the Council states:

"A specific social group normally comprises persons from the same background, with the same customs or the same social status, etc.

Fear of persecution cited under this heading may frequently overlap with fear of persecution on other grounds, for example race, religion or nationality.

Membership of a social group may simply be attributed to the victimized person or group by the persecutor.

In some cases, the social group may not have existed previously but may be determined by the common characteristics of the victimized persons because the persecutor sees them as an obstacle to achieving his aims."

⁶⁷ Council of the European Union, Document 496X0196, *Joint Position on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees*, [1996] O.J. L. 063/2, online: <http://europa.eu.int/eur-lex/en/lif/dat/1996/en_496X0196.html>.

⁶⁸ *Treaty on the European Union* as amended by the *Treaty of Amsterdam* [1997] O.J. C. 340/145; the joint position refers to Article K.1, which is the pre-Amsterdam article number of Article 29.

⁶⁹ Council of the European Union, Document 496X0196, *supra* note 67 at 2.

⁷⁰ Above, Chapter II.2.

Just like the UNHCR *Handbook*, these guidelines are rather general and leave room for further interpretation, especially on the question of the defining factor of a group.

But two things are striking about them. First, the guidelines point out the importance of the persecutor's perception and conduct which constitutes an implicit rejection of any sort of requirement concerning cohesiveness of the group. This view is clearly in accordance with the majority of the jurisprudential interpretations analysed earlier.

Secondly, though, the proposition that membership of a particular social group, like other persecution grounds, is attributable to a person or group, could be interpreted as favouring the view that the common fear of persecution is sufficient proof for the existence of a particular social group. This would seemingly be the case if the group that the persecutor believes his victims to be a member of, does in fact not exist⁷¹. Yet such a view would be in contrast to international decisions on the issue, as outlined above. Unfortunately, there is no decision from any of the Member States that takes express reference to the guidelines and its propositions on the 'particular social group' category. As far as it is apparent, the only country to expressly rely on the stated principles was Italy in a country report for a UNHCR Symposium⁷². On the other hand, the 1999 decision by the House of Lords argued that there can only be a 'particular social group' if the group exists independently of the persecution, which is an indication that the interpretation considered above is not likely to be adopted among the Member States of the European Union.

⁷¹ If the group exists and the persecutor falsely believes his victim to be a member of it, the case is by far clearer. See the example given by Nicole LaViolette in "The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*" (1997) 55 U.T. Fac. L. Rev. 1 at 38.

⁷² Giovanni Kojanec, "Italy", Country Report for the UNHCR Symposium on Gender-Based Persecution (1997) Int'l J. Ref. L. Special Issue 1997 at 57.

While certain interpretative differences remain, this chapter has attempted to outline the general principles that shape the meaning of the 'membership of a particular social group' category. This concept shall later serve to evaluate the determination of gender-based refugee claims. Before these two notions can be linked, however, it is necessary to thoroughly examine what is meant when speaking of gender-based persecution, as the definition of this term is not free from contrariety either.

III. Gender-based persecution

According to the definition of ‘refugee’, any person applying for refugee status has to apprehend a certain form of harm which the *Refugee Convention* identifies as ‘persecution’ or a well-founded fear thereof. As a consequence, the conceptualisation of those claims that qualify as gender-based persecution necessarily has to start by first defining the term ‘persecution’ in order to filter out other forms of hardship or suffering that do not meet the Convention standard. This will provide the basis for the examination of the rather common differentiation between so called “normal claims” and gender-specific or “women’s claims”. The second part of this section will then examine the different concepts to approach gender-based persecution which were developed by the UNHCR and several national governments by means of publishing so called ‘gender guidelines’.

1. Conceptualising ‘gender-based persecution’

a) The meaning of ‘persecution’

As the UNHCR *Handbook* notes,

“[t]here is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success.”⁷³

Moreover, it seems to be generally acknowledged that the drafters of the *Refugee Convention* intentionally left the meaning of ‘persecution’ undefined as they realised the

⁷³ UNHCR *Handbook*, *supra* note 22 at para. 14.

impossibility of enumerating in advance all the forms of maltreatment which might legitimately fall within the scope of Article 1⁷⁴.

Despite these difficulties, the UNHCR *Handbook* attempts to give some orientation on what is to be understood as 'persecution' by referring to Article 33 of the *Refugee Convention*⁷⁵. According to this linkage, "a threat to life or freedom" on account of the enumerated grounds in any case amounts to persecution as required by Article 1⁷⁶. It then goes on by saying:

"Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made [...]. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary."⁷⁷

Albeit this statement, scholars have continuously tried to conceptualise the notion of 'persecution' beyond what is evidently regarded so because it constitutes a threat to life or freedom. The dominant view bases itself on the use of human rights standards, claiming that refugee law ought to concern itself with actions which deny human dignity

⁷⁴ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 102; UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends" (1997) *Int'l J. Ref. L. Special Issue 1997*: UNHCR Symposium on Gender-Based Persecution 79 at 82.

⁷⁵ Article 33 of the *Refugee Convention* reads:

"Prohibition of Expulsion or Return ('Refoulement')

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 in a particular social group or political opinion. [...]"

⁷⁶ UNHCR *Handbook*, *supra* note 73 at 51; see also Gregory A. Kelson, "Gender-Based Persecution and Political Asylum: The International Debate for Equality begins" (1997) 6 *Tex. J. Women & L.* 181 at 184.

⁷⁷ *Ibid.* at 52.

in any key way⁷⁸. According to this view, the sustained and systematic denial of core human rights is the appropriate hurdle for determining the existence of persecution. On the other hand, however, though most human rights instruments include the concept of non-discrimination, the term 'persecution' clearly requires more than mere differentiation in treatment of groups by a government⁷⁹. This finding is supported by the UNHCR *Handbook* which states:

"Differences in the treatment of various groups [...] exist to a greater or lesser extent in many societies. Persons who receive less favorable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution."⁸⁰

These circumstances are identified as measures of discrimination which

"[...] lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities."⁸¹

Yet, this formulation is very abstract, leading to further questions: at which instant are consequences detrimental enough to be considered "of a substantially prejudicial nature"? Though certain examples are given, it is not at all obvious where exactly the line should be drawn.

The most systematic attempt to develop a framework for the term 'persecution' has been put forward by Professor James C. Hathaway⁸², who bases his interpretation on four

⁷⁸ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 108; UNHCR Division of International Protection, *supra* note 74 at 82; see, on the other hand, Aile Grahl-Madsen, *The Refugee in International Law*, vol. 1 (Leyden: Sijthoff, 1966) [hereinafter: Grahl-Madsen, *The Refugee in International Law*] at 193.

⁷⁹ Helton, *supra* note 18 at 54.

⁸⁰ UNHCR *Handbook*, *supra* note 22 at para. 54.

⁸¹ *Ibid.*

⁸² Hathaway, *The Law of Refugee Status*, *supra* note 8 at 108ff.

distinct categories of human rights violations⁸³. Depending on the category to which the maltreatment in question belongs, it will or will not qualify as persecution. Unfortunately, Hathaway likewise finds himself making further distinctions according to the severity of the violation, stating, for example, that the infringement of Economic, Social and Cultural Rights will *normally* not constitute persecution *unless* their denial is extreme or their implementation discriminatory⁸⁴. Yet, these limitations cause the same difficulties as the general approach taken in the UNHCR *Handbook*: it is not always possible to draw a clear line between acts that qualify as persecution and the sort of hardship that has to be endured. Hence, a “grey zone” where the decision concerning the existence of persecution has to be made on a case-by-case basis according to the specific circumstances remains inevitable.

However, for the purpose of this analysis, the presented concepts sufficiently outline the meaning of ‘persecution’, since the cases that will be examined in Part IV mainly focus on the *ground* of persecution. Thus, for the most part, the existence of persecution within the meaning of the *Refugee Convention* will not be in question.

b) What is gender-based persecution?

Although prevalent in today’s legal discourse on refugee law, the term ‘gender-based persecution’ is seldom defined or even explained. Moreover, it needs to be noted that

⁸³ These categories can be summarized as: 1. Human rights that serve to safeguard primary physical conditions; 2. Classical civil rights; 3. Economic, Social and Cultural Rights and 4. Rights that are not codified in binding international instruments; see also Thomas Spijkerboer, *Gender and Refugee Status* (Aldershot: Ashgate, 2000) [hereinafter: Spijkerboer, *Gender and Refugee Status*] at 108ff.

⁸⁴ Hathaway, *The Law of Refugee Status*, *supra* note 813 at 116ff.

every reference to gender-based persecution is almost without exception one that is aimed at the concerns of women refugees. For example, the following definition of 'gender-based persecution' suggests:

"The term gender-based persecution, in essence, refers to those asylum applications made by women which are premised on issues that pertain specifically to their gender."⁸⁵

But since the word 'gender' encompasses the female as well as the male gender, it may be useful to explain why the term gender-based persecution is nowadays exclusively associated with women's claims for refuge.

Generally, women as well as men may be persecuted for reasons associated with their gender⁸⁶. The difference though is, that men's cases are usually not regarded as problematic, and normally fit into one of the enumerated categories that make them eligible for refugee status. There is hence no need to stress or even recognise the fact that the claim is in any way connected to the applicant's gender and in practice, these cases are indeed not seen as gender-specific⁸⁷.

Therefore, the gender of the male applicant plays no role while being female very well may, because:

"[refugee] law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the special protection needs of women."⁸⁸

⁸⁵ Anjana Bahl, "Home is Where the Brute lives: Asylum Law and Gender-based Claims of Persecution" (1997) 4 Cardozo Women's L.J. 33 at 35.

⁸⁶ Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 129, who uses the example of circumcision, which exists for men as well as for women; see also Hathaway, *The Law of Refugee Status*, *supra* note 8 at 163, referring to the Immigration Appeal Board Decision V83-6807 of June 26, 1986 in which the Salvadoran claimant was found to be "a young man, a member of the broad social group that is the primary target of military and guerilla alike".

⁸⁷ Spijkerboer, *Gender and Refugee Status*, *supra* note 84 at 129, referring to German cases having dealt with the compulsory circumcision of Christian men in the Turkish army.

⁸⁸ Nancy Kelly, "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26 Cornell Int'l L.J. 625 at 674.

In an attempt to target this problem, feminist critiques of refugee law have developed concepts according to which female applicants are assessed under the specific consideration of their gender. "Female applicants" in this context literally means *all* female applicants because "[e]ven when the applicant's gender is not central to her persecution claim [...] there may be gender-related aspects to her case."⁸⁹ For example, it is suggested that the cases of women eligible for political asylum can be formulated within six categories. But in fact only one of these six categories is deemed to encompass gender-neutral forms of persecution "on the same grounds as [...] male counterparts"⁹⁰. Further, it is asserted that even the assessment of these seemingly rare cases of gender-neutral persecution has to take the woman's gender into account:

"In assessing a woman's claim, therefore, it is always important to consider the status and experiences of women in the country from which the applicant has fled, including the position of women before the law, the political rights of women, the social and economic rights of women, the incidence of violence against women and the protection available to women facing such violence."⁹¹

This concept has been criticised for its tendency to frame any and all persecution of women as persecution on account of gender while it may have the unwelcome effect that women's claims in general receive an implicit or explicit label of "special" which may foster unfavourable treatment in legal practice⁹².

⁸⁹ *Ibid.* at note 80.

⁹⁰ *Ibid.* at 642. In line with this, Kelly states at 634 that "Under this framework, the gender-related claims of women will largely be formulated within the particular social group category of the refugee definition." which seems to suggest that the majority of women's claims cannot be assessed under the more traditional grounds of religion, race, nationality and political opinion.

⁹¹ *Ibid.* at note 80. See also Karen Bower, "Recognizing Violence against Women as Persecution on the Basis of Membership in a Particular Social Group" (1993) 7 Geo. Immigr. L.J. 173 at 174f.

⁹² Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 169ff. Spijkerboer calls this the anti-essentialist critique and claims that what he calls the 'human rights approach' serves to reinforce the image of only men being "real" refugees.

If women have “special protection needs” compared to men, they seem to face persecution that is on the one hand associated with their gender and, on the other hand, does not match one of the enumerated persecution grounds (political opinion, race, nationality, religion or membership of a particular social group), because otherwise the claim would be covered by the ‘general’ protection scheme for all refugees. Such an interpretation, however, invites the idea that these claims do not belong to the core of refugee law and should therefore be dealt with by granting something less than refugee status⁹³.

As a consequence, many scholars, instead of arguing on the basis of the existing definition of ‘refugee’, insist that only an amendment to the *Refugee Convention* which implements ‘gender’ as a sixth category of persecution grounds could appropriately accommodate the asylum claims of women⁹⁴. In interpreting the enumerated grounds of persecution as the appropriate protection scheme for men, it is argued that women need their own category, that being gender, because:

“[t]o oblige women seeking asylum to prove that such treatment is just a variation of the oppression faced by men is illogical and - when you get right down to it - discriminatory.”⁹⁵

But on the other hand, what seems to be neglected is the fact that the addition of a sixth category for women could reinforce the marginalisation of women by means of creating the impression that only men have political opinions, only men are activated by religion

⁹³ *Ibid.* at 129/130.

⁹⁴ See, for example: Todd Stewart Schenk, “A Proposal to Improve the Treatment of Women in Asylum Law: Adding a “Gender” Category to the International Definition of “Refugee”” (1994) 2 *Indiana J. Global Leg. Stud.* 301; Mattie L. Stevens, “Note, Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category” (1993) 3 *Cornell J.L. & Pub. Pol’y* 179; Daniel McLaughlin, “Case Note and Comment: Recognizing Gender-Based Persecution as Grounds for Asylum” (1994) 13 *Wis. Int’l L.J.* 217 at 241; Emily Love, “Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution” (1994) 17 *Harv. Women’s L.J.* 133.

and only men have racial presence. Hence, the answer to adequate protection of women refugees does not merely lie in creating a separate 'female paradigm' for gender-based claims of persecution⁹⁶. Moreover, despite the demands for an amendment, a large body of international case law shows that a variety of so-called gender-related claims of refugee women are successful under the current legal framework. The immediacy of their situation simply does not allow refugee women to wait for the law to change before seeking safety⁹⁷. And many of their claims fit into the traditional categories of persecution, such as religion and political opinion, while a significant share of them are discussed within the 'membership of a particular social group' category, as noted above. The existing decisions show that the law is not monolithic and that solutions can be found by means of legal argumentation⁹⁸.

Yet, what role does gender play or should gender play, then, in the assessment of women's refugee claims and what purpose does the discussion about gender-based persecution serve? With regard to the international jurisprudence, there is certainly no universal answer to this question. Courts around the world have decided cases that

⁹⁵ Linda Hossie, "For Women, Oppression is often a Way of Life", *Globe and Mail*, 5 February 1993, at A15.

⁹⁶ Jaqueline Greatbach, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1 *Int'l J. Refugee L.* 518 at 526.

⁹⁷ François Crépeau, "Droit Comparé de l'Asile et du Refuge. L'Application Diversifiée de la Convention de Genève de 1951 en Europe et Ailleurs" in Société Française pour le Droit International, *Droit d'Asile et des Réfugiés* (Paris: Pedone, 1997) [hereinafter: Soc. Franç., *Droit d'Asile*] 261 at 270. Crépeau notes that the *Refugee Convention* is not, as some describe it, outdated, but that its abstraction enables it to accommodate a larger number of claims than initially envisaged by its drafters. See also Pamela Goldberg, "Where in the World Is There Safety For Me?: Women Fleeing Gender-based Persecution" in Julie Peters and Andrea Wolper, eds., *Women's Rights Human Rights, International Feminist Perspectives* (New York: Routledge, 1995) [hereinafter: Peters/Wolper, *Women's Rights Human Rights*] 345 at 352.

⁹⁸ Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 171. Apart from that, one scholar rightly argues that "[a]dding gender to the Convention definition as an independent basis of persecution would unnecessarily delay assistance to women since member-nations will find it necessary to argue and debate a change of that magnitude", Kristine M. Fox, "Note and Comment: Gender-based Persecution: Canadian Guidelines offer a Model for Refugee Determination in the United States" (1994) 11 *Ariz. J. Int'l & Comp. Law* 117 at 131.

concerned gender-based persecution with varying degrees of consideration for the factor 'gender'. As for refugee law discourse, the U.K.-based non-governmental organisation *Refugee Women's Legal Group (RWLG)* seems to have developed a gendered perspective to refugee law and policy that provides the necessary gender sensitivity while at the same time avoiding to create the impression that men "own" the categories of persecution that are not explicitly "gendrified"⁹⁹. The key to this approach is the definition of the term 'gender'. While most scholars explicitly or implicitly treat the term 'gender' as equivalent to biological sex, the *RWLG* bases its concept on a completely different notion, stating that

"The term 'gender' refers to the social construction of power relations between men and women, and the implications of these relations for women's (and men's) identity, status, roles and responsibilities [...]"¹⁰⁰

According to this definition, gender therefore concerns the social organisation of sexual difference and takes into account the historical, cultural and geographical specificities that shape the various experiences of women - as well as men - over place and time. At the same time, though, it must not be forgotten that other factors like race, class, sexuality, age, marital status and so on, can likewise influence these experiences¹⁰¹. Gender may explain why a woman was persecuted or it may determine the form that persecution takes. Sometimes, it may even be a risk factor that makes a woman's fear of

⁹⁹ Refugee Women's Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the U.K.* (London: Refugee Women's Legal Group, 1998) [hereinafter: *RWLG Gender Guidelines*]; the *RWLG*'s approach seems to have adopted the concept of gender-based persecution presented by Audrey Macklin in "Refugee Women and the Imperative of Categories" (1995) 17 Hum. Rts. Q. 213 at 258ff.

¹⁰⁰ *Ibid.* at para. 1.8.

¹⁰¹ *Ibid.* at para. 1.9/1.10.

persecution more well-founded than that of a man in similar circumstances¹⁰². However, these links between gender and persecution are by no means synonymous.

This realisation allows for those cases which require the consideration of gender as an important factor to be determined in an abstract manner. For this purpose, the RWLG *Gender Guidelines* differentiate between persecution of women *as* women (indicated as *gender-specific* persecution) and persecution of women *because* they are women (indicated as *gender-related* persecution)¹⁰³. The concept of women being persecuted *as* women addresses the forms of persecution that are gender-specific and which only or mostly affect women (e.g. sexual violence, female genital mutilation, forced abortion and sterilisation). *Gender-specific* persecution therefore relates to the 'serious harm' within the meaning of persecution. Conversely, to say that a woman is persecuted *because* she is a woman addresses the causal relationship between gender (as socially constructed) and persecution. Hence, it is possible to think of various constellations in which a woman's gender enters the picture:

"A woman may be persecuted *as* a woman (e.g. raped) for reasons unrelated to gender (e.g. activity in a political party), not persecuted *as* a woman but still *because* of gender (e.g. flogged for refusing to wear a veil), and persecuted *as* and *because* she is a woman (e.g. female genital mutilation)."¹⁰⁴

Under this premise, there is no need to rely on examples of gender-related persecution nor is it necessary to frame categories of types of persecution and to link them once and for all to one of the enumerated persecution grounds¹⁰⁵. Instead, the described approach avoids focussing on any of the enumerated grounds of persecution. Rather, its aim is to

¹⁰² Macklin, *supra* note 99 at 258.

¹⁰³ RWLG, *Gender Guidelines*, *supra* note 99 at para. 1.11ff., see also Macklin, *supra* note 99 at 258f.

¹⁰⁴ Macklin, *supra* note 99 at 259.

“encourage decision-makers to let gender inform their assessment” under all five categories¹⁰⁶ which is mainly due to the inference that gender-related violations do not necessarily constitute persecution **because of gender**.

It can therefore be concluded that the notion of gender-based persecution can be conceptualised in a way that avoids dropping into the extremes of either collapsing every persecution of women into the category of “persecution on grounds of gender” or, on the other hand, submerging the gender component entirely under other labels¹⁰⁷. Instead, gender-based persecution is proved to be an integral part of the core of refugee claims if the factor gender is appropriately emphasised so as to ensure that all aspects of a woman’s asylum claim are fully and fairly considered.

2. Gender Guidelines

In an attempt to set out a systematic method for the evaluation of gender-based persecution, the governments of several countries have issued so called ‘gender guidelines’ over the last few years. The impetus to develop such guidelines came from the UNHCR *Guidelines on the Protection of Refugee Women*¹⁰⁸ which were issued in July 1991 and which gave the impulse for comprehensive documents in Canada, the

¹⁰⁵ See, Nancy Kelly, “Guidelines for Women’s Asylum Claims” (1994) 6 Int’l J. Refugee L. 515 at 526ff.; see also Hathaway, *The Law of Refugee Status*, *supra* note 8 at 162 and Fox, *supra* note 98 at 131.

¹⁰⁶ RWLG, *Gender Guidelines*, *supra* note 100 at para. 4.1.

¹⁰⁷ Macklin, *supra* note 99 at 259.

¹⁰⁸ United Nations High Commissioner on Refugees (UNHCR), *Guidelines on the Protection of Refugee Women* (Geneva, 1991) [hereinafter: UNHCR *Guidelines*], online: Homepage of the Center for Gender and Refugee Studies at the University of Chastings <http://www.uchastings.edu/cgrs/law/guidelines/guidelines_un.pdf> (page numbers refer to the document in pdf-format).

United States and Australia¹⁰⁹. The following section will start with an overview of the UNHCR *Guidelines* as they constitute the initial source of inspiration, before comparing the approaches taken in the different national documents.

a) The UNHCR *Guidelines*

In parallel with the growing awareness of women's human rights, the discussion of the needs of refugee women has increased over the last two decades. The UNHCR first officially acknowledged the specificity of women refugees' experiences and needs when, in 1985, its Executive Committee adopted a Conclusion concerning the international protection of refugee women ("Conclusion No. 39")¹¹⁰. Among other things, the Committee therein conceded that:

"States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention."¹¹¹

More UNHCR Executive Committee Conclusions followed in 1988, 1989 and 1990 on refugee women and their protection¹¹² until, in 1991, the UNHCR *Guidelines* were released. The comprehensive discussion on how to recognise and address refugee

¹⁰⁹ In other countries, like the Netherlands and Germany, the authorities decided to rely on rather short, non-comprehensive documents, respectively administrative directives, which the present paper will not examine specifically. For an evaluation of the Dutch document, see Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 175.

¹¹⁰ UNHCR Executive Committee, Conclusion No. 39 'Refugee Women and International Protection', UN GAOR, 36th Session, UN Doc. A/AC.96/673 (1985).

¹¹¹ *Ibid.* at para. (k).

¹¹² UNHCR Executive Committee, Conclusions No. 54 (1988), No. 60 (1989) and No. 64 (1990), referred to in Valerie L. Oosterveld, "The Canadian Guidelines on Gender-Related Persecution" (1996) 8 Int'l J. Refugee L. 567 at note 24.

women's protection concerns at a practical level presented a ground-breaking policy statement¹¹³.

The main purpose of the UNHCR *Guidelines* was to ensure that women refugees are afforded the necessary protection when they settle in a new country¹¹⁴. For this reason, the document discusses various issues of relevance to refugee women, including protection from physical, sexual and other forms of violence in refugee camps, legal aspects of status determination, access to food, shelter and other services, as well as repatriation¹¹⁵. What seems most important, though, is the fact that these guidelines addressed the need for refugee-receiving countries to treat gender-based persecution as a valid basis for obtaining refugee status¹¹⁶.

Section II (b) of the UNHCR *Guidelines* is concerned with the "Legal procedures and criteria for the determination of refugee status". Therein, the fact that the refugee definition's persecution grounds do not include gender is identified as a substantive problem and the difficulties arising in cases where women are persecuted for having transgressed the social mores of society are specifically addressed:

"As a UNHCR legal adviser has noted, 'transgressing social mores is not reflected in the universal refugee definition.' Yet, examples can be found of violence against women who are accused of violating social mores in a number of countries. The offence can range from adultery to wearing of lipstick. The penalty can be death."¹¹⁷

¹¹³ Oosterveld, *supra* note 112 at 574.

¹¹⁴ Kelson, *supra* note 76 at 207.

¹¹⁵ Audrey Macklin, "Cross-Border Shopping for Ideas: A Critical View of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims" (1998) 13 Geo. Immigr. L.J. 25 at 29.

¹¹⁶ Oosterveld, *supra* note 112 at 574.

¹¹⁷ UNHCR *Guidelines*, *supra* note 108 at 2.

In order to confront this dilemma, the UNHCR calls for “an improved understanding of the various bases upon which women can and should be granted refugee status”¹¹⁸. Also, the guidelines recommend:

“[to] promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status. Others may be seen as having made a religious or political statement in transgressing the social norms of their society.”¹¹⁹

The issue of sexual violence against women is covered briefly in the recommendation to promote “acceptance of the notion that sexual violence against woman is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish”¹²⁰.

Overall, the guidelines cover most of the physical and legal problems that women refugees can face, suggest improvements that can and should be made, and recognize that women refugees should seek asylum if confronted with violence¹²¹. The fact that these issues were, for the first time, laid down in an official document, was of immeasurable importance at the time when the UNHCR *Guidelines* were released. Nevertheless, their practical influence was limited from the outset since the UNHCR is not in the position to dictate to States Parties any policies or practices and especially not how to interpret the *Refugee Convention*¹²². Hence, the UNHCR *Guidelines* have no binding force and it is left to the discretion of countries to adopt the suggested interpretations and to follow the numerous recommendations of the UNHCR. However, in support of the guidelines and in

¹¹⁸ *Ibid.* at 7.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Kelson, *supra* note 76 at 208.

¹²² Macklin, *supra* note 115 at 29.

an effort to encourage gender sensitivity among the State Parties, the Executive Committee, in 1993, recommended "the development [...] of appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men"¹²³.

While the relevant authorities of some countries have followed this call, others have taken the opposite stand by pointing out that the Executive Committee's conclusions impose no obligation on States Parties to recognise the interpretation suggested therein¹²⁴.

b) The Canadian, United States and Australian Guidelines

The first country to issue guidelines similar to those put out by the UNHCR was Canada. In 1993, the Immigration and Refugee Board (IRB) of Canada¹²⁵ introduced its 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution'¹²⁶ as a reaction to the report of several cases decided by the IRB in late 1992 and early 1993, which denied refugee status to women¹²⁷. Although the *Canadian Guidelines* have often

¹²³ UNHCR Executive Committee, Conclusion No. 73, cited in UNHCR Division of International Protection, "Gender-Related Persecution: An Analysis of Recent Trends", *supra* note 74 at 80.

¹²⁴ Macklin, *supra* note 115 at 29 with reference to the British Home Office; the statement was again made at the UNHCR Symposium on Gender-based Persecution in 1997, see Hugo Storey, "United Kingdom", Country Report (1997) Int'l J. Ref. L. Special Issue 1997, 71.

¹²⁵ The IRB is an administrative governmental agency. It comprises the Convention Refugee Determination Division (CRDD) which exclusively deals with the adjudication of refugee claims. See Davies Bagambiire, *Canadian Immigration and Refugee Law* (Aurora: Canada Law Book, 1996) at 211.

¹²⁶ Canadian Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: on Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 8 March 1993) [hereinafter: *Canadian Guidelines*], reprinted in 5 Int'l J. Refugee L. 278, updated November 13, 1996, UPDATE available online: IRB Homepage <http://www.cisr.gc.ca/legal/guidline/women/index_e.stm>.

¹²⁷ Oosterveld, *supra* note 112 at 574. The most highly publicised case was that of Nada, a Saudi Arabian woman who fled to Canada after being punished and having her life threatened for her feminist beliefs; Convention Refugee Determination Division, Decisions No. 1096, No. M91-04822, 1991 WL (WESTLAW, Quicklaw, C.R.D.D. File).

been labelled “the first of their kind [...] to officially expand the basis of refugee claims to include gender persecution”¹²⁸, its objectives do not support this interpretation as the central issue is identified as “the need to determine the **linkage** between gender, the feared persecution and one or more of the definition grounds”¹²⁹. For this purpose, the *Canadian Guidelines* list four critical questions which are raised in gender-related claims, the first two of which are related to the refugee definition:

“To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or combination, of the five enumerated grounds of the Convention refugee definition?”

and

“Under what circumstances does sexual violence, or a threat thereof, or other prejudicial treatment towards women constitute persecution as that term is jurisprudentially understood?”¹³⁰

The answers to these questions are mainly to be found in Section I of the document which carries the title “Determining the nature and the grounds of the persecution” and which begins with the explicit recognition that not all claims brought forward by women are specifically gender-related¹³¹. But even for those claims that are qualified as gender-related, the *Canadian Guidelines* make clear that all of the five enumerated grounds of the refugee definition can be applicable and examples are provided for each category. In doing so, these guidelines provide a much more comprehensive framework for the assessment of gender-related claims than the UNHCR *Guidelines*. In particular, the *Canadian Guidelines* disagree with the UNHCR’s proposal to determine claims involving

¹²⁸ Fox, *supra* note 98 at 135; Spijkerboer is also critical about this remark, see *Gender and Refugee Status*, *supra* note 83 at 178.

¹²⁹ *Canadian Guidelines*, *supra* note 126 at 279; see also Kai Hailbronner, “Geschlechtsspezifische Fluchtgründe, die Genfer Flüchtlingskonvention und das deutsche Asylrecht” (1998) *Zeitschrift für Ausländerrecht und Asylpolitik* 152 at 154.

¹³⁰ *Ibid.*

¹³¹ *Ibid.* at 280.

fear of persecution for transgressing social norms on the ground of the 'membership in a social group category' and instead invoke the grounds of religion or political opinion as appropriate¹³².

The 'membership of a particular social group' category is nevertheless being devoted special attention as the four other persecution grounds are simply labelled as "Grounds other than membership in a particular social group". The document first mentions the possibility of defining a particular social group by familial affiliation (kinship) and by gender in itself. It then sets out the conditions under which the 'membership of a social group' category may be applied as a ground for gender-related fear of persecution, stating that "[g]ender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition"¹³³ and that "[p]articular social groups comprised of sub-groups of women may also be an appropriate finding in a case involving gender-related persecution"¹³⁴.

The next government to decide to publish gender guidelines were the United States. On May 26, 1995, two years after the release of Canada's groundbreaking initiative, the United States Office of International Affairs of the U.S. Department of Justice issued a memorandum entitled "Considerations For Asylum Officers Adjudicating Asylum Claims From Women"¹³⁵. Though the *U.S. Considerations* explicitly refer to the

¹³² *Ibid.* at 283; in fact, the *Canadian Guidelines* insofar explicitly reject UNHCR *Conclusion No. 39*.

¹³³ *Canadian Guidelines UPDATE*, *supra* note 126 at para. A.III.2.

¹³⁴ *Ibid.*

¹³⁵ Phyllis Coven, Office of International Affairs, *Memorandum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995) [hereinafter *U.S. Considerations*], reprinted in 7 Int'l J. Refugee L. 700 and online: Homepage of the Center for Gender and Refugee Studies at the

Canadian Guidelines as a motivational precedent, their dissimilar structure and objective immediately become evident. Instead of abstract principles, the *U.S. Considerations* contain a compilation of the U.S. case law on gender-based persecution. Only in very limited instances do they develop ideas as to how some decisions' implications could be expanded or maybe even reinterpreted¹³⁶. Overall, however, the American guidelines constitute a documentation of the state of law rather than an interpretative guide on how to deal with gender-based persecution¹³⁷.

With regard to the persecution grounds, the *U.S. Considerations* only discuss 'political opinion' and 'membership of a particular social group' and are silent on the intersection of gender and the other enumerated grounds. This might be due to the fact that U.S. case law until then had not dealt with gender-based claims on account of race, religion or nationality. But, given that the persecution ground is a considerable interpretative hurdle in gender-related claims, the lack of guidance in this point appears to be a major shortcoming of the guidelines.

Contrary to the *Canadian Guidelines*, the *U.S. Considerations* clearly adopt the approach that women who refuse to conform to gender-specific laws and social or moral norms, fall within the 'membership of a particular social group' category rather than 'political opinion'¹³⁸. Nevertheless, the formulation of the text does not promise much success for these claims as the conditions seem to be very strict, apart from the fact that the document's explanations on how to assess these cases are everything but systematic and

University of Chastings <http://www.uchastings.edu/cgrs/law/guidelines/guidelines_us.pdf> (page numbers refer to the document in pdf-format).

¹³⁶ *Ibid.* at 11, see also Part IV.1b), below.

¹³⁷ Contrary to the *Canadian Guidelines*, though, the *U.S. Considerations* have not been updated even though U.S. case law on gender-related claims has evolved since.

therefore offer little guidance. On the other hand, the idea of a social group defined by family membership finds support even though the state of law is uncertain on that point¹³⁹.

On a general scheme, the *U.S. Considerations* do seem to follow the same intentions as the guidelines provided by the UNHCR and the Canadian IRB, as it is stated in the introduction that "[...] this memorandum seeks to enhance the ability of U.S. Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims"¹⁴⁰. Yet at the same time, the explanations provided for decision-makers sometimes seem to complicate things more than they facilitate them. This is illustrated by statements such as:

"[...] gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims."¹⁴¹

These statements have the slight tendency to let gender-based persecution once again appear to be highly problematic and possibly beyond the scope of refugee law as it creates such "complex issues" which asylum officers are not prepared to deal with¹⁴².

Apart from that, the *U.S. Considerations* have also been criticised for their retrospective focus on existing jurisprudence which leads them to miss the opportunity of suggesting new alternatives for the assessment of gender-based claims¹⁴³.

¹³⁸ *U.S. Considerations*, *supra* note 135 at 14.

¹³⁹ *Ibid.* at 15.

¹⁴⁰ *Ibid.* at 1.

¹⁴¹ *Ibid.* at 8.

¹⁴² See also Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 175.

¹⁴³ Macklin, *supra* note 115 at 69.

A completely different picture arises when looking at the most recent government guidelines for gender-related refugee claims that were published by Australia¹⁴⁴ in July 1996. Without a doubt, the *Australian Guidelines* are the most compelling and most comprehensive of the governmental guidelines. Furthermore, they are also uniquely broad in their scope since they not only apply to refugee status applicants but also to the non-refugee humanitarian classes.

Some authors have criticised that the *Australian Guidelines* - like the Canadian and U.S.-American documents - uphold the distinction between “normal claims” and “gender-specific claims”. This distinction has been found to possibly be detrimental to women’s chances of success, but the *Australian Guidelines* nevertheless seem to make the greatest effort to counterbalance this notion¹⁴⁵. Not only do they mention that “claims of gender-based persecution can be made by both men and women”¹⁴⁶, they also stress that “[i]t is important to bear in mind that gender-based persecution is only one of many types of persecution a woman may encounter”¹⁴⁷.

In line with this, the Australian document like the *Canadian Guidelines* considers all five persecution grounds as applicable to gender-related claims, but treats them as equal alternatives instead of creating two groups of grounds and thereby laying emphasis on the ‘membership of a particular social group’ category. Remarkably, there are no specific

¹⁴⁴ Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants, Guidelines for Gender Issues for Decision Makers* (July, 1996) [hereinafter: *Australian Guidelines*], reprinted in Int’l J. Ref. L. Special Issue 1997: UNHCR Symposium on Gender-Based Persecution, 195 and online: Homepage of the Center for Gender and Refugee Studies at the University of Chastings <http://www.uchastings.edu/cgrs/law/guidelines/guidelines_aust.pdf> (page numbers refer to the document in pdf-format).

¹⁴⁵ See Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 173.

¹⁴⁶ *Ibid.* at 3.

¹⁴⁷ *Ibid.* at 16.

examples for claims that should be assessed under the ‘membership of a particular social group’ category. The explanations are kept very general and remind of the fact that the principles and conditions for this ground to be invoked remain the same when dealing with gender-related persecution¹⁴⁸ and when determining whether gender itself or combined with other characteristics may define a particular social group. As advice to decision-makers, the document provides:

“Officers should consider this Convention ground on a case by case basis which takes account of the totality of an applicant’s claims and the situation in the country of origin of the applicant.”¹⁴⁹

Since much of the discussion about gender-based persecution in the last decade has circled around the ‘membership of a particular social group’ category, it is somewhat surprising that the *Australian Guidelines* offer no explicit guidance that would assist decision-makers in determining the possible characteristics of a particular social group in the framework of a gender-related claim.

Having therefore looked at all three national guidelines on gender-based persecution, a few final remarks have become necessary. First of all, despite the criticism expressed before with regard to these documents, it should be acknowledged that the *Canadian Guidelines* and *Australian Guidelines* as well as the *U.S. Considerations* all represent bold and courageous initiatives by national agencies to address the specificity of women’s experiences of persecution within the context of the *Refugee Convention*¹⁵⁰. However, the fact that all of these documents function as non-binding directives should

¹⁴⁸ *Ibid.* at 22.

¹⁴⁹ *Ibid.*

¹⁵⁰ Macklin, *supra* note 115 at 67.

certainly be pointed out as a weakness¹⁵¹. Nevertheless, their potential impact for the assessment of women's claims is considerably larger than that of the UNHCR *Guidelines* since, on a national level, the documents constitute important policy decisions which cannot be categorically ignored¹⁵².

¹⁵¹ Oosterveld, *supra* note 112 at 580.

¹⁵² For the *Canadian Guidelines*: Jennifer I. Hoffman, "International Developments, In Canada, Defining 'Refugee' to Include Victims of Gender-based Persecution" (1993) 7 Geo. Imm. L.J. 507 at 510.

IV. The international jurisprudence on gender-based persecution

The preceding chapter illustrates the difficulties in the conceptualisation of gender-based persecution due to it being such a multi-faceted phenomenon. Women can be subject to a variety of gender-related acts of violence, ranging from severe physical harm - such as battery - to sexual abuse, rape, and even mutilation. And even though these are known and wide-spread forms of violence, the international refugee system has long been unable to respond to the forms of persecution that women experience.

When a response finally became necessary because the number of cases of women applying for refugee status on the basis of such persecutory measures kept rising, the task eventually remained with the courts of jurisdictions around the world to make the appropriate decisions on whether or not to grant these women refugee status. While some of these decisions have received great attention in refugee law discourse, it can clearly be said that the growth of the international jurisprudence took place at such a rapid pace, with ever-increasing numbers of applicants and cases that it can hardly be regarded as evolutionary. Only in the last couple of years has the situation become more easy to survey and have courts attempted to handle the issue in a more reasoned and systematic manner.

The following sections will present cases of gender-based persecution from different jurisdictions, sorted by the specific kind of persecution feared: Violence against Women (which embraces the issues of Domestic Violence and Physical and/or Sexual Violence in other contexts), Female Genital Mutilation, Forced Abortion/Sterilisation and Severe Discrimination/Subordination of Women. The enumeration of these forms of gender-

based persecution is by no means exhaustive. However, for the purpose of the envisaged comparative analysis it appears preferable to rely on those issues which have produced a larger number of decisions.

1. Violence against Women

a) Domestic Violence

As emphasised before, violence against women can have many faces, but without a doubt the most prevalent and most universal kind is that of domestic violence. On the level of international law, this issue has always been regarded as problematic and only the deconstruction of the so-called public/private distinction of international human rights law¹⁵³ has made it possible in fairly recent years to recognise domestic violence as a violation of the victim's human rights¹⁵⁴.

Yet, the treatment of the issue of domestic violence under international refugee law does not coincide with this development since the *Refugee Convention's* definition of 'refugee' does not "just" require the violation of the applicant's human rights. Fortunately, though, the public/private distinction does not place any further hurdles on refugee claims by women since Article 1 A.2. of the *Refugee Convention* does not require

¹⁵³ This development is based on jurisprudence as well as scholarly writings. The decision by the Inter-American Court for Human Rights in *Velásquez Rodríguez v. Honduras*, [1989] 28 I.L.M. 294 has played a key role. See also the articles by Rebecca J. Cook, "State Responsibility for Violations of Women's Human Rights" (1994) 7 Harv. Hum. Rts. J. 125 and Celina Romany, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 Harv. Hum. Rts. J. 87 for further discussion and references.

¹⁵⁴ See, e.g., Dorothy Q. Thomas and Michele E. Beasley, "Domestic Violence as a Human Rights Issue" (1993) 15 Hum. Rts. Q. 35; Charlotte Bunch, "Women's Rights as Human Rights : Toward a Re-Vision of Human Rights" (1990) 12 Hum. Rts. Q. 486.

persecution by the state or one of its agents. Rather, persecution by others against which the State is unwilling or unable to grant protection, may also fall within its scope¹⁵⁵. It will nevertheless become apparent from the examination of the jurisprudence, that the implications of the public/private distinction are still noticeable. That is, for example the case when judges sometimes refer to domestic violence and especially rape as “private” forms of violence¹⁵⁶.

But what is to be analysed in this chapter is the question of whether women fleeing domestic violence can claim refugee status on the basis of the ‘membership of a particular social group’ category as all of the other enumerated convention grounds are clearly non-applicable¹⁵⁷.

A series of cases on this issue exists in Canadian jurisprudence at the beginning of which stands *Canada v. Mayers*¹⁵⁸. The case concerned a woman from Trinidad and Tobago who had been the victim of spousal abuse during 15 years of her marriage. The issue upon which the Federal Court of Appeal had to decide was whether the adjudicator of a credible basis panel had erred in law by implicitly concluding that the Refugee Division might find “Trinidadian women subject to wife abuse” to be a ‘particular social group’ within the meaning of the refugee definition. Though the court rejected the idea that the particular social group to which the applicant belongs may be defined as “women” or as

¹⁵⁵ Spijkerboer, *Gender and Refugee Status*, *supra* note 76 at 111; Hathaway, *The Law of Refugee Status*, *supra* note 8 at 126; Goodwin-Gill, *The Refugee in International Law*, *supra* note 4 at 71.

¹⁵⁶ See also Chapter IV.1.b), below.

¹⁵⁷ Mahsa Aliaskari, “U.S. Asylum Law applied to Women Fleeing Islamic Countries” (2000) 8 Am. U.J. Gender Soc. Pol’y & L. 231 at 244.

¹⁵⁸ *Canada (Minister of Employment and Immigration) v. Marcel Mayers*, [1993] 1 F.C. 154 [hereinafter: *Mayers*].

“Trinidadian women”¹⁵⁹, it came to the conclusion that the adjudicator had not erred in law by implicitly concluding that the Refugee Division might find “Trinidadian women subject to wife abuse” to be a particular social group but added:

“That is not to say that the Refugee Division would be right if it so decided [...]”¹⁶⁰

The last comment makes clear that the court did not purport to make a ruling as to whether women so identified did in fact constitute a particular social group. Even though the decision does not preclude such a finding, the court made another suggestion which invites the idea that the group defined as “Trinidadian women subject to wife abuse” in the eyes of the court did not qualify the applicant for refugee status. As Mahoney J.A. wrote:

“A question may be posed for the future: since, in this context, persecution must be feared by reason of membership in a particular social group, can fear of that persecution be the sole distinguishing factor that results in what is at most merely a social group becoming a particular social group?”¹⁶¹

This question aims at the same conclusion that was drawn by the Australian Court in *A & Anor* several years later: that the persecution that is feared cannot be used to define a particular social group¹⁶².

However, in the cases that followed *Mayers*, the groups that the applicants claimed to belong to were similarly defined. In *Rodionova v. M.E.I.*¹⁶³, the applicant asserted herself to be a member of the group described as “Russian women subject to family violence”. Relying on the decision in *Mayers*, the Federal Court decided that the so-defined group

¹⁵⁹ *Ibid.* at 168.

¹⁶⁰ *Ibid.* at 170.

¹⁶¹ *Ibid.* at 169.

¹⁶² Above, Chapter II.3.

¹⁶³ *Rodionova v. Minister of Employment and Immigration*, [1993] 66 F.T.R. 66.

could qualify as a particular social group and that, generally, women can belong to a particular social group by being in danger of domestic violence.¹⁶⁴ The question of whether the definition of the group may be based on the persecution feared was not addressed.

Finally, the last decision in this series of cases dealing with domestic violence was *Navaez v. Canada*¹⁶⁵. The applicant was a citizen of Ecuador and had been abused by her husband through verbal and physical attacks including rape. The Immigration and Refugee Board had refused her claim for refugee status on the basis of membership of a particular social group defined as "women in Ecuador subject to domestic violence". The Trial Division Court, however, overturned the panel's ruling by finding that

"the Board's analysis fails to take into account the female applicant's membership in a particular social group, i.e. women who are subject to domestic violence in Ecuador. If this is the group, a person who suffers personal abuse at the hands of her husband is not suffering random violence perpetrated against her as an individual but is suffering violence perpetrated against her as a woman with an abusive husband."¹⁶⁶

In doing so, the Court seems to accept that "women who are subjected to domestic violence and abuse **share a similar background**"¹⁶⁷ and can therefore be characterised as a particular social group. Again, however, the issue of whether the group in question can be defined by the persecution that is feared, was not addressed by the court even though, at this time, the Federal Court of Appeal had already decided that a particular social group could not solely be defined by the fact that its members face a particular

¹⁶⁴ *Ibid.* at 68, 69; see also Pia Zambelli, *The 1995 Annotated Refugee Convention* (Toronto: Carswell, 1995) [hereinafter: Zambelli, *Annotated Refugee Convention*] at 60.

¹⁶⁵ *Navaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 C.F. 55 [hereinafter: *Navaez*].

¹⁶⁶ *Ibid.* at 68.

¹⁶⁷ *Ibid.* at 71 [Emphasis added], citing from Convention Refugee Determination Division, Decision No. U92-08714 dated March 11, 1993 [*C.(X.N.) (Re)*, [1993] C.R.D.D. No. 27 (QL)].

form of persecutory treatment¹⁶⁸. The hurdle in *Navaez* would have therefore been to establish that the sub-group of 'women who are victims of domestic violence' possessed sufficient common characteristics to constitute a particular social group¹⁶⁹. The Court, however, gave no insight as to whether the similar background that it referred to was anything else but the persecution in form of domestic violence.

The problem as to whether victims of domestic violence share a common characteristic was also hinted at in two Australian cases, both decided by the Australian Refugee Review Tribunal. As shown earlier, the High Court of Australia in "*A*" & *Anor*¹⁷⁰ gave the term 'particular social group' a wide interpretation which was acknowledged by the Tribunal¹⁷¹. The two decisions concerned women from Ecuador and Lebanon respectively, who had been victims of domestic violence.

But despite the more liberal approach to the convention ground, the Tribunal made it clear that it did not support the idea that women could be qualified as members of a group which is defined by them being victims of domestic violence, as advocated in the preceding Canadian jurisprudence. It argued that, even if such a group existed, the

¹⁶⁸ *Chan v. Canada*, *supra* note 50 at 677.

¹⁶⁹ Heather Potter, "Gender-Based Persecution: A Challenge to the Canadian Refugee Determination System" (1994) 3 *Dalhousie Journal of Legal Studies* 81 at 94 with reference to the Federal Court of Appeal's decision in *Mayers*, *supra* note 158.

¹⁷⁰ *Supra* note 55.

¹⁷¹ Refugee Review Tribunal, RRT Reference N97/15435 (28 January 1998) and RRT Reference N97/20008 (13 January 1999), both available online: Australasian Legal Information Institute, Database on Refugee Review Tribunal cases <<http://www.austlii.edu.au/au/cases/cth/rtr/>>. The reasons in both decisions are almost word for word the same which is why they will be considered together.

persecution feared by its members would not be “for reason of” membership in that group¹⁷².

The argumentation of the Australian Tribunal certainly holds some truth in it. It is a fact that the definition of ‘refugee’ in the *Refugee Convention* requires that the persecution feared be **for reasons of** the membership in a particular social group. Having this in mind, the Canadian decisions implicitly conclude that women are victims of domestic violence (being “the persecution feared”) because they are members of a group of women who are subjected to domestic violence - a conclusion which is obviously not coherent.

In line with these objections, recent decisions by the United States Board of Immigration Appeals have rejected asylum claims based on domestic violence¹⁷³. The Board held that the applicants had failed to establish that members of the particular social group defined by the common characteristic of having experienced intimate violence, were harmed because of this shared feature.

Other efforts have been made to define a ‘particular social group’ under which women who are victims of intimate violence could seek refuge from their persecutors¹⁷⁴. It was suggested that the shared characteristic could be identified as the woman’s “belief in her

¹⁷² *Ibid.*, citing McHugh J.’s critique of the finding by the Canadian Court of Appeal that “Trinidadian women subject to wife abuse” could constitute a particular social group (“A” & *Anor*, *supra* note 55 at 358, footnote 120).

¹⁷³ See the references in Sakina Thompson, “Developments in the Executive Branch: BIA Decisions: Asylum Claim Based upon Domestic Violence” (1999) 14 Geo. Immigr. L.J. 244 and the BIA decision in *In Re R-A*- discussed in Megan Annitto, “Comment: Asylum for Victims of Domestic Violence: Is Protection possible after *In Re R-A*?” (2000) 49 Cath. U. L. Rev. 785 at 801ff. However, one case has been cited in which a woman was granted asylum on account of her membership in the group of “Bangladeshi women who are in a polygamous marriage and are accorded inferior status”, see reference in Patricia A. Seith, “Notes, Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women” (1997) 97 Colum. L. Rev. 1804 at 1842.

¹⁷⁴ Also, some authors have argued for the granting of refugee status to victims of domestic violence without specifying the group at all, see Annitto, *supra* note 173.

right to be free from the arbitrary violence of a male intimate”¹⁷⁵. The problem, though, remains the same: women are certainly not victims of domestic violence **because** of this belief¹⁷⁶. Another approach that was made relied on the woman’s “refusal to submit to the domination of her batterer”¹⁷⁷, which has also been labelled as a political opinion¹⁷⁸. But while such a refusal may have been the incentive to seek refuge elsewhere, it is hard to see how it could have been the primary cause for the battering.

Does this mean that women who flee intimate violence are generally not eligible for refugee status under the *Refugee Convention*? Not necessarily. As McHugh noted in “*A*” & *Anor*¹⁷⁹, a case sometimes becomes easier to argue if the particular social group is defined more widely. This becomes evident in the Australian cases where the applicants, instead of relying on the persecution, defined the groups of which they alleged to be members as “women”, or alternatively “Ecuadorian/Lebanese women”, hence women in a specific country or society. But, for reasons related to the structure of this analysis the discussion of this approach will follow at a later point in this work¹⁸⁰.

b) Physical and/or Sexual Violence in other contexts

A greater number of cases dealing with the claims of women who have become victims of violence, especially sexual violence, exists in the United States and the Netherlands.

¹⁷⁵ Pamela Goldberg, “Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence” (1993) 26 Cornell Int’l L.J. 565 at 598.

¹⁷⁶ Similarly, Macklin, *supra* note 115 at 58.

¹⁷⁷ *Ibid.*

¹⁷⁸ Aliaskari, *supra* note 157 at 244.

¹⁷⁹ “*A*” & *Anor*, *supra* note 55 at 353.

¹⁸⁰ Part IV.5., below.

Though the facts of some of these cases describe very different kinds of situations, the persecution that the women fear or have already suffered is usually very similar: predominantly rape, sometimes combined with severe battery.

For some reason, however, sexual violence is widely regarded as inherently different from other forms of violence. In the absence of indications to the contrary, it is considered private, aimed at satisfaction and unrelated to any other motives of whatever kind¹⁸¹ though scholars have for long argued against this understanding, explaining that rape is rather an act of power and domination than of sexual satisfaction¹⁸².

These anticipations should be borne in mind when looking at the jurisprudence on this issue since a woman will hardly be able to establish that the persecution in question was for reasons of a convention ground if, in the eyes of an adjudicator, rape is a purely 'personal' form of violence.

One of the most well-known decisions in this field is *Gomez v. INS*¹⁸³. The case concerned a Salvadoran woman who had been battered and raped by Salvadoran guerillas in her youth and who argued that by virtue of these attacks she became a member of a social group, "i.e., women who have been previously battered and raped by Salvadoran guerillas"¹⁸⁴. Her claim was rejected on the basis that Gomez failed to produce evidence that these women possess common characteristics - other than gender and youth - such

¹⁸¹ Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 127.

¹⁸² See, for instance, Lynne Henderson, "Rape and Responsibility" (1992) 11 Law & Phil. 127 at 158. The recent decision of the International Criminal Tribunal for the former Yugoslavia, in which the systematic rape of Bosnian women was considered a war crime, may indicate a change in attitude, see *Prosecutor v. Furundzija* (2000), Case No. IT-95-17/1-A, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: United Nations <<http://www.un.org/icty/furundzija/appeal/judgment/index.html>>.

¹⁸³ *Carmen Gomez v. Immigration and Naturalization Service*, [1991] 947 F.2d 660.

¹⁸⁴ *Ibid.* at 663.

that would-be persecutors could identify them as members of the purported group. Apart from that,

“[the] [p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”¹⁸⁵

Unfortunately, the facts of the case do not make any reference to the question of why the applicant had become a victim of the guerillas. As the older case of *Campos-Guardado v. INS*¹⁸⁶ shows, women can be singled out for attacks for specific reasons. Ms. Campos-Guardado became a guerilla victim as part of an attack against her family, during which she eye-witnessed the political assassination of her uncle and was afterwards raped. Her claim for refugee status on account of membership of a particular social group relied upon the attackers' alleged attribution of political opinions to the family. The Court of Appeals nevertheless did not comment on the question of whether a family could constitute a social group and instead focussed on the “political opinion” category. Further, it confirmed the Immigration Board's finding that “the record does not establish that [Ms. Campos] was persecuted on account of any political opinion she herself possessed or was believed by the attackers to possess “¹⁸⁷. But if, in the opinion of the Court, it was not an actual or imputed political opinion that motivated the attackers to rape the applicant, it would have been necessary to assess the real motivation, for example, her kinship ties. Although it was stated in *Sanchez-Trujillo* that “[t]he prototypical example of a particular social group is the family”¹⁸⁸, the Court did not make

¹⁸⁵ *Ibid.* at 664.

¹⁸⁶ *Sofia Campos-Guardado v. Immigration and Naturalization Service*, [1987] 809 F.2d 285.

¹⁸⁷ *Ibid.* at 289.

¹⁸⁸ *Sanchez-Trujillo*, *supra* note 24 at 1576.

any statement on this issue despite the fact that Ms. Campos-Guardado had invoked the persecution ground of 'membership of a particular social group'.

The *U.S. Considerations* even suggest that the case could have been assessed under the 'political opinion' category, holding that

"The court might reasonably have concluded that the chanting of political songs during the rape indicated not merely that the attackers were politically motivated, but more specifically that they believed the petitioner to have contrary political views and that they punished her because of it."¹⁸⁹

An example of how cases such as the previous one could be argued on this basis is *Lazo-Majano v. INS*¹⁹⁰, in which the Court of Appeals found a woman from El Salvador to be eligible for refugee status on account of 'political opinion'. Ms. Lazo-Majano had been raped and injured by her employer, a sergeant in the army, who believed that her husband had intended to overthrow the government by unlawful means and that she, too, was a "subversive". The Court came to the conclusion that the applicant had been persecuted for the political opinion that was imputed to her by her persecutor in that he found her to be a "subversive", even if this imputation may, in the words of the court, have been "cynical"¹⁹¹. The dissenting opinion by Poole C.J., however, found that Ms. Lazo-Majano had been abused and dominated "purely for sexual, and clearly ego reasons"¹⁹² which reflects what was said before about the common perception of sexual violence.

¹⁸⁹ *U.S. Considerations*, *supra* note 135 at 11; see also Maureen Mulligan, "Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on account of Political Opinion" (1990) 10 Third World L.J. 355 at 371ff. Mulligan does unfortunately not identify what exactly is the political opinion a rape victim expresses.

¹⁹⁰ *Olimpia Lazo-Majano v. Immigration and Naturalization Service*, [1987] 813 F.2d 1432.

¹⁹¹ *Ibid.* at 1435: "Zuniga knows that Olimpia is only a poor domestic and a washerwoman. She does not participate in politics."

¹⁹² *Ibid.* at 1427.

In the Netherlands, the jurisprudence also tends to adopt this perspective. In a decision concerning young Tamil women in Sri Lanka¹⁹³, the Supreme Court even went so far as to state that the risk of rape does not establish a well-founded fear of persecution. This finding was based on the Court's consideration of rape as an element of the general violence encountered in war and insufficiently directed at the person of the applicant¹⁹⁴. On the other hand, the Court of Appeal in the same case recognised that the sexual violence had specifically been directed at Tamil women and thereby acknowledged that Tamil women (and not others) were its victims¹⁹⁵. Whether this makes "young Tamil women" a particular social group in the sense of the *Refugee Convention* was not considered in the case.

Another Dutch case dealing with the situation of the Tamil in Sri Lanka¹⁹⁶ once more raised the issue of kinship ties as the motivation for persecution in form of sexual violence. The Council of State dismissed the appeal of a Sri Lankan Tamil who had been arrested six times and raped several times by Sri Lankan soldiers who were trying to find her partner¹⁹⁷. It ruled that

"what the applicant has experienced [...] was not a consequence of activities undertaken by her but of the activities of her friend R. whose whereabouts the soldiers were trying to find out. [...] That in any way the

¹⁹³ [X] v. *De Staat der Nederlanden*, Hoge Raad No. 14.329, 14 December 1990, Rechtspraak Vreemdelingenrecht 1990, 9. A summary of this case is available online: UNHCR REFWORLD Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

¹⁹⁴ Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 126.

¹⁹⁵ *Ibid.*, see footnote 120 for reference to the Court of Appeal's decision.

¹⁹⁶ *M.A.P. v. De Staatssecretaris van Justitie*, Afdeling rechtspraak van de Raad van State No. R02.86.2640, 8 December 1989, Rechtspraak Vreemdelingenrecht 1989, 8. A summary of this case is available online: UNHCR REFWORLD Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

¹⁹⁷ Facts taken from: Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 119.

attention of the Srilankan authorities was directed at the applicant personally has been neither stated not established.”¹⁹⁸

Such a reasoning, however, makes it impossible to ever base a claim for refugee status on kinship or family ties since, by the very nature of these attacks, the persecution is never aimed at the applicant personally¹⁹⁹.

What becomes clear from these cases is that there is a profound confusion with regard to the “personal” aspect of rape. If a woman is clearly singled out for persecution, for example for reasons of family membership, it is assumed that she is targeted as a person and the refugee claim fails to succeed because it lacks a general notion which is classifiable under one of the enumerated Convention grounds. On the other hand, if a woman is clearly persecuted as part of a large group, as in cases of ethnic violence, her claim all of a sudden fails because the attack was not aimed specifically at her person. The bottom line of these contradictory findings seems to be that women simply generally run the risk of rape, either as the result of a personal misfortune or as the result of an unfortunate “general situation” in which it is not unusual for women to become the victims of sexual violence²⁰⁰.

What one can observe in this context is that a phenomenon that primarily befalls women, such as sexual violence, should not be viewed in such an undifferentiated manner²⁰¹. Rape may be motivated by a number of factors and it should in no way be regarded as

¹⁹⁸ Excerpt taken from: Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 120; see also the list of similarly decided cases at 145 n. 121.

¹⁹⁹ *Ibid.*

²⁰⁰ Bahl, *supra* note 85 at 39.

²⁰¹ *Ibid.* at 127.

part of a general warfare situation. With regard to the rape of Bosnian women, this finally seems to be taken into account²⁰². As acknowledged by a German court, “[e]thnic cleansing including women rapes, [...] cannot be considered as prejudices usually resulting from war”²⁰³. Under this premise, a convincing argument can be made for considering victims of ethnic warfare in form of sexual violence a particular social group under the refugee definition, their common characteristic being their ethnicity²⁰⁴. It is important to note, though, that the social group category is not the only convention ground that may apply in cases of mass rape for the purpose of warfare. Depending on the facts of each case, the refugee claim could also be based on the other convention grounds, especially religion and nationality.

Other cases of sexual violence may, nevertheless, be more difficult to argue since generalisations are hard to make. For those women who become victims of sexual violence because of their close affiliation with others²⁰⁵, especially family members, a careful assessment should be made as to whether an imputed political opinion is the motivation for the persecution²⁰⁶ or whether a ‘particular social group’ claim defined by family membership or kinship ties could be established. In a non gender-specific context,

²⁰² Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 131 notes that the Bosnian cases of sexual violence were apparently so clear to decisionmakers that they hardly ever reached the courts and when they did, the decisions were mostly positive. But see the earlier analysis by Amy E. Ray, “The Shame of it: Gender-Based Terrorism in the former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries” (1997) 46 Am. U. L. Rev. 793.

²⁰³ Verwaltungsgericht Würzburg, 15 March 1994, No. W 9 K 92.30416. A summary of this case is available online: UNHCR REFworld Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

²⁰⁴ See also Krishna R. Patel, “Recognizing the Rape of Bosnian Women as Gender-Based Persecution” (1994) 60 Brooklyn L. Rev. 929.

²⁰⁵ See the decision of the Federal Court of Australia wherein a woman from Somalia was granted refugee status because of her membership of the “Musa Arra sub-clan of the Habr Yunis sub-clan of the Isaaq clan”:

Minister for Immigration & Multicultural Affairs v Jama [1999] FCA 1680, online: The University of Michigan Law School Refugee Caselaw Site <<http://www.refugeecaselaw.org/>>.

the later reasoning seems to be recognised by the Canadian Immigration Appeal Board²⁰⁷ which - given that courts can overcome their undifferentiated treatment of rape and sexual violence as a “societal phenomenon”²⁰⁸ - should be applied accordingly in cases of gender-specific persecution²⁰⁹. However, the particular facts and circumstances of each individual case remain a crucial factor for the assessment of a claim²¹⁰.

What is, of course, not admissible, is the definition of a social group by the feared or experienced persecution, as was explained before in the domestic violence cases. Hence, the alleged membership in a group comprised of “women who have been previously battered and raped by Salvadoran guerillas”²¹¹ does not comply with the refugee definition²¹².

2. Female Genital Mutilation

The international case law concerning Female Genital Mutilation²¹³ started to evolve at a fairly late point but then received a large amount of media attention. On a human rights

²⁰⁶ As Kelly, *supra* note 88 at 666 notes, “[t]his type of persecution is closely related to and will often overlap with persecution based on imputed political opinion”.

²⁰⁷ See Hathaway, *The Law of Refugee Status*, *supra* note 8 at 164 -166.

²⁰⁸ Mulligan *supra* note 189 at 379 criticises the biased definitions of the United States Board of Immigration Appeals and the reluctance to qualify rape as persecution.

²⁰⁹ As noted earlier, it is here only the kind of persecution, namely rape, which qualifies the cases as gender-specific and which, at the same time, causes it to be regarded differently by courts. For example: if a woman is beaten because of her husband’s political activities, she is more likely to succeed with a claim based on her family ties than a woman who is raped for the same reason but where the act of persecution is judged to be “sexual” and therefore “personal”.

²¹⁰ Kelly, *supra* note 88 at 667.

²¹¹ *Gomez v. INS*, *supra* note 183.

²¹² Bahl, *supra* note 85 at 56ff., however, seems to disagree with this view. So does - though implicitly - Aliaskari, *supra* note 157 at 248.

²¹³ Hereinafter: FGM.

scale, FGM has in the meantime become one of the most considered women's rights issues in legal discourse, especially in North America²¹⁴.

The first case ever for a woman to apply for refugee status because of a fear of being subjected to FGM, occurred in France²¹⁵. Aminata Diop, the 20-year-old applicant, alleged that her family and her fiancé (with whom a marriage was arranged by Aminata's father) insisted that she be circumcised before her marriage, but she refused to undergo this procedure. Even though the French Commission for the Appeals of Refugees acknowledged that the threat or practice of FGM amounts to persecution, it rejected the claim on the basis that the applicant had not sought protection from the local authorities²¹⁶. The court did therefore not engage in a discussion about whether the persecution was due to one of the enumerated Convention grounds.

A few years after the French decision, a Canadian case was decided by the Canadian IRB Refugee Division²¹⁷ in which it was found that Khadra Hassan Fadrah, a Somali national, ought to be granted refugee status on the grounds that her 10-year-old daughter would be subjected to mutilation if she were forced to return to Africa²¹⁸. The Board held that:

“[f]orcing a minor female to undergo female genital mutilation would grossly infringe her rights as secured in international human rights

²¹⁴ For general information about the practice of FGM, see Nahid Toubia, “Female Genital Mutilation” in Peters/Wolper, *Women's Rights Human Rights*, *supra* note 97 at 224; Amnesty International, “Female Genital Mutilation: A Human Rights Information Report” (1998), online: Amnesty International Homepage, Campaigns <<http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm>>.

²¹⁵ Commission des recours des réfugiés (CCR), *Aminata Diop*, CRR No. 164078, 18 September 1991. The CCR decision is available online: UNHCR REFworld Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>. The facts of the case are set out by Valerie Oosterveld, “Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent” (1993) 51 U.T. Fac. L. Rev. 277 at 278f.; see also Kelson, *supra* note 76 at 195ff.

²¹⁶ *Aminata Diop*, *supra* note 215.

²¹⁷ Immigration and Refugee Board, Refugee Division (Toronto), *Khadra Hassan Fadrah*, 13 July 1994, T93-12198, T93-12199 and T93-12197. A summary of this case is available online: UNHCR REFworld Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

²¹⁸ The applicant's two children were co-claimants in the case.

instruments. The Somalian state does not protect minor females from suffering this treatment. Being a minor female from Somalia therefore qualifies for Convention refugee status.”²¹⁹

In specifying the relevant Convention ground, the Board stated:

“The claimant belongs to the **two social groups of minors and women** according to the categories set up in Ward. She may therefore well fear persecution because of being a member of these groups.”²²⁰

This argumentation, however, leaves open some questions. It does not become perfectly clear whether membership in either one of the groups that the court identified would have been sufficient to fulfil the requirements of the refugee definition or whether the court meant to define the group as “minor females”, using two common characteristics, or even “minor females from Somalia” as the first excerpt suggests.

The problems in defining the proper group for women fleeing FGM continued in *Matter of M- K*²²¹, in which a U.S. Immigration Judge found a 29-year-old woman from Sierra Leone to be eligible for asylum for several reasons, one of them being her resistance to FGM and its forced imposition on her. Hence, contrary to the earlier cases, the applicant had in the past been forced to undergo this procedure and the persecution she still feared resulted from her opposition to it.

The Judge therefore held that:

“Respondent is eligible for asylum because of the past abuse from her forced female genital mutilation, and because of her fear of future harm, [...]. This can be classified as either: ‘persecution on account of political opinion’ for her resistance to, and complaints about, female genital mutilation; or ‘persecution on account of membership in the social group

²¹⁹ *Ibid.*

²²⁰ *Ibid.* [Emphasis added].

²²¹ *Matter of M. K.*, No. A72-374-558 (Virginia Executive Office for Immigration Review, 9 August 1995), unpublished. Online: Homepage of the Center for Gender and Refugee Studies at the University of Chastings <<http://www.uchastings.edu/crgs/caselaw>>.

that consists of women who are forced to undergo female genital mutilation’.”²²²

As to the ‘persecution on account of political opinion’, it needs to be stated that the applicant was threatened to be killed if she were to reveal the “secret” (the practice of FGM) of the “Bundo Society” to which she belonged²²³. The mutilation itself, as a form of persecution, however, led to an assessment on account of ‘membership of a particular social group’. Also, the decision again raises doubts with respect to the definition of the group as it is exclusively based on the shared experience of persecution. Furthermore, its potential as a precedent for other cases was limited from the outset as the decision was merely a discretionary interpretation of the U.S. refugee statute by an administrative Immigration Judge and did therefore not become binding on other courts²²⁴.

Refugee Status was also granted in a German decision²²⁵ concerning a woman from Ivory Coast who had been ordered to be the Queen of the Apolo Tribe which would have required her to undergo FGM. But due to the formulation of the provisions on asylum in the German Basic Law²²⁶, the persecution ground is unfortunately not specified. However, it seems difficult to imagine how the applicant could have claimed to be a member of a ‘particular social group’ if the threat of forced circumcision resulted from her exceptional societal position as the queen of her tribe.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Kathy M. Salamat, “In re Kasinga: Expanding the Judicial Interpretation of “Persecution,” “Well-Founded Fear,” and “Social Group” To Include Anyone Fleeing “General Civil Violence”?” (1996) 40 *How. L.J.* 255 at 260.

²²⁵ Verwaltungsgericht Magdeburg, 20 June 1996, No. 1 A 185/95, *Neue Zeitschrift für Verwaltungsrecht*, Supplement 2/1998 at 18. See also Verwaltungsgericht München, 2 December 1998, No. M 21 K 97.53552.

²²⁶ Art. 16a (1) of the German Basic Law is simply worded: “Persons persecuted on political grounds shall have the right to asylum.” According to the unanimous interpretation of the provision, this nevertheless refers to the persecution grounds laid down in the *Refugee Convention*. Hailbronner, *supra* note 129 at 152.

Probably the most famous case dealing with FGM which is often cited as a precedent for the recognition of gender-based persecution in the refugee context is *In re Kasinga*²²⁷, a decision rendered in 1996 by the United States Board of Immigration Appeals. The applicant by the name of Fauziya Kassindja²²⁸, a national of Togo and member of the Tchamba-Kunsuntu Tribe, claimed that her aunt and husband tried to force her to submit to their tribal custom of FGM. She was granted refugee status on the basis of her membership in the particular social group defined as "Young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practised by that Tribe, and who oppose the practice"²²⁹. The Court obviously tried to avoid labelling the group in terms of the common fear of being forced to undergo FGM. Instead, it pointed out other characteristics shared by the members of the group:

"The characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it."²³⁰

The scope of this definition of the 'particular social group' is clearly wide enough to remain applicable for future cases of women fleeing FGM. Nevertheless, the Board expressly refused "to set forth a comprehensive analytical framework in the context of this one case"²³¹. Especially women who have previously suffered FGM will not find

²²⁷ *In re Fauziya Kasinga*, File A73 476 695 - Elizabeth (United States Board of Immigration Appeals, 13 June 1996), 35 I.L.M. 1145 and online: Homepage of the Center for Gender and Refugee Studies at the University of Chastings <<http://www.uchastings.edu/crgs/caselaw>>.

²²⁸ The Board of Immigration Appeals misspelled her name, see Seith, *supra* note 173 at 1834 n. 208.

²²⁹ *In re Fauziya Kasinga*, *supra* note 227 at 1151.

²³⁰ *Ibid.*

²³¹ *Ibid.* at 1155.

much inspiration in its reasoning, which is why the precedential value of the decision is a more limited one than the publicity it received may suggest²³².

It may nevertheless be questioned, whether the Board did not define the group too narrowly. As a decision from Australia²³³ shows, the reference to a woman's opposition towards FGM or the fact that her genitalia are still intact may not be necessary to identify the social group. The Refugee Review Tribunal had to decide the case of a mother and a daughter, both citizens of Nigeria and members of the Yoruba people as one of the major ethnic groups of Nigeria, who allegedly would be subjected to FGM if they had to return to their home country. For the mother, this fear resulted from a marriage contract between her father and her prospective husband which required her to be circumcised. While the Australian Immigration Authorities refused to grant asylum, the Tribunal overturned the decision and found the applicants to be eligible for refugee status on the basis of their membership in the particular social group defined as "Yoruba women in Nigeria". This finding was based on the following argumentation:

"The Yoruba people are bound by certain characteristics or elements of language, tradition, territory and kinship which sets them apart from Nigerian, or any other, society at large. [...] Within the Yoruba people, its women are a recognisable and cognisable sub-group. [...] Yoruba women are a group of Yoruba persons who share certain sex characteristics and other elements such as socioeconomic status which unite them and enable them to be set apart from Yoruba men. Women are united, and set apart from men, by the roles that they must play within Yoruba society and the options that are open to them"²³⁴.

²³² Arthur C. Helton and Alison Nicoll, "Female Genital Mutilation As Ground for Asylum in the United States: The Recent Case of *In Re Fauziya Kasinga* and Prospects For More Gender Sensitive Approaches" (1997) 28 Colum. Hum. Rts. L. Rev. 375 at 378.

²³³ Refugee Review Tribunal, RRT Reference N97/19046 (16 October 1997), online: Australasian Legal Information Institute, Database on Refugee Review Tribunal cases <<http://www.austlii.edu.au/au/cases/cth/rrt/>>.

²³⁴ *Ibid.*

This reasoning suggests that the United States Board of Immigration Appeals, having a very similar case before it, could have held Fauziya Kassindja to simply be a member of the group defined as "Togolese women of the Tchamba-Kunsuntu Tribe". As Board member Rosenberg notes in her concurring opinion in *In re Kasinga*,

"Unlike requests for asylum premised upon political opinion, social group claims, like those involving race, ethnicity, or religion, are status based and do not necessarily require a showing of the presence of an individual's opinions or activities which spurs the persecutor's wrath or otherwise motivates the harm or persecution. [...] Rather, such requests involve a determination of whether the shared characteristics are those which motivate an agent of persecution to seek to overcome or otherwise harm the individual. [...] Consequently, while not inaccurate, it is surplusage to define the social group in this case by including as an element the applicant's opposition to the practice of female genital mutilation."²³⁵

Also, the fact that the applicant was not yet circumcised, seems to be an unnecessary classification since the very nature of FGM as the form of persecution precludes that a woman, once circumcised, could be subjected to FGM a second time²³⁶. Hence, the inclusion of this "characteristic" also raises concerns as to whether the Board of Immigration Appeals implicitly included the persecution feared in the definition of the social group²³⁷.

Finally, it could be argued that the 'particular social group' category is not, as the cases seem to suggest, the only Convention ground applicable to cases concerning FGM for they could possibly be based on one or more of the other persecution grounds. Especially

²³⁵ *In re Fauziya Kasinga*, *supra* note 227 at 1157. See also Connie M. Ericson, "Casenote: In Re Kasinga: An Expansion of the Grounds for Asylum for Women" (1998) 20 Hous. J. Int'l L. 671 at 686. Aliaskari, *supra* note 157 at 254, however, argues that this defining factor is in fact detrimental to future claims of women because victims of these and other forms of violence will rarely take action in order not to further endanger their lives.

²³⁶ *Ibid.* at 1154 (Concurring opinion of Board member Filppu).

²³⁷ This seems to be the interpretation by Nicholas Pengelley, "Female Genital Mutilation: Grounds for Grant of an Australian Protection Visa? The Ramifications of *Applicant A*." (1998) 24 Monash U. L. Rev. 94 at 105.

for the Tchamba-Kunsuntu Tribe of Togo, a Muslim community who interprets the Koran to require FGM, the persecution ground of 'religion' could well be taken into account²³⁸. Whether such a claim would, in the end, be successful, goes beyond what can be analysed within the present framework. But in light of the fact that social group claims may, as the *UNHCR Guidelines* point out, frequently overlap with other persecution grounds²³⁹, the idea is certainly not easily dismissed. It is therefore important that Courts do not take too narrow an approach towards FGM claims by limiting their assessment to the 'membership of a particular social group' category. Depending on the individual facts, a claim may very well have the potential to be successful under one of the other persecution grounds. Such an approach would also avoid the impression that FGM claims, or even gender-based claims in general, can only be recognised as justifying the granting of refugee status if the refugee definition is interpreted in an unusually generous manner or one that exceeds the limits of what is normally admissible. As for other successful gender-based claims on the basis of the 'particular social group' category, a discussion to this extent has likewise resulted from the decision in *In re Kasinga*²⁴⁰ which has somewhat earned the case the label of being "exceptional" - a label that is rather detrimental to the claims of women in general²⁴¹.

In conclusion, it can be noted that despite the fact that women fleeing FGM have managed to prevail in their claims for refugee status in several jurisdictions, the cases

²³⁸ Bernadette Passade Cissé, "International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation" (1997) 35 Colum. J. Transnat'l L. 429 at 447. Cissé also argues that the persecution may in other cases be feared for reasons of race, nationality or political opinion.

²³⁹ *Supra* note 22 and 23.

²⁴⁰ See, for example, Patricia A. Armstrong, "Female Genital Mutilation: The Move Toward the Recognition of Violence Against Women as a Basis For Asylum in the United States" (1997) 21 Md. J. Int'l L. & Trade 95 at 112ff.

nevertheless show interpretative differences which go beyond the differences in facts. Contrary, however, to the domestic violence and rape cases, the decisions seem to acknowledge that gender plays a role in the determination of FGM claims. The Australian Refugee Review Tribunal, for instance, expressly regarded the societal status of women in the specific tribe as a factor in assessing the claim under the refugee definition²⁴². Hence, in the eyes of the Tribunal, it is not just the women's sex which unites them as a group but their situation as a whole, especially vis-à-vis the men of their tribe. To a certain extent, this notion is also apparent in the other FGM decisions and it looks as if this view somehow facilitated the forming of an opinion. One may cynically speculate whether this different perspective results from the fact that the means of persecution used on these women in the eyes of a judge from a Western culture is simply more shocking and incomprehensible whereas wife beating and rape seem more common and somewhat "normal" (and hence less deserving of refugee status).

3. Forced Abortion and Forced Sterilisation

The cases of women fleeing forced abortion or forced sterilisation arise in the context of the Chinese "one-child-policy", according to which married couples are not allowed to have more than one child and even this only after a permit has been issued by the regional authorities²⁴³. The means of enforcement of this policy may, depending on the

²⁴¹ *Supra* note 92 and accompanying text.

²⁴² *Supra* note 233.

²⁴³ See in general about the "one-child-policy" in China: Jennie A. Clarke, "The Chinese Population Policy: A Necessary Evil?" (1987) 20 N.Y.U. J. Int'l L. & Pol. 321 and the analysis by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No. 3/91 RE ZWD*, *supra* note 38.

region, include coercive abortions in cases of a second pregnancy and coercive sterilisation for one or both partners to avoid further pregnancies.

It should be noted, at this point, that under this policy, men also run the risk of being forced to undergo sterilisation and that many claims for refugee status for reasons of this kind of persecution have in the past been made by male applicants or couples. This is presumably why many scholars do not include the issue of forced abortion/sterilisation in their discourse about gender-based persecution, as it does not exclusively pertain to women²⁴⁴.

However, there are two reasons why this topic is included in the framework of the present analysis. First, there could hardly be an act of violence infringing a woman's right to be free from bodily harm that is more closely related to her gender than that of a forced abortion. Moreover, the act of forced sterilisation is usually performed at the same occasion and, just like the sterilisation of a male, takes place for reasons of the person's gender²⁴⁵. Secondly, this approach reflects the need to see women in their individual situation as women even if they are accompanied by a man. From this perspective, the claim of a wife (as part of a couple) does not essentially differ from a claim made by a single woman. Both flee as women who are trying to protect their unborn child or their reproductive ability and physical integrity. Gender-based claims, in the approach chosen for this analysis, are therefore not limited to the claims of women who lack protection through - or simply the company of - a male relative.

²⁴⁴ See, for instance, Kelly, *supra* note 88 at 642; Spijkerboer, on the other hand, discusses the issue: *Gender and Refugee Status*, *supra* note 83 at 121 and the *RWLG* considers forced abortion and sterilisation in their *Gender Guidelines*, *supra* note 99 at 2.10.

²⁴⁵ Macklin, *supra* note 115 at 56 further points out, that where the choice of which spouse will be sterilised is made by the couple, it is almost always the woman who ends up being sterilised.

An early case of a Chinese woman fleeing the threat of forced sterilisation occurred in France²⁴⁶. Due to the typically very brief style of the decision, it does not become clear on which persecution ground the claim was based. What does become clear is that the applicant was denied refugee status based on the argument that the Chinese legislative provisions on population growth control are of a “general character and non-discriminatory” and can therefore not be regarded as giving rise to one of the situations anticipated by the refugee definition²⁴⁷. This is, in fact, a logic that can be found in many refugee cases dealing with the one-child policy.

In the case of *Cheung v. Canada*²⁴⁸, the Immigration and Refugee Board had initially refused the applicant’s claim for refugee status for exactly this reason:

“Even though the claimant faces the possibility of being sterilized if she is returned to China, since this violation of her personal integrity is simply the implementation of a law of general application and cannot be related to one of the five Convention grounds, I do not see it falling within the gambit (sic) of the Convention refugee division.”²⁴⁹

The Federal Court, however, overturned the Board’s decision on the grounds that it had failed to examine the methods used to enforce the policy and therewith “ignored the severity of the intrusiveness of sterilization to a person’s mental and physical integrity”²⁵⁰. The Court then went on to examine whether “women in China who have more than one child and are faced with forced sterilisation” constitute a particular social

²⁴⁶ Commission des recours des réfugiés (CCR), *Yong Hua YU ZHANG*, CRR No. 67843, 10 November 1987. See also Commission des recours des réfugiés (CCR), *Jin Wu*, CRR No. 218361, 19 April 1994. Both CCR decisions are available online: UNHCR REFWORLD Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

²⁴⁷ *Ibid.*

²⁴⁸ *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 [hereinafter: *Cheung*].

²⁴⁹ *Ibid.* at 319.

²⁵⁰ *Ibid.*

group within the meaning of the definition of a Convention refugee. It accepted this view by arguing that

“[t]hese people comprise a group sharing similar social status and hold a similar interest which is not held by their government. They have certain basic characteristics in common. All of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a women’s reproductive liberty is a basic right ‘ranking high on our scale of values’.”²⁵¹

In a subsequent paragraph, though, the Court seems to adopt a slightly different definition of the social group in question as it notes that not all women in China who have more than one child may automatically claim Convention refugee status but that this would only result where the woman also has a well-founded fear of persecution (that being the fear of forced sterilisation)²⁵². As shown before, this approach would be more in accordance with the methodology of the refugee definition as it avoids to qualify the social group on the basis of the persecution feared.

In another Canadian decision, however, the Federal Court decided against the (male) applicant who equally feared forced sterilisation and had based his claim on his alleged membership in a particular social group comprised of “parents in China with more than one child who disagree with forced sterilisation”²⁵³.

In New Zealand, the case of a male applicant fearing sterilisation²⁵⁴ led the Court to analyse the implications of the Chinese one-child policy extensively but the claim was nevertheless rejected. In examining different possibilities of how to define the particular

²⁵¹ *Ibid.* at 322.

²⁵² *Ibid.*

²⁵³ *Chan v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 675 at 676. The decision was confirmed by the Supreme Court in *Chan v. Canada*, *supra* note 50.

²⁵⁴ *Refugee Appeal No. 3/91 RE ZWD*, *supra* note 38.

social group, the Court came to the conclusion that “opposition to the one-child policy” was neither an immutable characteristic, nor was it “so fundamental to the identity of the individuals in question that they ought not to be required to change it”. Further, with regard to a definition on the basis of the common experience of “having been required to submit to a form of birth control measure”, the Court finds that this characteristic identified “little more than a statistical group whose common experience is accidental”²⁵⁵.

A similar argumentation was used in another case from New Zealand where the applicant - a single woman - claimed to have fled from China for fear of being forced to undergo an abortion²⁵⁶. Apart from the fact that the Court did not believe the applicant, it also held that “unmarried mothers or expectant mothers who have refused to undergo an abortion” did not constitute a particular social group since the so-defined group was merely a statistical but not a social group and, moreover, because the group was defined by the anticipated persecution²⁵⁷.

Finally, some case law exists in Australia. The High Court’s decision in “A” & Anor, which was examined at an earlier point in this analysis²⁵⁸ once more concerned a couple arguing that they would be forcibly sterilised if they returned to China. Initially, the Refugee Review Tribunal had decided in favour of the couple who it held to be a member of the group defined as “those who, having only one child do not accept the limitations

²⁵⁵ *Ibid.* A similar argumentation can be found in the case of *Yang Chen Huan v. Carroll* [1994] 852 F.Supp. 460, in which a United States District Court rejected the claim of a Chinese man fearing forced sterilisation with the argument that Chinese families with more than one child “are more appropriately described as a demographic division than as a social group” (at 470). Notice that in 1996, the refugee definition in the US Immigration and Nationality Act was changed to include one-child policy cases, see Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 122.

²⁵⁶ New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 2124/95 RE LYB* (30 April 1996), online: New Zealand Refugee Law - RefNZ <<http://www.refugee.org.nz>>.

²⁵⁷ *Ibid.*

²⁵⁸ “A” & Anor, *supra* note 55 and accompanying text.

placed on them or who are coerced or forced into being sterilised". On appeal to the Full Court of the Federal Court, however, the decision was overturned and a further appeal to the High Court of Australia was eventually dismissed because the majority of the Court found that the group had no recognisable existence separate from the persecutory acts complained of²⁵⁹. This reasoning was ironically supported by the appellants' own concession that the group could not be defined without reference to persecution²⁶⁰.

It is questionable, though, whether there is indeed no other uniting factor or characteristic for those who fear persecution under the one-child policy. If a group, like in *Cheung*, can be comprised of "women in China with more than one child", it should equally be possible to identify a group where the risk factor is being married and having one child²⁶¹. Certainly, this would adequately describe those who are subject to the law since there is no evidence to suggest that anyone else is forcibly sterilised. Nevertheless, this view was rejected in *"A" & Anor*. As Dawson J. stated:

"I am unable to see how all those couples of reproductive age, who have one child, who are not of a certain ethnicity and who live in a particular location are united by the existence of those characteristics rather than by the fact that they all fear persecution."²⁶²

This argument seems to reflect the notion that the one-child policy is considered as "a law of general application" and that its targets - making up for a large part of the general population - could not possibly constitute a social group.

However, taking the opposite approach by arguing for the existence of such a group would cause the dilemma that one is seemingly condemning the law itself and not just its

²⁵⁹ *Ibid.* at 347, 363.

²⁶⁰ *Ibid.* at 361.

²⁶¹ Catherine Dauvergne, "Chinese Fleeing Sterilisation: Australia's Response against a Canadian Backdrop" (1998) 10 Int'l J. Refugee L. 77 at 86.

application in certain cases. But it is doubtful whether the reported abuses, which are not part of the official policy, justify the conclusion that there should be no effort to control population growth²⁶³. Courts therefore restrain themselves from being too judgmental in their evaluation and instead acknowledge “that it is often difficult for Westerners to comprehend the pressures of over-population, since Western nations are faced with ageing societies and decreasing birth rates”²⁶⁴.

The problem in the determination of claims on the basis of a fear of forced abortion or forced sterilisation is therefore not simply one that is related to the interpretation of the refugee definition. Instead, the reluctance to condemn the Chinese Government’s condonation of these measures already precludes any comprehensive analysis of whether the social group may actually be made up of women or couples who already have one child²⁶⁵. The key factor to assess one-child policy claims under the *Refugee Convention* is to distinguish the existence of family planning policies from the methods used to implement them²⁶⁶.

Finally, it could be taken into consideration whether victims of China’s population policy suffer persecution on account of the imputation of a political opinion²⁶⁷. But it is difficult to see, how the persecution in form of forced sterilisation could be “on account of” the person’s opposition to the one-child policy. After all, this measure is imposed because the

²⁶² “A” & Anor, *supra* note 55 at 347.

²⁶³ Clarke, *supra* note 243 at 354.

²⁶⁴ *Refugee Appeal No. 3/91 RE ZWD*, *supra* note 38.

²⁶⁵ Dauvergne, *supra* note 261 strongly argues in favor of such an approach.

²⁶⁶ Karin Landgren, “Genderrelated Persecution” in Danish Refugee Council, *Women and asylum - A conference report on genderrelated persecution*, ed. by Mette Ellegaard (Danish Refugee Council, 1997); online: Homepage of the Danish Refugee Council <<http://www.drc.dk/eng/pub/womenasylum/menu.html>>.

²⁶⁷ *Refugee Appeal No. 3/91 RE ZWD*, *supra* note 38; See E. Tobin Shears, “Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers” (1990) 30 *Virginia Journal of International Law* 1007.

couple already has one or two children. In fact, it is not even part of the official policy and, generally speaking, what the person who flees seems to oppose is rather the persecutory act itself. Opposition to the persecutory act cannot, however, amount to a political opinion as in that case every refugee claim would be well-founded²⁶⁸. Nevertheless, depending on the specific circumstances, there may very well be cases in which the facts establish a sufficiently “political” element for a political opinion (actual or imputed) to be found²⁶⁹.

4. Severe Discrimination/Subordination

Contrary to the categories discussed above, the cases falling under the heading of “discrimination” or “subordination” first of all raise the question of whether the treatment in question can be qualified as “persecution” in the sense of the refugee definition. After all, women are subjected to discriminatory treatment in many countries, sometimes through law and sometimes through the imposition of cultural or religious norms which restrict the rights and opportunities of women²⁷⁰. In some situations, however, discriminatory treatment can be so severe that it rises to the level of persecution which is the case when the discriminatory measures deprive the woman of fundamental human rights or lead to consequences of a substantially prejudicial nature²⁷¹.

²⁶⁸ Also, the “conscientious objection” to a policy is not covered by this category, see Shears, *supra* note 267 at 1034ff. and Goodwin-Gill, *The Refugee in Int'l Law*, *supra* note 4 at 54.

²⁶⁹ Rodger P.G. Haines, “Gender-Based Persecution: New Zealand Jurisprudence” (1997) *Int'l J. Ref. L. Special Issue 1997: UNHCR Symposium on Gender-Based Persecution*, 129 at 151.

²⁷⁰ Kelly, *supra* note 88 at 664.

²⁷¹ *Ibid.*

As noted earlier in this analysis, the line between discrimination and persecution is not a clear one²⁷². Therefore, in evaluating a claim based on discriminatory treatment, an adjudicator must evaluate all of the circumstances, including the type of right or freedom denied, the manner in which the right is denied, the seriousness of the harm to the applicant, and any non-persecutory justification for the discriminatory treatment²⁷³. The examination of the cases to follow will indicate the specific treatment that reaches the threshold for “persecution”.

The UNHCR started to pay attention to the situation of women who face severe discrimination or subordination in the societies that they live in long before the case law on this issue began to evolve. By way of “Conclusion No. 39”²⁷⁴, it created the group definition of “women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live”.

Few decisions, however, have actually adopted this definition. It seems as if the spectrum of discriminatory acts against women proved to be larger than what could be included in it. This is especially true for those cases in which women become victims of societal perceptions rather than them having actively transgressed any such mores.

An early decision by the Canadian Immigration Appeal Board illustrates this phenomenon: *Zekiye Incirciyan*, a Turkish widow without other male relatives sought refugee status because she was harassed on a daily basis by young men, sexually assaulted and became the object of an abduction attempt due to the fact that it was seen inappropriate for women in the Turkish society to live without the protection of a male

²⁷² Above, Chapter II.1.a).

relative²⁷⁵. The Board found her to be a refugee by reason of her membership of a particular social group comprised of “single women living in a Moslem country without the protection of a male relative”. The characteristics of being female and living without male protection were also found to be decisive in a decision by the Immigration and Refugee Board in which it granted refugee status to the Somali applicant on the basis of her membership in the group defined as “female Hawiye clan members without male protection”²⁷⁶.

In New Zealand, the RSAA decided the case of a Muslim woman from India who claimed that, as a woman living apart from her husband with two children and no means of support, she would be vulnerable to physical attack, abuse and discrimination at the hands of other male Muslims if she were forced to return to India²⁷⁷. Although the Court had already accepted her claim on the ground of ‘religion’, it nevertheless examined the ‘particular social group’ category and found that, additionally, she was persecuted on account of her membership in the group defined as:

“Muslim women living separate from their husbands in a Muslim community with no accommodation and no male family or financial support available to them and with a reputation for having transgressed the mores of their community.”²⁷⁸

In the later case of a Chinese woman, though, the RSAA refused to approve the existence of a group made up of “women with a dependant child or children who are not currently

²⁷³ See UNHCR *Handbook*, *supra* note 22 at para. 55.

²⁷⁴ *Supra* note 110 and accompanying text.

²⁷⁵ Immigration Appeal Board Decision M87-1541X, 10 August 1987; see Hathaway, *The Law of Refugee Status*, *supra* note 8 at 162; Goldberg, *supra* note 97 at 350.

²⁷⁶ Immigration and Refugee Board, Refugee Division (Toronto) No. U91-04008, 24 December 1991. A summary of this case is available online: UNHCR REF WORLD Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

²⁷⁷ New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 80/91 N.S.* (20 February 1992), online: New Zealand Refugee Law - RefNZ <<http://www.refugee.org.nz>>.

²⁷⁸ *Ibid.*

married and who have never been married to the natural father of their child or children” because “single solo mothers”, as the Court suggested in a shorter version, were not a cognisable group within Chinese society²⁷⁹. A question may be asked as to whether this conclusion was not at least partly linked to the fact that the Court had already stated that the applicant did not have a well-founded fear of persecution²⁸⁰.

In Germany, the case of a mother and a daughter from Afghanistan arose, which led the Court to address the treatment of women through the Taliban²⁸¹. It acknowledged that the women were at risk of severe physical and sexual abuse as they were not granted any rights whatsoever and that they were further in danger of “draconian punishment” for the slightest suspicion of transgressing Islamic social mores. The Court hence decided that the women were members of a particular social group and therefore entitled to political asylum. The relevant group was described as :

“Single women in Afghanistan, who, due to their pressing situation and the lack of protection by other family members or husbands, are forced to appear in public in order to earn a living and who are therefore vulnerable to being accused of transgressing the strict Islamic moral and social mores imposed by the Taliban”²⁸².

Overall, the four successful cases described above can be categorised by the common fact that the society’s perception of the woman or of her lifestyle was the initial reason for the persecution she feared while the woman herself did nothing to actually transgress the mores imposed on her. It was rather through the circumstances, over which the women

²⁷⁹ New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 70326/96 C Z* (24 October 1996), online: New Zealand Refugee Law - RefNZ <<http://www.refugee.org.nz>>.

²⁸⁰ The applicant in this case had stated that she wanted to live in New Zealand because it offered herself and her son “a better life than in China”, *ibid*.

²⁸¹ Verwaltungsgericht Frankfurt am Main, 23 October 1996, No. 5 E 33532/94.A (3), *Neue Zeitschrift für Verwaltungsrecht*, Supplement 6/1997 at 46.

²⁸² *Ibid.* at 47 [my translation].

did not have control, that they were not able to comply with the expectations of their society²⁸³.

In the English case of *Islam*²⁸⁴, which was mentioned earlier already, a transgression of social mores was moreover imputed on the female applicants. The two women from Pakistan were at risk of being falsely accused of adultery, a crime that in Pakistan may be punished by flogging or stoning to death²⁸⁵. The House of Lords found both women to be eligible for refugee status under the 'membership of a particular social group' category and, among other reasoning, identified a possible group to be made up of three factors: their gender, the suspicion of adultery, and their unprotected position in Pakistan²⁸⁶.

The other type of cases dealt with under the heading of discrimination and subordination is characterised by the fact that the applicants, due to their own beliefs, oppose the way in which they are treated by society. A number of these cases have concerned women from Iran and the most well-known one among them is probably *Fatin v. INS*²⁸⁷. The applicant in this case had claimed to face persecution because of her membership in the group of "Iranian women who refuse to conform to the government's gender-specific laws and social norms"²⁸⁸. The consequences of such non-compliance were described to be "74 lashes, a year's imprisonment, and, in many cases, brutal rapes and death"²⁸⁹. But the U.S. Court of Appeals rejected her claim by holding that, while the given definition may

²⁸³ Kelly, *supra* note 88 at 662.

²⁸⁴ *Islam*, *supra* note 62.

²⁸⁵ *Ibid.* at 635; on the situation in Pakistan, see also Michael F. Polk, "Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a Basis for Asylum Claims in the United States" (1998) 12 Geo. Immigr. L.J. 379.

²⁸⁶ *Ibid.* at 645.

²⁸⁷ *Fatin v. INS*, [1993] 12 F.3d 1233.

²⁸⁸ *Ibid.* at 1241.

²⁸⁹ *Ibid.*

well satisfy the concept of a 'particular social group', the applicant was not a member of that group. This conclusion mainly resulted from Ms. Fatin's testimony, in which she did not categorically refuse to comply with the restrictions placed upon her in Iran, especially the requirement to wear the chador. Instead, in the eyes of the Court, she merely gave the impression that she found these restrictions objectionable and would not observe them if she could avoid doing so.

The situation was different in the case of *Namitabar v. Canada*²⁹⁰, in which the applicant was strictly opposed to the wearing of the chador and had more or less publicly expressed criticism of the Iranian dress code. The Federal Court rejected the Refugee Division's finding that the law in question was generally applicable and could therefore not constitute a persecutory or even discriminatory act²⁹¹. Further, the Court held the applicants to be eligible for refugee status, though the persecution ground it decided upon was that of 'political opinion':

"In a country where the oppression of women is institutionalised, any independent point of view or act opposed to imposition of a clothing code will be seen as a manifestation of opposition to the established theocratic regime."²⁹²

Although 'membership of a particular social group' was relied on by the applicant, the Court did not feel that it was necessary to deal with this ground since one ground was sufficient to establish that she was to be granted refugee status.

²⁹⁰ *Namitabar v. Canada (Minister of Employment and Immigration) (T.D.)*, [1994] 2 F.C. 42.

²⁹¹ *Ibid.* at 46ff.

²⁹² *Ibid.* at 49.

Although the New Zealand Refugee Appeals Authority, in a similar case²⁹³, had equally approved that the Iranian applicant had been persecuted for reasons of her political opinion as well as her religion and her race, it nevertheless commented on the ground of 'membership of a particular social group' because it found that

"[a]n approach to refugee determination which unjustifiably favours the political opinion ground to the exclusion of the social group ground will tend to reinforce the male gender bias often complained of by female asylum seekers, and inhibit the development of a refugee jurisprudence which properly recognises and accommodates gender issues within the legitimate bounds of the Refugee Convention."²⁹⁴

Hence, the Authority held that in addition, the applicant was also persecuted because of her membership in a particular social group that could loosely be defined as "women who, as a result of their deeply held values, beliefs, and convictions, reject or oppose the way in which they are treated in Iran, and the attendant power structure which perpetuates and reinforces the so-called 'Islamist' justification for this state of affairs"²⁹⁵.

It should be noted that the reliance on the category of 'political opinion' in these cases seems to have raised the standard for persecution. What *Fatin* implies is that the woman must prove some sort of "missionary fever to defy the law" if she wants to be accepted as a refugee under the 'membership of a particular social group' category: only if a woman is willing to take the risk of severe punishment does the court find her beliefs so fundamental to her identity or conscience that she cannot be required to change them²⁹⁶.

²⁹³ New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 2039/93 Re MN* (12 February 1996), online: New Zealand Refugee Law - RefNZ <<http://www.refugee.org.nz>>.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ Spijkerboer, *Gender and Refugee Status*, *supra* note 83 at 130.

But drawing the contours of the group by reference to the likelihood of persecution confuses the issues of identity and risk²⁹⁷.

Moreover, the Court in *Fatin* also applied this standard to the assessment under the 'political opinion' category, stating that the applicant did not show to possess the opinion that Iran's gender-specific laws and repressive social norms "must be disobeyed on grounds of conscience"²⁹⁸. Yet, it should be clear that the refugee definition requires a forward-looking assessment of risk in which the issue is whether there is reason to believe that the claimant's decision to exercise her right to form an opinion would place her in jeopardy upon return to her home state²⁹⁹. It would certainly have been much more difficult to argue against this threshold.

Two more Canadian cases deal with what also seems to be a prevalent phenomenon in societies in which women have a subordinate and submissive role to play: arranged marriages. The earlier of the two, *Vidhani v. Canada*³⁰⁰, concerned a woman from Kenya, but of Asian descent, who claimed to be the subject of considerable physical abuse by her father as well as her prospective husband if she did not submit to the marriage agreement. After explicitly considering the *Canadian Guidelines* on gender-based persecution, the Court contended that the Refugee Division, in refusing her claim, did not sufficiently address the question as to whether "women forced into marriages without their consent" constituted a particular social group³⁰¹. While the Court did not explicitly decide on this

²⁹⁷ Goodwin-Gill, *The Refugee in Int'l Law*, *supra* note 4 at 365.

²⁹⁸ *Fatin v. INS*, *supra* note 287 at 1243.

²⁹⁹ Hathaway, *The Law of Refugee Status*, *supra* note 8 at 150.

³⁰⁰ *Vidhani v. Canada (Minister of Employment and Immigration) (T.D.)*, [1995] 3 F.C. 60 [hereinafter: *Vidhani*].

³⁰¹ *Ibid.* at 65.

issue, its considerations on the issue leave the impression that it was in favour of such an interpretation.

This impression was confirmed in the case of *Sanno v. Canada*³⁰², where the Federal Court did not object to the Immigration and Refugee Board's determination that the female applicant from The Gambia had a well-founded fear of persecution (severe physical abuse by male relatives) for reasons of her membership in the particular social group of "women who refuse to cooperate with arranged marriages"³⁰³.

It needs to be noted that such a group can only exist if the imposition of an arranged marriage is not the persecution feared by the woman. In *Vidhani* as well as *Sanno*, the women had stated that they had already been beaten for their refusal to bow to the arrangement for marriage and both women also alleged that they would fear further severe violence if they had to return to their home countries. The groups are therefore not defined by the feared persecution. The common characteristic is rather the exercise of the right to enter freely into marriage as one that is so fundamental to human dignity that they should not be required to change it³⁰⁴.

It has become clear from the cases discussed under this heading that there are societies in which the distribution of rights and benefits is clearly organised by gender roles and the respective stereotypes associated with them³⁰⁵. In cases where these roles are also used to deny rights or inflict harm, Courts have found themselves in a relatively uncontroversial line of argumentation for the inclusion of these women under the refugee definition.

³⁰² *Sanno v. Canada (Minister of Employment and Immigration)*, [1996] 111 F.T.R. 206 [hereinafter: *Sanno*].

³⁰³ *Ibid.* at 208.

As to the discussion about whether women who oppose the way they are being treated in their society should rather be assessed under the 'membership of a particular social group' category or 'political opinion', it may simply be necessary to realise that there is no coherent, cogent approach valid for all claims³⁰⁶. Individuals often may fear persecution for more than one reason, and it is not surprising that persecution for political opinion and for membership in a social group overlap³⁰⁷, though the task of the decision-maker is admittedly not made any easier by this fact. However, neither category should be favoured to the exclusion of the other since this would inhibit the development of a refugee jurisprudence which properly accommodates these claims³⁰⁸.

Apart from this, women and the issue of feminism should not be "depoliticised". The suggestion that a woman's refusal to abide by the traditions of her country is not based on any political opinion or religious belief but rather on her personal distaste for that particular tradition³⁰⁹ is not, in the eyes of the author, an appropriate generalisation. Moreover, it serves to reinforce the marginalisation of women as it invites the decision-maker to draw the conclusion that such claims, like claims for economic reasons (a claimant's "personal distaste" for the living conditions in his/her home country, so to say³¹⁰), are not deserving of refugee status.

³⁰⁴ *Vidhani v. Canada*, *supra* note 300 at 65.

³⁰⁵ Goodwin-Gill, *The Refugee in Int'l Law*, *supra* note 4 at 365.

³⁰⁶ *Ibid.*

³⁰⁷ Fullerton, *supra* note 12 at 551.

³⁰⁸ New Zealand Refugee Status Appeals Authority, *Refugee Appeal No. 2039/93 Re MN*, *supra* note 293.

³⁰⁹ Linda Cipriani, "Gender and Persecution: Protecting Women under International Refugee Law" (1993) 7 *Geo. Immigr. L.J.* 511 at 538.

³¹⁰ See the example *supra* at note 279/280 and the accompanying text. See also Goodwin-Gill, *supra* note 4 at 3.

5. Women as a particular social group

The preceding paragraphs have outlined how courts in the past have attempted to find suitable definitions for the term 'particular social group' for women who escape certain kinds of persecutory treatment. The last approach that shall be discussed in this context is one that goes beyond these classifications. To a certain degree, it seeks to find the common denominator of all the categories listed above as being forms of gender-based persecution.

It has long been argued that an approach which recognises a particular social group that is defined by the common characteristic of gender, could encompass all difficulties associated with the assessment of gender-related claims for refugee status. In the international jurisprudence, this argument has nevertheless, up until today, found little support despite the fact that LaForest J. had already laid a basis for it in *Ward* by suggesting that the shared characteristic that defines a group may be that of sex³¹¹. But *Ward* was not a gender-based claim, which is why the Canadian Supreme Court did not actually decide on the existence of a 'particular social group' defined solely by gender.

The earliest decision to implicitly suggest the approval of a particular social group defined simply as "women" is the case of Nadia El Kebir³¹², an Algerian woman who had become the victim of violent attacks through the Islamic Salvation Front because her lifestyle (especially the fact that she pursued a job) did not conform to Islamic social and religious mores. The Court held that the Algerian legislation in question applied to all

³¹¹ *Ward*, *supra* note 43 at 739.

³¹² Commission des recours des réfugiés (CCR), *El Kebir*, 22 July 1994. The decision is available online: UNHCR REFWORLD Legal information at <<http://www.unhcr.ch/refworld/cgi-bin/refcas.pl>>.

women and that therefore those who oppose it could not be regarded as a particular social group.

Nevertheless, the applicant was granted refugee status because she could not receive protection from the Algerian authorities and because her individual fear of persecution was well-founded. But if it was not for her membership in a group comprised of those who do not conform to social and religious mores, the only relevant persecution ground that remains would be her membership in the particular social group of women, respectively women in Algerian society.

The French authorities nevertheless insist that this interpretation, although stringent, does not reflect the underlying objective of decisions like *El Kebir*:

“If refugee status may be accorded in certain instances to some women who have been the victims of violence [...], this is definitely not merely because they belong to an especially vulnerable section of the community (that is, women), but by virtue of the persecution which they have suffered in a personal capacity and of the authorities’ attitude towards them”.³¹³

In the same year, as *El Kebir*, 1994, the Australian Refugee Review Tribunal became the first court in the international jurisprudence to explicitly decide that women constitute a particular social group³¹⁴. The case concerned a woman from the Philippines who had experienced domestic violence for a period of 27 years and fled her home country out of fear of being killed by her husband. Without focussing narrowly on the situation of women in the Philippines, the Court delivered a thorough reasoning on why to regard

³¹³ Brigitte Horbette, “France”, Country Report for the UNHCR Symposium on Gender-Based Persecution (1997) Int’l J. Ref. L. Special Issue 1997, 49 at 50.

³¹⁴ Refugee Review Tribunal, RRT Reference N93/00656 (3 August 1994), online: Australasian Legal Information Institute, Database on Refugee Review Tribunal cases <<http://www.austlii.edu.au/au/cases/cth/rtr/>>.

women as a particular social group in the sense of the *Refugee Convention*. Some excerpts from the decision shall outline the Court's argumentation:

"It is the Tribunal's view that "women", [...], whilst being a broad category, nonetheless have both immutable characteristics and shared common social characteristics which make them cognisable as a group and which may attract persecution. [...]"

The shared social characteristics common to all women, relate to gender and either emanate from, or are generally perceived to emanate from, gender. They include the ability to give birth, the role of principal child-bearers, nurturers, keepers of the family home, supportive partners in a relationship. [...]"

That women share a common social status is evident from the fact that women generally earn less than men and that few women hold positions of power in both government and non-government institutions. [...]"

These characteristics, specifically shared by women, defined by their social status, are addressed through the various affirmative action and equal opportunities policies, and through Commonwealth anti-discrimination legislation. [...]"

That domestic violence of "wife bashing" is regarded in many countries as a private problem rather than a public crime, can be directly attributed to women's social status; to the fact that historically, in many societies, women have been, and in many instances still are, regarded as being the private property of firstly their fathers then their husbands. [...]"

It is the Tribunal's view that there is ample evidence indicating that "women" are a particular social group as, in spite of being a broad group, they are a cognisable group in that they share common fundamental and social characteristics. Whilst there does exist separation in lifestyles, values, political leanings etc., women share a defined social status and as such are differentially dealt with by society as a group. Furthermore the Tribunal finds that women can face harm based on who they are as women, and therefore for their membership of this particular social group. It is women's social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence."³¹⁵

³¹⁵ *Ibid.*

The decision, which was delivered by the Tribunal member Leslie Hunt, received some praise³¹⁶ but did nevertheless not find approval in the Tribunal's subsequent jurisprudence on gender-based claims. In a 1997 decision, the Tribunal decided against this approach for the following reasons:

“While women share an obvious demographic characteristic, their gender, their individual circumstances differ so much in terms of the societies in which they live, their characteristics (apart from gender), attributes, activities, beliefs, interests and goals, that, in my view, the group is too broad and disparate to be properly considered to be united or linked by its common element of gender alone, to the extent that the group can be sensibly said to have “membership”. ”³¹⁷

The Tribunal, nevertheless considered the possibility that women in certain countries or societies may constitute a particular social group due to their gender and their societal position:

“[P]ersecution may serve to identify or cause the creation of a particular social group in a society, and there is no reason why systemic discrimination against women might not serve to identify or cause the creation of women as a particular social group in a particular country. This might be so in countries where women are subjected to systemic and entrenched discrimination amounting to persecution such that they can appropriately be said to be set apart from society by their shared characteristic, gender, alone. In some extremely patriarchal societies, males define the legal, social, religious and cultural norms of that society so exclusively, marginalising women so effectively, that their common experience as women may override any differences so as to unite them in the relevant sense, and set them apart from the society in which they live.”³¹⁸

The most recent decision to discuss this issue was the case of *Islam*³¹⁹, which has already been mentioned several times during this analysis. The majority of the House of Lords came to the conclusion that “women in Pakistan” constitute a particular social group.

³¹⁶ Macklin, *supra* note 115 at 64ff.; the *Australian Guidelines*, *supra* note 144 at 22 paraphrase one short excerpt from the decision but do not actually cite the decision.

³¹⁷ RRT Reference N97/15435, *supra* note 171.

³¹⁸ *Ibid.*; in the eyes of the Tribunal, this was not the case for women in Ecuador.

³¹⁹ *Supra* note 62.

They based themselves on the fact that discrimination of women is wide-spread in Pakistan and that, as a group, women are unprotected by the state³²⁰. As Lord Hope of Craighead put it:

“The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women.”³²¹

When reading the Lords’ reasonings, one cannot help but find this approach perfectly logical and wonder why courts have not chosen to decide this way more frequently and much earlier. In fact, a look at the doctrine on this issue shows that scholars had favoured to classify women as a particular social group long before any court was prepared to comment on this argument³²².

One reason for the reluctance among courts can be found in the French decision of *El Kebir*. The will to grant refugee status to the applicant as an individual, but not as a member of a social group, reflects a dilemma generally faced by refugee receiving nations: though a person appears deserving of refugee status, the authorities are reluctant to creating a precedent the consequences of which are not easy to survey. It is common for states to argue that once a group is defined broadly, all of its members will “flood” the receiving country. Though it seems completely unrealistic to think that all Algerian women will leave to seek refuge in France, the so-called “floodgates” argument is at

³²⁰ *Ibid.* at 644.

³²¹ *Ibid.* at 658.

³²² See, for instance, Neal, *supra* note 4 at 238ff.

times brought forward³²³ in the discussion about whether women in general or women in certain societies may form a particular social group.

First of all, this argument carries the implication that a group, to be recognised as a 'particular social group', must not exceed a certain size. Women, making up for approximately half of the world's population, are therefore seen as too broad a group, and its members as too numerous. Even if limited to the female citizens of a certain country or society, the doubts with regard to the size of the group seem to remain the same.

But in the refugee definition itself, there is no indication for an inherent limitation of the group size. In the contrary - as the *Canadian Guidelines* note:

"The fact that the particular social group consists of large numbers of the female population in the country concerned is **irrelevant** -- race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people."³²⁴

That being said, it could actually be argued that larger numbers of similarly situated persons are not detrimental, but beneficial for a claimant, as they may lend credibility to his/her persecution claim³²⁵.

On the other hand, however, the criterion of 'persecution' and that of 'membership of a particular social group' should not be confused to an extent where it creates the impression that the group itself needs to be made up of people who are all equally

³²³ See, for example, T. Alexander Aleinikoff, "The Meaning of "Persecution" in United States Asylum Law" (1993) 3 Int'l J. Refugee L. 5 at 9; Neal, *supra* note 4 at n. 192 notes that the "floodgates" argument is hardly a substantiated argument as it appeals more to fear than to analysis.

³²⁴ *Canadian Guidelines* UPDATE, *supra* note 126 at para. A.III.2.; the wording is the same in the RWLG *Gender Guidelines*, *supra* note 99 at para. 4.26.

³²⁵ John Linarelli, "Conceptualizing Violence: Present and Future Developments in International Law: Panel III: Sex and Sexuality: Violence and Culture in the New Order: Violence against Women and the Asylum Process" (1997) 60 Alb. L. Rev. 977 at 985; Kelly, *supra* note 88 at 654f..

persecuted. Courts have at times fallen into this trap, as an excerpt from the *Fatin*-case shows:

“while we assume for the sake of argument that requiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution, this requirement clearly does not constitute persecution for all women.”³²⁶

Fact is: refugee status is an individual remedy, which requires a claimant to establish an individual and well-founded fear of persecution³²⁷. Hence, if the treatment a woman is subjected to amounts to persecution and if this persecution occurs for reasons of her being a member of a social group, it is simply irrelevant whether she alone is persecuted, or whether she is persecuted with others³²⁸. This was acknowledged by the House of Lords in *Islam*:

“It is [...] a fallacy to say that because not all members of a class are persecuted, it follows that persecution of a few cannot be on grounds of membership of that class.”³²⁹

The social group category therefore only serves to identify what affiliation an individual has that incites her or his persecution - it does not foreclose further inquiry into whether any particular member of that group is in fact persecuted³³⁰.

Conversely, this point also invalidates the “floodgates” argument. Designing “women” as a ‘particular social group’ does not inevitably lead to the consequence that all its members are automatically entitled to refugee status³³¹. Membership of the group “women” is only one eligibility criterion in the assessment of a claim and will, by itself,

³²⁶ *Fatin v. INS*, *supra* note 287 at 1242.

³²⁷ *Canadian Guidelines UPDATE*, *supra* note 126 at para. A.III.2..

³²⁸ Bahl, *supra* note 85 at 67.

³²⁹ *Islam*, *supra* note 62 at 653.

³³⁰ Neal, *supra* note 4 at 244.

³³¹ Macklin, *supra* note 99 at 247.

not ever be enough to earn one refugee status³³². Hence, not every woman who comes from an oppressive society will qualify³³³.

But even if we assumed that, due to wide-spread persecution, the “floodgates” concern actually had some validity in that large numbers of women would theoretically be eligible for refugee status, it would still not constitute an appropriate legal consideration and would, in fact, amount to a discriminatory application of the law³³⁴. The fear that the *Refugee Convention*’s scope may, in fact be larger than states have previously realised, does not justify a false reductionist interpretation³³⁵.

At last, there is a practical consideration against the “floodgates” argument. It is the fact that very few women actually have the necessary resources to flee from their country³³⁶. And even those who do, may simply, for one reason or another, not be willing to leave³³⁷.

It can therefore be said that a particular social group defined as “women” is neither precluded by its size nor by the fear of a massive influx of women refugees.

Notwithstanding this conclusion, some questions remain. First of all, there are two different approaches to defining a particular social group by the common trait of gender. One, which is represented in the decision by the Australian Tribunal member Hunt,

³³² Macklin, *supra* note 115 at 63.

³³³ Neal, *supra* note 4 at 245.

³³⁴ Bower, *supra* note 91 at 205. Due to the fact, however, that Art. 3 of the *Refugee Convention* does not prohibit discrimination on the grounds of sex, the receiving state needs to be bound by either domestic anti-discrimination provisions or by other international conventions, such as the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (Art. 1).

³³⁵ Crépeau, “Droit Comparé de l’Asile et du Refuge. L’Application Diversifiée de la Convention de Genève de 1951 en Europe et Ailleurs” in Soc. Franç., *Droit d’Asile*, *supra* noted 97 at 270.

³³⁶ Linarelli, *supra* note 325 at 986; Macklin, *supra* note 115 at 63; Annitto, *supra* note 173 at 818.

virtually includes all women in the group - the entire female population of this planet. The other approach, as can be seen in *Islam*, limits itself to the particular country or society that the claimant comes from and specifically analyses the situation of women within this framework.

There are advantages and disadvantages associated with both approaches. Hunt's decision, for instance, avoids relying on religious or ethnic stereotypes of other cultures and does not implicitly glorify the status of women in the Western culture³³⁸. On the other hand, as noted in the subsequent decision by the Tribunal³³⁹, the idea that a particular social group may be made up of members who, across continents and cultures, find themselves in such disparate circumstances, is not prone to receiving large-scale approval among courts. A more narrow interpretation that is, at the same time, clearly within the ambit of the refugee definition, may therefore be more promising for the success of women's claims. The consequence of the approach taken by Hunt is, in essence, the creation of an additional persecution ground "gender" since women will categorically qualify as a particular social group. Yet, in the eyes of the author, as explained before³⁴⁰, the answer to adequate protection of women refugees is not to be found in a separate "female paradigm".

With regard to these comments and with regard to the interpretation of the term 'gender-based persecution' that is advocated in this analysis, the definition of a gender-defined group consequently needs to focus on the country or society that a woman comes from. The assessment of the claim will therefore require a comprehensive study of the status

³³⁷ Cipriani, *supra* note 309 at 545.

³³⁸ Macklin, *supra* note 115 at 67.

and living conditions of women in that particular environment. Moreover, it could be argued that by granting a claimant relief from a human rights violation, pressure may implicitly be brought upon the offending country to remedy the kind of abuses complained of by the refugee seeker³⁴¹. After all, the decision to grant refugee status always implies a negative judgement about the political and societal system of another state³⁴².

One final question, then, remains: to what extent can a gender-defined group be a solution for claims of gender-based persecution? The answer can only be: it depends.

While the mass rape of Bosnian women or the mutilation of the female members of certain tribes in certain countries are among those cases that can best or only be solved by reference to a gender-defined group, other cases require additional factors or circumstances to be taken into account. Claims concerning forced sterilisation or forced abortion cannot adequately be determined on the basis of a group such as "women in China". Instead, the fact that the woman is not married or already has one child is a crucial factor for the classification of this type of persecution. Incidents of sexual violence that are linked to such factors as family membership will likewise be insufficiently classified if the claim exclusively relies on the applicant's gender.

On the other hand, as the decision in *Islam* shows, the severe discrimination or subordination of women is, in some countries, of such a prevalence that persecutory

³³⁹ *Supra* note 317 and accompanying text.

³⁴⁰ Above, Chapter II.1.b).

³⁴¹ Bahl, *supra* note 85 at 71.

measures can easily be proved to occur for reasons of the applicant's membership of the social group of women.

Similar conditions are necessary in order to qualify domestic violence as persecution on account of membership of a social group comprised of women. Again, it is the status and role of women in the society in question which will establish the necessary link to the persecution ground of 'membership of a particular social group'. In other words: though domestic violence against women occurs in most or even all countries of this world, the *Refugee Convention* will only offer a remedy in those cases where women become victims of domestic violence as a result of a prevalent social perception of the female gender³⁴³.

³⁴² Hailbronner, *supra* note 129 at 156.

³⁴³ Goodwin-Gill, *supra* note 4 at 365 n.154, notes that this gender-based approach to domestic violence leaves other similarly situated claimants potentially unprotected, as, for example, the battered partner in a single-sex relationship whose gender is evidently not a factor in his or her victimization. However, just like not all rape victims (men or women) or all those who fear forced sterilisation (men or women) can be classified in a single 'particular social group', the victims of domestic violence may have to be assessed according to their very own group characteristics.

V. Conclusion

In conclusion of this analysis, I would like to come back to the initial question that best sums up the purpose of this paper: What is the **link** between gender-based persecution and the 'membership of a particular social group' category? The answer to this, after what has been said in the course of this analysis, can only be that there is no such one linkage of the two conceptions. It is always necessary to look at the specific type of persecution and the individual facts before a linkage can be established.

The problems that have occurred in the past in the assessment of claims of gender-based persecution under the international definition of 'refugee' have mainly been the consequence of misinterpretations of both gender-based persecution and the Convention's enumerated grounds of persecution. By ignoring the fact that women, even if their claims are based on or related to gender, are very well assessable under all five persecution grounds, decision-makers have erroneously focussed on the 'membership of a particular social group' category. What resulted was the impression that the claims of women had at times to be squeezed into patterns and definitions in resigning from the established *modus operandi* of refugee law application. As the present analysis has shown, this is an unnecessary complication of the interpretation of the refugee definition, as well as of the perception of gender-based persecution.

But even under the more limited aspect of the 'membership of a particular social group' category and the cases that are, in fact only assessable under this ground, the examined decisions have shown that, at times, courts have disregarded interpretative imperatives to

render decisions which may be just but all too often appear too premeditated and unsystematic.

There is, I believe, one key factor to resolve the existing dilemma. It has been advocated before in scholarly writings and it has, after all, started to arise from the international jurisprudence: the differentiation between gender as signifying biological sex and gender as referring to social organisation, sexual difference and the respective relations of power.

Judges, in the past, have mostly limited their views to the common characteristic of the female sex when assessing claims based on gender-defined social groups, whereas it is much more important to explore which role this characteristic plays in self-perception, group affiliation and identification by others³⁴⁴. The failure to assume a social perspective of the term 'social group' leaves courts with the need to indiscriminately employ all the particular attributes of a claimant's case to draw the boundaries of the social group and thereby run the risk of reducing it down to a population of one, namely the claimant³⁴⁵.

It is therefore crucial to understand that women who make gender-based claims are not persecuted because they are genetically female, but because of the social status they are accorded because they are female and because this status makes them vulnerable as a group. Whether or not this group qualifies as a particular social group will depend on the kind of persecution and the particular circumstances of the case.

With this in mind, it will be possible to accurately determine claims of gender-based persecution. This is not to say that all these claims will, in the end, be successful, maybe

³⁴⁴ LaViolette, *supra* note 71 at 33.

³⁴⁵ Macklin, *supra* note 51 at 377.

not even those which, *prima facie*, appear to be deserving of refugee status. But, as the issue of domestic violence in same-sex relationships illustrates, this is not solely a problem of gender-bias. It is the question of whether the refugee protection system alone can be forced to provide answers to problems for which it might just be ill-equipped³⁴⁶.

³⁴⁶ Goodwin-Gill, *The Refugee in Int'l Law*, *supra* note 4 at 365, n. 154.

ANNEX

Convention relating to the Status of Refugees of 28 July 1951

Date of entry into force: 22 April 1954 (Convention), 04 October 1967 (Protocol)

States Parties As of 21 July 2000:

Total Number of States Parties to the 1951 Convention: 136

Total Number of States Parties to the 1967 Protocol: 135

States Parties to both the Convention and Protocol: 132

States Parties to one or both of these instruments: 139

States Parties to the 1951 Convention only:

Madagascar, Monaco, Namibia and Saint Vincent and the Grenadines

States Parties to the 1967 Protocol only:

Cape Verde, USA and Venezuela

The dates indicated are the dates of deposit of the instrument by the respective States Parties with the United Nations Treaty Section in New York. In accordance with article 43(2), the Convention enters into force on the ninetieth day after the date of deposit. The Protocol enters into force on the date of deposit (article VIII(2)).

Most recent State Party:

Mexico 7 June 2000 (accession)

Country	Signature	Ratification(r), accession(a), succession (s)	
		Convention	Protocol
Albania		18 Aug 1992 a	18 Aug 1992 a
Algeria		21 Feb 1963 s	08 Nov 1967 a
Angola		23 Jun 1981 a	23 Jun 1981 a
Antigua and Barbuda		07 Sep 1995 a	07 Sep 1995 a
Argentina		15 Nov 1961 a	06 Dec 1967 a
Armenia		06 Jul 1993 a	06 Jul 1993 a
Australia		22 Jan 1954 a	13 Dec 1973 a
Austria	28 Jul 1951	01 Nov 1954 r	05 Sep 1973 a
Azerbaijan		12 Feb 1993 a	12 Feb 1993 a

Bahamas		15 Sep 1993 a	15 Sep 1993 a
Belgium	28 Jul 1951	22 Jul 1953 r	08 Apr 1969 a
Belize		27 Jun 1990 a	27 Jun 1990 a
Benin		04 Apr 1962 s	06 Jul 1970 a
Bolivia		09 Feb 1982 a	09 Feb 1982 a
Bosnia and Herzegovina		01 Sep 1993 s	01 Sep 1993 s
Botswana		06 Jan 1969 a	06 Jan 1969 a
Brazil	15 Jul 1952	16 Nov 1960 r	07 Apr 1972 a
Bulgaria		12 May 1993 a	12 May 1993 a
Burkina Faso		18 Jun 1980 a	18 Jun 1980 a
Burundi		19 Jul 1963 a	15 Mar 1971 a
Cambodia		15 Oct 1992 a	15 Oct 1992 a
Cameroon		23 Oct 1961 s	19 Sep 1967 a
Canada		04 Jun 1969 a	04 Jun 1969 a
Cape Verde (P)			09 Jul 1987 a
Central African Republic		04 Sep 1962 s	30 Aug 1967 a
Chad		19 Aug 1981 a	19 Aug 1981 a
Chile		28 Jan 1972 a	27 Apr 1972 a
China (Peoples Rep. of)		24 Sep 1982 a	24 Sep 1982 a
Colombia	28 Jul 1951	10 Oct 1961 r	04 Mar 1980 a
Congo		15 Oct 1962 s	10 Jul 1970 a
Costa Rica		28 Mar 1978 a	28 Mar 1978 a
Côte d'Ivoire		08 Dec 1961 s	16 Feb 1970 a
Croatia		12 Oct 1992 s	12 Oct 1992 s
Cyprus		16 May 1963 s	09 Jul 1968 a
Czech Republic		01 Jan 1993 s	01 Jan 1993 s
Democratic Rep. of the Congo		19 Jul 1965 a	13 Jan 1975 a
Denmark	28 Jul 1951	04 Dec 1952 r	29 Jan 1968 a
Djibouti		09 Aug 1977 s	09 Aug 1977 s
Dominica		17 Feb 1994 a	17 Feb 1994 a
Dominican Republic		04 Jan 1978 a	04 Jan 1978 a
Ecuador		17 Aug 1955 a	06 Mar 1969 a
Egypt (Arab Republic of)		22 May 1981 a	22 May 1981 a
El Salvador		28 Apr 1983 a	28 Apr 1983 a
Equatorial Guinea		07 Feb 1986 a	07 Feb 1986 a
Estonia		10 Apr 1997 a	10 Apr 1997 a
Ethiopia		10 Nov 1969 a	10 Nov 1969 a
Fiji		12 Jun 1972 s	12 Jun 1972 s
Finland		10 Oct 1968 a	10 Oct 1968 a
France	11 Sep 1952	23 Jun 1954 r	03 Feb 1971 a
Gabon		27 Apr 1964 a	28 Aug 1973 a
Gambia		07 Sep 1966 s	29 Sep 1967 a
Georgia		09 Aug 1999 a	09 Aug 1999 a
German Federal Republic	19 Nov 1951	01 Dec 1953 r	05 Nov 1969 a
Ghana		18 Mar 1963 a	30 Oct 1968 a
Greece	10 Apr 1952	05 Apr 1960 r	07 Aug 1968 a

Guatemala		22 Sep 1983 a	22 Sep 1983 a
Guinea		28 Dec 1965 s	16 May 1968 a
Guinea-Bissau		11 Feb 1976 a	11 Feb 1976 a
Haiti		25 Sep 1984 a	25 Sep 1984 a
Holy See (Vatican)	21 May 1952	15 Mar 1956 r	08 Jun 1967 a
Honduras		23 Mar 1992 a	23 Mar 1992 a
Hungary		14 Mar 1989 a	14 Mar 1989 a
Iceland		30 Nov 1955 a	26 Apr 1968 a
Iran, Islamic Republic of		28 Jul 1976 a	28 Jul 1976 a
Ireland		29 Nov 1956 a	06 Nov 1968 a
Israel	01 Aug 1951	01 Oct 1954 r	14 Jun 1968 a
Italy	23 Jul 1952	15 Nov 1954 r	26 Jan 1972 a
Jamaica		30 Jul 1964 s	30 Oct 1980 a
Japan		03 Oct 1981 a	01 Jan 1982 a
Kazakhstan		15 Jan 1999 a	15 Jan 1999 a
Kenya		16 May 1966 a	13 Nov 1981 a
Korea (Republic of)		03 Dec 1992 a	03 Dec 1992 a
Kyrgyzstan		08 Oct 1996 a	08 Oct 1996 a
Lesotho		14 May 1981 a	14 May 1981 a
Latvia		31 Jul 1997 a	31 Jul 1997 a
Liberia		15 Oct 1964 a	27 Feb 1980 a
Liechtenstein	28 Jul 1951	08 Mar 1957 r	20 May 1968 a
Lithuania		28 Apr 1997 a	28 Apr 1997
Luxembourg	28 Jul 1951	23 Jul 1953 r	22 Apr 1971 a
The former Yugoslav Republic of Macedonia		18 Jan 1994 s	18 Jan 1994s
Madagascar		18 Dec 1967 a	
Malawi		10 Dec 1987 a	10 Dec 1987 a
Mali		02 Feb 1973 s	02 Feb 1973 a
Malta		17 Jun 1971 a	15 Sep 1971 a
Mauritania		05 May 1987 a	05 May 1987 a
Mexico		7 June 2000 a	7 June 2000 a
Monaco		18 May 1954 a	
Morocco		07 Nov 1956 s	20 Apr 1971 a
Mozambique		16 Dec 1983 a	01 May 1989 a
Namibia		17 Feb 1995 a	
Netherlands	28 Jul 1951	03 May 1956 r	29 Nov 1968 a
New Zealand		30 Jun 1960 a	06 Aug 1973 a
Nicaragua		28 Mar 1980 a	28 Mar 1980 a
Niger		25 Aug 1961 s	02 Feb 1970 a
Nigeria		23 Oct 1967 a	02 May 1968 a
Norway	28 Jul 1951	23 Mar 1953 r	28 Nov 1967 a
Panama		02 Aug 1978 a	02 Aug 1978 a
Papua New Guinea		17 Jul 1986 a	17 Jul 1986 a
Paraguay		01 Apr 1970 a	01 Apr 1970 a
Peru		21 Dec 1964 a	15 Sep 1983 a
Philippines		22 Jul 1981 a	22 Jul 1981 a

Poland		27 Sep 1991 a	27 Sep 1991 a
Portugal		22 Dec 1960 a	13 Jul 1976 a
Romania		07 Aug 1991 a	07 Aug 1991 a
Russian Federation		02 Feb 1993 a	02 Feb 1993 a
Rwanda		03 Jan 1980 a	03 Jan 1980 a
Saint Vincent and the Grenadines			03 Nov 1993 a
Samoa		21 Sep 1988 a	29 Nov 1994 a
Sao Tome and Principe		01 Feb 1978 a	01 Feb 1978 a
Senegal		02 May 1963 s	03 Oct 1967 a
Seychelles		23 Apr 1980 a	23 Apr 1980 a
Sierra Leone		22 May 1981 a	22 May 1981 a
Slovakia		04 Feb 1993 s	04 Feb 1993 s
Slovenia		06 Jul 1992 s	06 Jul 1992 s
Solomon Islands		28 Feb 1995 a	12 Apr 1995 a
Somalia		10 Oct 1978 a	10 Oct 1978 a
South Africa		12 Jan 1996a	12 Jan 1996 a
Spain		14 Aug 1978 a	14 Aug 1978 a
Sudan		22 Feb 1974 a	23 May 1974 a
Suriname		29 Nov 1978 s	29 Nov 1978 s
Swaziland		14 Feb 2000 a	28 Jan 1969 a
Sweden	28 Jul 1951	26 Oct 1954 r	04 Oct 1967 a
Switzerland	28 Jul 1951	21 Jan 1955 r	20 May 1968 a
Tajikistan		07 Dec 1993 a	07 Dec 1993 a
Tanzania		12 May 1964 a	04 Sep 1968 a
Togo		27 Feb 1962 s	01 Dec 1969 a
Tunisia		24 Oct 1957 s	16 Oct 1968 a
Turkey	24 Aug 1951	30 Mar 1962 r	31 Jul 1968 a
Turkmenistan		02 Mar 1998 a	02 Mar 1998
Tuvalu		07 Mar 1986 s	07 Mar 1986 s
Uganda		27 Sep 1976 a	27 Sep 1976 a
United Kingdom	28 Jul 1951	11 Mar 1954 r	04 Sep 1968 a
USA			01 Nov 1968 a
Uruguay		22 Sep 1970 a	22 Sep 1970 a
Venezuela			19 Sep 1986 a
Yemen		18 Jan 1980 a	18 Jan 1980 a
Yugoslavia	28 Jul 1951	15 Dec 1959 r	15 Jan 1968 a
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